

# ***POST-EMPLOYMENT ETHICS RULES FOR BRAC COMMISSIONERS APPOINTED AS SPECIAL GOVERNMENT EMPLOYEES (SGEs)***

## Introduction

This summary has been prepared primarily for Commissioners appointed to serve on the Base Realignment and Closure (BRAC) Commission, a Department of Defense (DoD) advisory committee, as Special Government Employees (SGEs). If you have questions on any of the topics covered in this guidance, you should consult with the General Counsel, David Hague, the Ethics Official, Rumu Sarkar, or the Designated Federal Official, Dan Cowhig, of the legal office of the BRAC Commission.

### ***Personal Lifetime Ban***

1.1 **SIMPLIFIED RULE**: After you leave Government service, you may not represent someone else to the Government regarding *particular matters* that you worked on while in Government service.

### ***Official Responsibility: 2 Year Ban***

1.2 **SIMPLIFIED RULE**: For 2 years after leaving Government service, you may not represent someone else to the Government regarding *particular matters* that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

### ***Trade or Treaty 1 Year Ban***

1.3 **SIMPLIFIED RULE**: For 1 year after leaving Government service, you may not aid, advise, or represent someone else regarding trade or treaty negotiations that you worked on during your last year of Government service.

## **Part 2: Compensation Ban on Representation by Others**

2.1 **RULE: COMPENSATION FOR REPRESENTATION TO THE GOVERNMENT BY OTHERS**: After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service. (Examples: Lobbying, consulting, and law firms). (18 U.S.C. 203).

### **Part 3: Additional Restrictions for Retired Military Personnel and Reservists**

3.1 **SIMPLIFIED RULE: FOREIGN EMPLOYMENT:** Unless you receive prior authorization from your Service Secretary, you may forfeit your military pay during the time you perform compensated services for a foreign government.

### **Part 4: Administrative Reminders**

4.1 **USE OF NONPUBLIC INFORMATION:** Even though you have left Government service, you still may not use nonpublic information to further your own private interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.



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Compensation Ban on Representation by Others	After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service. (Examples: Lobbying, consulting, and law firms). (18 U.S.C. 203).
Additional Restrictions for Retired Military Personnel and Reservists (Foreign Employment)	Unless you receive prior authorization from your Service Secretary, you may forfeit your military pay during the time you perform compensated services for a foreign government.
Administrative Reminders	Even though you have left Government service, you still may not use nonpublic information to further your own private interests, or those of another, including

	<p>your subsequent employer.</p> <p>Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.</p>
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## Understanding the Revolving Door:

### How Ethics Rules Apply to Job Seeking and Post-Government Employment Activities

If you are planning to leave the current Presidential Administration and return to private employment, you need to know how the Federal ethics laws may affect you, both while you are looking for a job and after you leave the Government. This pamphlet describes the relevant restrictions that apply in these situations. The rules in this area are very complex, so you should consult your agency's ethics official for additional guidance.

### Looking for a Job

This section identifies several issues that can arise when you are looking for employment outside the Government while you are still working in the executive branch. A criminal conflict of interest law (18 U.S.C. § 208) generally prohibits you from working in your Government job on a matter that would affect the financial interests of someone with whom you are discussing possible employment. The Standards of Ethical Conduct for Executive Branch Employees (5 C.F.R. part 2635) have a similar rule that applies even before employment discussions begin, and may apply even when you have just sent a resume. If you participate in certain procurement matters, you may be subject to additional rules, including the duty to report employment contacts made by you or a bidder or offeror.

During your job search, you must be careful not to misuse Government resources (such as official time, the services of other employees, equipment, supplies, and restricted information). As you look for a job, you also will want to keep the restrictions that will apply after you leave the Government (discussed below) in mind.

Finally, after you have accepted a job outside the Government, you must continue to refrain from working on matters in your Government job that would affect the financial interests of your prospective employer.

### Restrictions on Employment after Government Service

This section briefly highlights the restrictions on your employment activities after you leave executive branch service. Your agency's ethics official is available to provide more specific advice on these "post-employment" restrictions, both before and after you terminate Government employment.

#### 18 U.S.C. § 207

This criminal law does not bar employment with any particular employer. Rather, its restrictions address certain activities that involve, or may appear to involve, the unfair use of prior Government employment.

Some of the restrictions apply to all former executive branch employees, whereas others apply only to former senior officials or those with specified duties.

- ◆ As an executive branch employee, you are barred permanently from trying to influence

any Federal agency or court, by communications or appearances on behalf of someone other than yourself or the United States (i.e., "representational contacts"), on a matter that has parties (such as a contract, grant, or lawsuit), if you have worked on that matter as a Government employee. If the matter was under your official responsibility during your last year of Government service, even if you did not personally participate in it, you are barred from making representational contacts about that matter for two years.

- ◆ If you have served as a "senior employee" during your last year of Government service, you are restricted for one year from making any representational contacts to your former agency on any matter, regardless of whether the matter involves parties. Senior employees include people serving at Levels II-V of the Executive Schedule, those whose rate of basic pay equals or exceeds 86.5 percent of the rate of basic pay for Level II of the Executive Schedule (and, for two years after November 24, 2003, those who, on November 23, 2003, were paid at a rate of basic pay at least equal to the rate of basic pay for level 5 of the SES), military officers at 0-7 and above, some White House appointees, and private sector participants in the Information Technology Exchange Program. Unless your agency has separate components for post-employment purposes, this restriction on representational contacts generally extends to your entire former agency.

- ◆ If you have served as a "very senior employee," you are covered by a similar one-year cooling off period with respect to your former agency and also a one-year ban on making representational contacts with any

Executive Schedule employee serving in any agency. Very senior employees include people paid at a rate payable for Level I of the Executive Schedule, those serving in the Executive Office of the President and paid at a rate payable for Level II of the Executive Schedule, and certain other White House appointees.

- ◆ Former senior and very senior employees are restricted for one year after leaving Government service from representing, aiding or advising a foreign government or foreign political party, with an intent to influence any officer or employee of a Department or agency. You may also be prohibited from representing a foreign entity before Congress.

- ◆ If you worked on certain trade or treaty negotiations during your final year of Government service and have had access to certain restricted information, you are barred for one year from aiding or advising anyone other than the United States concerning those negotiations.

- ◆ If you were assigned to an agency from the private sector as a participant in the Information Technology Exchange Program, you may not aid, counsel, or assist in representing anyone other than the United States concerning any contract with that agency for one year after the end of that assignment.

There are several exceptions to some of these restrictions. For example, one exception permits former employees to engage in post-employment activities performed in carrying out official duties on behalf of the



United States. Another exception, which often is of interest to former political appointees, in some cases allows former senior and very senior employees to make representational contacts on behalf of a candidate for Federal or state office, or on behalf of national and campaign committees or a political party. Your agency's ethics official can help determine whether an exception applies to your situation.

### Additional Restrictions

Depending on your current duties and your future employment, other restrictions may apply. If you will be working for a firm that has represented clients before either the executive branch or any court where the United States had an interest, another criminal law (18 U.S.C. § 203) prohibits you from sharing in the profits earned by the firm for those matters. The restriction applies if the firm's work before the Government occurred while you were employed by the Government.

If you were involved in certain large procurements or in the administration of contracts, you may not be able to accept compensation from certain contractors for one year.

Some agencies also have special laws and regulations with post-employment provisions that may apply to you.

If you are an attorney or other licensed professional, you should consult your local bar rules or similar professional code for any special restrictions on employment following Government service.

### Summary for Avoiding Trouble

Understanding the Federal ethics laws that govern your conduct while you are looking for a job and after you terminate Government service can be challenging. If you have any questions, you should seek help from your agency's ethics official. Remembering a few key issues is critical to passing successfully through the revolving door.

### Recap on Seeking Employment

- ◆ You generally cannot work on a matter that will affect the financial interests of someone with whom you are seeking employment. This means that you may need to be disqualified from working on such a matter during your job search, as well as after you accept a job outside Government.

- ◆ "Seeking employment" is defined broadly. You may be considered to be seeking employment before you are engaged in actual negotiations. For example, you may be seeking employment if either you or a prospective employer has made a contact about possible employment.

- ◆ Working on certain procurement matters may trigger additional requirements.

- ◆ Remember not to misuse Government resources while job-hunting.

### Recap on Post-Government Employment

- ◆ If you worked on a matter that had parties (e.g., a contract or lawsuit), you may be permanently barred from representing anyone back to any Federal agency or court on that

matter. If such a matter was only under your official responsibility, a two-year bar may apply.

- ◆ If you are a senior employee, you are subject to a one-year bar on representational contacts with your former agency.

- ◆ Very senior employees are also subject to a similar one-year bar, as well as a bar on making representational contacts with any high level executive branch officials.

- ◆ Senior and very senior employees are subject to a one-year restriction regarding foreign governments or foreign political parties.

- ◆ Employees who worked on certain trade or treaty negotiations may be subject to another one-year bar.

- ◆ Employees who worked on certain procurements or contracts may be subject to additional restrictions.

- ◆ Remember to consult bar rules, other professional codes, and your agency for other potential restrictions.

### Conclusion

This pamphlet is only a starting point. You should obtain specific guidance from your agency's ethics official as to how these job-seeking and post-employment rules may apply to you.

Prepared by  
U.S. Office of Government Ethics  
June 2004

United States  
Office of  
Government  
Ethics



## Understanding the Revolving Door:

### How Ethics Rules Apply to Job Seeking and Post-Government Employment Activities



## Introduction

**A**s an executive branch employee, you have learned much about Government policies, programs, and personnel that could be of use to future employers. Even after you leave your Federal job, some of you may still be able to influence Government decisions.

This pamphlet briefly describes Federal laws that restrict what you can do after you leave Government service or when you leave certain Government positions. The laws address the types of activities that are most likely to cause the public to be concerned about the way the Government does its work.

Depending upon the nature of your Government job and what you plan to do in the future, some of these laws may not affect you. Or you may be affected by more than one restriction. Most of the laws do not apply to former military enlisted personnel. However, some of these laws apply even to individuals who worked for the Government only part-time.

In addition to the laws described in this pamphlet, you might also have to comply with rules that apply just to former employees of your agency. Also, if you have participated in a procurement or in the administration of a contract or had access to certain sensitive procurement information, some special restrictions or obligations may affect you. Finally, when you leave, you might agree to other limitations in exchange for a separation payment, or "buy-out."

This pamphlet only summarizes the laws. It is not a substitute for counseling. If you have any questions, you should contact your agency ethics official.

## Note: Seeking Future Employment

Although this pamphlet focuses on the laws that apply to post-Government activities, there are also laws that may affect you while you are looking for a job. For example, you may have to avoid working on certain official assignments while you are seeking or negotiating for a job. Ask an agency ethics official for advice before you take any steps toward getting a job with someone affected by matters that you are working on for the Government. Also, if you are participating in a procurement, you may have to file a written report if you contact or are contacted by a bidder or offeror about a possible job — even if you immediately reject any offer.

## If You Want to Represent Others Before the Government

After you leave your Federal job, you generally may work for any employer. You also may contact any part of the Government solely on your own behalf — by phone, by letter, or in person.

You may not, however, try to influence any Federal agency or court on behalf of anyone else (including a new employer) concerning certain kinds of matters — like contracts, grants, or lawsuits — if you worked on those same matters during your Government service. You do not have to be a "lobbyist" to be affected by the law, and you may be affected even if you are working for a good cause or are not being paid for your work.

Unless you served in a "senior" or "very senior" employee position, you may try to persuade current Government employees to take action concerning matters in which neither you nor any of

your subordinates were involved. You may even be able to try to influence current employees about some of your old assignments that did not involve a "party" or "parties," such as a regulation or legislation that you drafted.

The length of the restriction depends upon how you were involved in the matter while you still worked for the Government. If you were personally and substantially involved in the matter, then the restriction is permanent. If you merely supervised others who did the actual work, then the restriction lasts for two years from the date you leave Government service. The two-year restriction does not apply unless you supervised the matter during your last year of Federal service.

## If You Want to Accept Compensation from an Employer that Represents Others Before the Government

After you leave your Federal job, you generally may work for any employer — even one that represents clients before the Government. You may not, however, share in profits that your new employer earned as a result of representing clients — in connection with certain kinds of matters — before any Federal department, agency, or court at a time when you were still a Government employee. The restriction may affect you even though you were never involved in the matter during your Federal service.

This restriction is most likely to affect former employees who join law, accounting, or public relations firms as partners. As time passes, the restriction is less likely to be an issue since firms will eventually collect past due accounts and distribute the related profits to those firm employees who may accept them.

## If Your Government Work Has Related to Procurement

Even if you have participated in a procurement or in the administration of a contract, you may be able to work for a contractor that does business or seeks to do business with your former agency.

However, for one year you may not accept compensation from a contractor to serve as an employee, officer, director, or consultant if — while working for the Government — you had certain responsibilities or took certain actions relating to a large procurement involving that contractor. The bar against accepting compensation may apply to you whether you participated in the pre-award or post-award phase of the procurement.

For example, you may not accept compensation from a particular contractor if — in connection with a contract awarded to the contractor for more than \$10,000,000 — you served as the procuring contracting officer at the time of award, or as the program manager or administrative contracting officer for the contract. You also may not accept compensation from the contractor for one year if, for example, you approved a contract payment or payment of a claim to that contractor for more than \$10,000,000.

You may accept compensation from a division or affiliate of the contractor that does not produce the same or similar products or services as the entity responsible for the contract.

### Note: Disclosure of Procurement Information

If you have had access to certain sensitive procurement information, you may not disclose that information before the award of the contract to which the information relates (unless permitted by some other law).

### If Your Government Work Has Related to International Negotiations

If you worked on certain trade or treaty negotiations during your last year of Government service and had access to certain restricted information, you should contact your agency ethics official because you may be barred for one year from aiding or advising anyone (other than the United States) concerning those negotiations.

### If You Have Been a High-Level Government Official

Even if you have served in a high-level Government position, you generally may work for any employer -- including a foreign government -- after you leave Federal service. You are also free to contact any part of the Government solely on your own behalf -- by phone, by letter, or in person.

However, if you have served in a "senior" employee position, your future activities may be affected by restrictions in addition to the other restrictions discussed in this pamphlet. These additional restrictions last for one year from the date you leave your senior employee position and apply even if you aren't paid for your work. Specifically:

- ◆ You may not try to influence any department or agency in which you served during your last year of Government service, on behalf of anyone else (including a new employer), concerning any official matter -- even if you were never involved with the matter as a Government employee. (Some former senior employees, however, are allowed to contact certain components of their former department or agency.)

- ◆ You may not assist a foreign government or foreign political party in its attempt to influence a decision of any department or agency. You may also be prohibited from representing a foreign entity before Congress.

**Y**our ethics official can determine whether you are a senior employee. In general, "senior" employees include Presidential appointees, flag officers, most members of the Senior Executive Service (and some high-level employees in similar pay systems), and private sector participants in the Information Technology Exchange Program.

Former "very senior" employees, such as cabinet officers, are also prohibited from contacting their former department or agency to seek official action on any matter. In addition, they are prohibited for one year from trying to influence current high-level officials at any other department or agency. As described above, very senior employees are also prohibited from assisting a foreign government or foreign political party in its attempt to influence any department or agency. Very senior employees also may be prohibited from representing a foreign entity before Congress.

### If You Participated in the Information Technology Exchange Program

If you are an employee of a private sector organization and have been assigned to an agency under the Information Technology Exchange Program, you may not aid, counsel, or assist in representing anyone (other than the United States) concerning any contract with that agency. This restriction only lasts for one year after the end of your assignment.

### Conclusion

This pamphlet is only a brief summary of the post-employment rules. For more guidance about your particular situation, contact your agency ethics official.

June 2004

# RULES FOR THE ROAD



U.S. Office of Government Ethics



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EPA ETHICS ADVISORY 97-15

SUBJECT: Annual Ethics Training for Special Government Employees

FROM: Scott C. Fulton  
Principal Deputy General Counsel  
Designated Agency Ethics Official

TO: Deputy Ethics Officials

The purpose of this Ethics Advisory is to establish the procedure for providing training to Special Government Employees (SGEs). This ethics advisory replaces EPA Ethics Advisory 94-18 dated September 30, 1994. As you know, part of the Office of Government Ethics (OGE) Standards of Ethical Conduct for Employees of the Executive Branch require annual ethics training for employees who file public (SF 278) or confidential (SF 450) financial disclosure reports. See Subpart G, 5 C.F.R. Part 2638. All SGEs (Footnote 1) are required to file a financial disclosure report and receive annual ethics training.

OGE regulations provide that an agency may fulfill the training requirement for SGEs without the presence of a qualified individual by presenting the information verbally, by distribution of written materials, or by other means at the agency's discretion. 5 C.F.R. §2638.704(d)(2)(ii).

As the Designated Agency Ethics Official for EPA, it is my determination that the Agency may meet its annual training requirement for SGEs by the distribution of written materials by the responsible Deputy Ethics Official (DEO) or his/her designee. This determination is based on the following factors: (1) the large number of SGEs in EPA (approximately 500), (2) the logistical and cost considerations of conducting annual "face-to-face" training for SGEs in view of the limited duration and intermittent nature of most SGEs' services, and (3) the need to devote the limited ethics training resources to regular employees.

Therefore, annual training for SGEs will be accomplished by the distribution of the following written materials:

(1) a copy of the Office of Government Ethics' (OGE's) August 1992 booklet entitled "Standards of Ethical Conduct for Employees of the Executive Branch";

(2) a copy of EPA Ethics Advisory 96-11 of August 29, 1996, "Transmittal of Government Ethics Newsgram" regarding procurement integrity;

(3) a copy of EPA Ethics Advisory 96-18 of January 10, 1997, "Post-Employment Restrictions"; and

(4) a copy of this Ethics Advisory, including the attachment which compares ethics requirements for SGEs with those of regular employees.

\* \* \*

~~Please direct any questions you may have to Don Nantkes at (202) 260-4556 or Hale Hawbecker at (202) 260-4555.~~ (Note: The new contact for EPA is Ken Wernick at (202) 564-1761)

#### Attachment

### EFFECT OF SPECIAL GOVERNMENT EMPLOYEE STATUS ON APPLICABILITY OF CRIMINAL CONFLICT OF INTEREST STATUTES AND OTHER ETHICS RELATED PROVISIONS

#### Definition

As defined by 18 U.S.C. §202(a), a "special Government employee" (SGE) in the Executive Branch is an officer or employee who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for a period not to exceed 130 days during any period of 365 days, either on a full-time or intermittent basis.

#### Financial Disclosure

An SGE is subject to the financial disclosure provisions of the Ethics in Government Act and 5 C.F.R. Part 2634. If an SGE is expected to serve more than 60 days in any calendar year, and if the SGE is paid at a rate equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General Schedule, the Public Financial Disclosure Report (SF 278) must be filed. 5 C.F.R. §§2634.202(c) and 2634.204. If the salary rate is less than 120% of the minimum rate of basic pay for GS-15 of the General Schedule; or if the SGE, regardless of pay rate, is expected to work 60 days or less in any calendar year; submission of the Confidential Financial Disclosure Report (SF 450) is required. 5 C.F.R. §2634.904(b).

#### SUBSTANTIVE RESTRICTIONS

With significant exceptions outlined below, the criminal conflict of interest statutes, Executive Order 12674 (as amended by E.O. 12731), and the executive branch standards of ethical conduct (5 C.F.R. Part 2635) are applicable to SGEs. Other ethics-related

provisions concerning outside earned income and employment and political activities are wholly or partially inapplicable. The principal distinctions between the rules applicable to regular government employees and those governing SGEs are as follows:

I. Criminal Conflict of Interest Statutes

a. 18 U.S.C. §203 -- Prohibition of Compensated Representational Activities By Federal Employees Directed Towards the United States

Regular Employee: Section 203 prohibits an employee from seeking, accepting, or agreeing to receive or accept compensation for any representational services, rendered personally or by another, in relation to any particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, or other specified entity.

SGE: The bar applies only in relation to a particular matter involving a specific party or parties --

(1) in which the SGE has at any time, participated personally and substantially as a Government employee; or

(2) if the SGE has served in excess of 60 days during the immediately preceding 365 days, such matter is pending in the department or agency in which such employee is serving.

b. 18 U.S.C. §205 -- Prohibition of Uncompensated or Gratuitous Representational Activities By Federal Employees Directed Towards the United States

Regular Employee: Section 205 prohibits an employee, whether or not for compensation, from acting as agent or attorney for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity, in any particular matter in which the United States is a party or has a direct and substantial interest. It also prohibits receipt of any gratuity, or any share of or interest in a claim against the United States, in consideration for assisting in the prosecution of such claim.

SGE: The broad prohibition is narrowed in the same manner as noted above for section 203.

c. 18 U.S.C. §207 -- Post-Employment Restrictions

Regular Employee: Section 207 imposes bans of varying durations to prevent communications by former employees made with the intent to influence the Government. The lifetime ban covers particular matters involving specific parties in which the former employee was

personally and substantially involved. A similar two-year ban deals with such matters that were merely pending under the employee's official responsibility during the final year of government service. A one-year ban applies to employees involved in trade or treaty negotiations. Other rules apply to senior personnel (confirmed Presidential appointees, SES employees at grades ES-5 and ES-6, uniformed service officers at grade O-7 and above, and anyone paid at or above the basic daily rate for Level V of the Executive Schedule); such senior employees are subject to a one-year "cooling-off" period precluding any contacts with their former agency on any matter for which official action is sought.

(Note: Senior Clinton Administration appointees must sign an agreement increasing the duration of the "cooling-off" period to five years. The 5-year "cooling-off" period prescribed by E.O. 12834 of January 22, 1993, is applicable only to full-time, non-career senior appointees. This ethics provision was recinded by E.O. 13184 issued on 12/28/00)

SGE: The one-year "cooling-off" period for senior employees is not applicable to an SGE who served less than 60 days in the one-year period prior to termination. The 5-year ban also is not applicable. All other prohibitions are applicable to SGEs.

#### d. 18 U.S.C. §208 -- Conflict of Interest Provisions

Regular Employee: Section 208 proscribes personal and substantial participation in any "particular matter" which will have a direct and predictable effect on an employee's own financial interests or on the financial interests of the employee's spouse; dependent child; general partner; organization in which the employee is serving as officer, director, trustee, general partner, or employee; or any person or organization with whom the employee is negotiating or has any arrangement regarding prospective employment. The term "particular matter" can include rulemaking or policy matters as well as "specific party" matters such as contracts and permits. A waiver under section 208(b)(1) permitting official action in such matters may be obtained from the Designated Agency Ethics Official (DAEO) if the financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect." Certain other interests, such as interests in diversified mutual funds, are exempted by general regulation as "too remote or too inconsequential to affect the integrity of the services."

SGE: The same rules apply to SGEs. However, for SGEs who are members of advisory committees, the standard for waiver focuses on whether the need for the SGE's services outweighs the potential for conflict of interest rather than the value of the financial interest. In addition, the Environmental Education Act

at 20 U.S.C. §5501 provides that members of the National Environmental Education Advisory Council are permitted to take part in matters which affect their employers' financial interests, even without a waiver. However, 18 U.S.C. §208(a) continues to apply to members' own financial interests.

e. 18 U.S.C. §209 -- Ban on Supplementation of Salary

Regular Employee: Section 209 generally prohibits an employee from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a government employee.

SGE: This provision does not apply.

f. 18 U.S.C. §219 and the "Emoluments Clause" of the Constitution-- Foreign Agents and Receiving Anything of Value From a Foreign Government

Regular Employee: Section 219 bars any "public official" from being or acting as an agent of a foreign government who is required to register under the Foreign Agents Registration Act of 1938 at 22 U.S.C. §611 et seq.. Furthermore, the "Emoluments Clause" of the Constitution provides that no person who holds an office of "profit or trust" under the United States may receive any money, award or other thing of value from a foreign government or hold a position in a foreign government, except where permitted by statute.

SGE: An April 29, 1991 opinion of the Department of Justice Office of Legal Counsel (OLC) concluded that Section 219 applies to members of federal advisory committees-- both SGEs and "representative" members. However this provision can be waived for SGEs if EPA certifies that their employment is "necessary in the national interest" and sends a copy of the certification to the Attorney General for filing with the registration statement. The April 29, 1991 OLC opinion also concluded that the "Emoluments Clause" of the Constitution applies to members of advisory committees-- both SGEs and "representative members."

II. Other Ethics Related Statutes

a. 5 U.S.C. App. 7, §501(a) -- Outside Earned Income Limitation

Regular Employee: Section 501(a), and implementing regulations at 5 C.F.R. §§2636.301 through 2636.304, provide that a non-career employee paid at a rate in excess of a GS-15 may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1

of such calendar year.

SGE: This provision is not applicable.

b. 5 U.S.C. App. 7, §502(a) -- Limitations on Outside Professional Employment and Teaching

Regular Employee: Section 502(a), and implementing regulations at 5 C.F.R. §§2636.305 through 2636.307, prohibit a non-career employee paid at a rate in excess of a GS-15 from receiving any compensation for: (1) practicing a profession which involves a fiduciary relationship; (2) affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary relationship; (3) serving as an officer or member of the board of any association, corporation or other entity; or (4) teaching without prior approval.

SGE: This provision is not applicable.

c. 5 U.S.C. §§7321 - 7328 -- Hatch Act Political Activity Restrictions

Regular Employee: The "Hatch Act Reform Amendments of 1993" permit most EPA employees (i.e., non-career Senior Executive Service employees, Schedule C appointees, and GS/GM-15 level employees and below) to take an active part in political management and campaigns. This is a significant change from earlier provisions, which generally prohibited such activity. However the following activities remain prohibited: (1) running for partisan office, (2) soliciting political contributions from the general public, (3) engaging in political activity (including wearing buttons) while on duty, or in a government office, or while using a government vehicle, and (4) collecting political contributions unless both the donor and the collector are members of the same federal labor organization or employee organization and the person solicited is not a subordinate employee. Career employees in the Senior Executive Service and Administrative Law Judges remain subject to the earlier (and more restrictive) Hatch Act provisions. See EPA Ethics Advisory 96-09 of August 5, 1996 for further Hatch Act information.

SGE: SGEs are covered by the Act only during the 24-hour period of any day in which they are actually performing government business.

III. Executive Branch Standards of Ethical Conduct

The government-wide Standards of Ethical Conduct at 5 C.F.R. Part 2635, are fully applicable to both regular and special government employees. An SGE is covered by the standards even though the individual does not perform official duties on a given day.

SGEs are subject to the following provision in EXACTLY THE SAME WAY as regular employees:

a. 5 C.F.R. Part 2635, Subpart B, Gifts from Outside Sources

With certain exceptions listed at §2635.204, employees may not accept gifts from "prohibited sources" (generally persons or organizations affected by EPA actions) or given because of the employee's government position.

b. 5 C.F.R. Part 2635, Subpart C, Gifts Between Employees

With certain exceptions listed at §2635.304, employees may not give or contribute toward a gift for an official superior or receive a gift from an employee who receives less pay.

c. 5 C.F.R. Part 2635, Subpart E, Impartiality in Performing Official Duties

Employees may not participate in "specific party" matters where a "reasonable person with knowledge of the relevant facts" would question their impartiality. Consultation with an employee's Deputy Ethics Official (generally Office Director, Staff Office Director, Laboratory Director, or Regional Administrator) is strongly advised where the employee suspects a problem or where the matter will involve any of the following "covered relationships":

(1) persons or organizations with which the employee has business relationships,

(2) members of the employee's household or relatives with whom the employee has a close personal relationship,

(3) employers or prospective employers of spouses, parents, or dependent children,

(4) recent (within one year) former employers or clients, and

(5) organizations in which the employee is an "active participant."

The employee's Deputy Ethics Official may authorize participation if "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." 5 C.F.R. §2635.502(d).

d. 5 C.F.R. Part 2635, Subpart F, Seeking Other

## Employment

Employees may not participate in any "particular matter" (including a rulemaking or policy matter) which directly and predictably affects the financial interest of any person or organization with which the employee has had any contact regarding future employment (or relationships equivalent to employment, such as contracts and consultancies,) unless the employee's Deputy Ethics Official authorizes such participation under the same standards as in the Impartiality provisions of Subpart E discussed above. (Note: If the communications amount to "negotiating" for future "employment," the statutory restriction at 18 U.S.C. §208(a) applies, and employees may not participate in such matters unless the DAEO (not the Deputy Ethics Official) has granted a waiver under 18 U.S.C. §208(b)(1).)

SGEs are subject to the following restrictions to A LESSER DEGREE than regular employees:

### a. 5 C.F.R. §2635.805 -- Service as an Expert Witness

**Regular Employee:** An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless authorized by the DAEO.

**SGE:** The bar against expert testimony applies only if the individual has participated as a federal employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

If an SGE has been appointed by the President; serves on a commission established by statute; or has served or is expected to serve for more than 60 days in a period of 365 consecutive days, an additional restriction applies. These SGEs cannot serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the individual's employing agency is a party or has a direct and substantial interest, unless authorized by the DAEO.

### b. 5 C.F.R. §2635.807 -- Teaching, Speaking, and Writing

**Regular Employee:** Except for certain teaching activities, an employee shall not receive compensation from any source other than the Government for teaching, speaking, and writing that relates to the employee's official duties. The "relatedness" test is met if: (A) the activity is undertaken as an official government duty; (B) the circumstances indicate that the

invitation to engage in the activity was extended to the employee primarily because of the employee's official position rather than the employee's expertise on the particular subject matter;

(C) the invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance or nonperformance of the employee's official duties; (D) the information conveyed through the activity draws substantially on ideas or official data that are nonpublic information; or (E) the subject of the activity deals in significant part with:

(1) Any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period;

(2) Any ongoing or announced policy, program or operation of the agency; or

(3) In the case of certain noncareer employees, the general subject matter area, industry, or economic sector primarily affected by the programs and operations of the employee's agency.

SGE: The restrictions in paragraphs (2) and (3) above do not apply to an SGE. The restriction in paragraph (1) applies only during the current appointment of an SGE; except that if the SGE has not served or is not expected to serve for more than 60 days during the first year or any subsequent one year period of that appointment, the restriction applies only to "specific party" matters (such as contracts, licenses, and lawsuits) in which the SGE has participated or is participating personally and substantially.

#### c. 5 C.F.R. §2635.808 -- Fundraising Activities

Regular Employee: An employee may engage in fundraising in a personal capacity provided that the individual does not personally solicit funds or other support from a subordinate, or from any person known to the employee to be one of the five types of prohibited sources specified in section 2635.203(d) (generally persons or entities affected by EPA actions.)

An employee may participate in fundraising activities in an official capacity if authorized to do so as part of official duties. Such authorization can come from statutes, Executive Orders, or regulations. 5 C.F.R. §2635.808(b). One example of authorized official fundraising is the Combined Federal Campaign (CFC).

SGE: An SGE may engage in fundraising in a personal capacity provided that the individual does not personally solicit funds or other support from a subordinate, or from any person known to the employee

to be a prohibited source whose interests may be substantially affected by the performance or nonperformance of the employee's official duties. An SGE may also participate in authorized official fundraising such as the CFC.

(Footnote 1) SGEs are employees who are appointed to perform services, temporarily or intermittently, for not more than 130 days in any 365 day period. See 18 U.S.C. §202.

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DCN: 12154

**RETIREMENT BRIEFING**  
**POINT PAPER**

**I. PRE-RETIREMENT MATTERS:**

A. If negotiating with a company for, or have an understanding with respect to, future employment, you have a financial interest in that company that can result in a conflict of interest. May need to issue a written notice of this disqualification.

B. Merely "seeking" employment (*e.g.*, sending an unsolicited resume) creates a disqualifying relationship with the target company, *i.e.*, you may not participate in any official matter that affects financial interests of the company.

C. In some cases, may need to:

1. Issue a written notice of disqualification to superiors, subordinates and perhaps others;
2. Issue a special notice to specified individuals if participating in a procurement;
3. Change duties; and/or
4. Forgo pre-retirement job hunting with one or more companies.

E. Travel expenses paid for job interviews are gifts from an outside source, but may be accepted if the potential employer in such situations customarily pays such expenses.

F. Employment while on leave, including terminal leave: remember, you are still on active duty, and officers and employees are prohibited by criminal law from representing any non-Federal entity before the Federal government concerning *any* particular matter. If you file a financial disclosure report, you must obtain prior written approval before being employed by a "prohibited source" (*e.g.*, a contractor or someone seeking official action from the Army).

**II. RETIRED MILITARY MEMBERS:**

Retired military members may not accept employment from any foreign government, including corporations owned or controlled by foreign governments, without consent of Congress (Art I, sec 9, cl 8, US Constitution). Consent obtained if the Secretary of the Army and the Secretary of State approve (10 USC 712). Retired personnel seek approval from Commander, U.S. Army Reserve Personnel Center, ATTN: ARPC-SFR-SC, 9700 Page Boulevard, St. Louis, MO 63132-5200, Telephone (314) 538-5090, DSN 892-5090. (AR 600-291).

**III. FORMER "SENIOR EMPLOYEES" (GENERAL OFFICERS AND LEVEL V & VI SESS):**

A. May not, on behalf of someone else, attempt to influence anyone in the department or agency served in during the last year concerning any official matter ... for one year (cooling off period) (18 USC 207(c)).

B. May not aid, advise or represent any foreign entity to help influence any USG entity or employee ... for one year (18 USC 207(f)).

**IV. ALL FORMER OFFICERS OR EMPLOYEES:**

A. May not, on behalf of someone else, try to influence any USG agency, officer or employee concerning the same particular matter involving a specific party in which you participated personally and substantially for the Government at any time ... for ever (18 USC 207(a)(1)).

B. May not, on behalf of someone else, try to influence any USG officer or employee concerning a particular matter involving a specific party that was pending under your official responsibility during the last year of service ... for two years (18 USC 207(a)(2)).

**V. PROCUREMENT INTEGRITY LAWS:**

A. For one year, you may not accept compensation from a contractor if you:

1. Served as procuring contracting officer, source selection authority, a member of the source selection evaluation board or council, or the chief of a financial or technical evaluation team, for a procurement of more than \$10,000,000 won by that contractor.

2. Served as program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 held by that contractor.

3. Personally made a decision to award a contract, subcontract, modification, task order or delivery order in excess of \$10,000,000 to that contractor.

4. Personally made a decision to establish overhead or other rates, approve a contract payment or payments, or to pay or settle a claim, for more than \$10,000,000 for that contractor.

B. The restriction applies only to the prime contractor, but it does not apply to employment by a different division or affiliate of the contractor that does not produce the same or similar products or services.

**VI. REPORTING REQUIREMENTS:**

If you file the Public Financial Disclosure Report (SF 278), you must file a termination report not earlier than 15 days before, and not later than 30 days after retirement.

**VII. Miscellaneous Military Provisions:**

A. Use of Title. Retirees may use military rank in private commercial or political activities, but the retired status must be clearly indicated, there must be no appearance of DoD endorsement, and the use must not discredit DoD (JER 2-304).

B. Wearing the Uniform. Retirees may wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social or ceremonial occasions. (para. 29-4, AR 670-1).

**VIII. IN GENERAL:**

A. Unless Procurement Integrity applies (Section V., above), you can work for whomever you want (except for foreign governments) and work on any project or matter for the new employer.

B. Unless Procurement Integrity applies (Section V., above) none of the restrictions and prohibitions are at issue unless and until you begin to interface with departments or agencies of the USG (except for General Officers and SESs advising foreign governments in their first year).

C. If you are not restricted by the one-year Procurement Integrity no-compensation ban,

and if you do not interface with the USG, all you need to worry about is protecting and not exploiting classified, procurement integrity and other inside information.

Michael J. Wentink  
Ethics Counselor  
Office of Command Counsel  
U.S. Army Materiel Command  
(703) 617-8003, DSN 767-8003  
(rev'd September 1999)



## **SUMMARY OF THE RULES APPLICABLE TO THE JOB SEARCH AND POST-GOVERNMENT EMPLOYMENT**

### **Restrictions When Leaving Government Employment**

These restrictions can be summarized in one sentence: **You may not simultaneously work on a matter affecting a potential employer while seeking a job with it.** The specific rules are:

**18 USC 208** prohibits an employee from participating personally and substantially in a particular matter in which he knows a person with whom he is negotiating for employment or with whom he has an arrangement for future employment has a financial interest.

**5 CFR 2635.604** prohibits an employee from participating personally and substantially in a particular matter that she knows will have an effect on the financial interests of a prospective employer with whom she is seeking employment.

The standard of conduct is much broader than the criminal statute. The employee must actually be negotiating or have an agreement for employment in order to trigger the criminal statute. Under the standard, simply sending a resume or not rejecting an approach by a potential future employer will trigger the standard. <sup>(1)</sup> The only remedy is disqualification as we generally do not waive disqualification for something so significant as the financial interests of as a future employer.

### **When are you seeking employment?**

You are seeking employment under the standard when you send a resume or call a potential employer or you do not immediately reject the possibility of employment with someone who has approached you about a job. Postponing employment discussions until you have finished working on a matter does not absolve you of the conflict. You must either reject an unsolicited communication about a job, or if you want to follow up, you must disqualify yourself.

### **What if you receive no reply to your resume?**

After two months with no response you no longer need to disqualify yourself from matters affecting that entity.

### **What if you are using a headhunter?**

You must be disqualified if the headhunter tells you the name of the prospective employer he has approached on your behalf. Both the standard and the statute have a knowledge test. Once you know that a prospective employer has been supplied with your resume, you are disqualified from matters involving that entity.

### **May a prospective employer pay your travel expenses for an interview?**

Yes, because such payment qualifies for the exception from the gift acceptance prohibition

for a gift based on an outside business relationship. You do not need approval to accept, but if the amount of the reimbursement exceeds \$260 you must report it on your financial disclosure report. ✓

### **Post-Government Employment Restrictions**

Most of the restrictions on former employees are found in 18 USC § 207, a criminal statute. None of the provisions bar self-representation or assisting behind the scenes in a representation, but lawyers must be mindful of their bar rules, which generally do bar behind-the-scenes assistance.

**18 USC § 207(a)(1)** prohibits a former employee from communicating to or appearing before a federal court or agency with the intent to influence on behalf of someone other than the United States on a particular matter involving specific parties in which he participated personally and substantially while with the government and in which the United States is a party or has a direct and substantial interest.

This is a lifetime bar and is very similar to the bar rule that prohibits switching sides. However, most bar rules also prohibit all aspects of representation, including counseling or other behind-the-scenes assistance. ~~See ABA Model Rule 1.11.~~

**18 USC § 207(a)(2)** prohibits a former employee from communicating to or appearing before a federal court or agency with the intent to influence on behalf of someone other than the United States on a particular matter involving specific parties that he knows was pending under his official responsibility during his last year of government service and in which the United States is a party or has a direct and substantial interest .

This is a two-year bar and there is no parallel bar rule. Further, an employee's recusal from a matter does not remove it from his official responsibility. These are matters that the employee may not have worked on and may not have even known about. After you leave government, if you are not sure if something was pending under your official responsibility, you may call an ethics official with the Department who will find out.

### **Application of the two-year bar to heads and staff of Senior Management Offices.**

Generally someone serving in a staff capacity, rather than a line capacity does not need to attribute to his official responsibility matters pending in components that he services. <sup>(2)</sup> For example, an Associate Deputy Attorney General does not have pending under his official responsibility every matter in the Bureau of Prisons (BOP) even though BOP may be his assigned area of responsibility. Conversely, everything pending in BOP (indeed in the entire Department) is pending under the Deputy Attorney General's responsibility. Similarly, everything in the Department is pending under the official responsibility of the Attorney General. The Associate Attorney General is responsible for everything pending in the components that report to him.

**18 USC 207(b)** bars a former employee from representing, aiding or advising on the basis of confidential information, on behalf of someone other than the United States on an ongoing treaty, or a trade negotiation under the Omnibus

Trade and Competitiveness Act of 1988, in which she participated personally and substantially during her last year as a senior employee.

This is a one-year bar. The Department is not generally involved in trade agreements to which the statute applies but some Justice employees have been involved in treaty negotiations.

**18 USC § 207(c)** bars a former senior employee, that is, one paid at the Executive Level or one paid at a rate equal to or greater than that of ES-5 of the Senior Executive Service (SES), from communicating to or appearing before the agency in which he served during his last year of government service, with the intent to influence, on behalf of another person on a matter on which he seeks official action.

This is a one-year bar and covers direct contacts with Department officials as well as appearances in court when representatives of the Justice Department are appearing. Senate-confirmed presidential appointees are barred from representations before the whole Department. Members of the SES in components designated as separate are barred only from representations to their own components, but SES staff of the senior management offices and SES in components not designated separate are barred from their own offices and from all components not designated separate.<sup>(3)</sup>

**18 USC § 207(d)** bars a former cabinet official from making, with the intent to influence, a communication to or appearance before, any Executive Level official in the Executive Branch on behalf of someone other than the United States.

This is a one-year bar.

There are some exceptions to subsections (c) and (d) for representing certain types of organizations such as a state or local government or an organization having 501(c)(3) status.

**18 USC § 207(f)** bars a former senior employee from representing a foreign entity before an agency of the United States or aiding or advising a foreign entity with the intent to influence an employee of a federal agency.

This is a one-year bar and covers employees paid at the Executive Level and those paid at a rate equal to or above ES-5 of the SES.

**18 USC § 203** bars a former employee from sharing in fees for representations before a federal agency or a court rendered by another at the time she was with the government on matters in which the United States is a party or has a direct and substantial interest.

This means that if a former government employee joins a law firm that has a government practice, she should be on salary for a time or her share of fees must be screened so that her share does not include fees from cases with the United States that were earned by representations before a federal agency or a court while she was with the government.

1. An employee is not disqualified from a matter that has industry or class-wide applicability such as legislation or regulations, if he sends a resume to someone who is affected by such a matter. However, he would be disqualified if and when he receives a favorable response.
2. The term "official responsibility" is defined as "the direct administrative or operating authority ... to approve, disapprove or otherwise direct government action." The scope of an employee's official responsibility is usually determined by those areas assigned by statute, regulation, executive order, job description or delegation of authority.
3. Separate components include all bureaus, divisions, each U.S. Attorney's Office and each U.S. Trustee's Office, but **not** offices with broad jurisdiction such as the Senior Management Offices, JMD, OIG, OLC, OLA, OIP, OPD, OPR, PAO and PRAO. Other components not designated separate include COPS, EOIR, IGA, INTERPOL, NDIC, and OIPR.





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### POST-EMPLOYMENT RESTRICTIONS

There are statutory prohibitions on a former government employee that generally prevent her from "switching sides" after leaving the government. The following are the main restrictions:

**Lifetime Ban** - An employee is prohibited from representing anyone else before the government on a particular matter involving specific parties in which she participated personally and substantially.

**Two-Year Ban** - An employee is prohibited for two years from representing another person on a particular matter involving specific parties which was pending under her responsibility during her last year of government service.

**One-Year Ban** - An Executive Level official or an employee paid at Senior Executive Service Levels 5 or 6 prior to January 11, 2004, a Senior Executive Service member (or other employee in comparable pay systems) with an annual rate of basic pay (excluding locality adjustments) at or above 86.5 percent of the rate for level II of the Executive Schedule (\$140,216.50 as of January 9, 2005) is subject to an additional restriction that generally prohibits her from representing anyone before the Department or her component for one year.

Certain components of the Department of Justice are considered separate for purposes of the one-year ban. An employee who works in a designated separate component is barred only from appearing before her own component. An employee not from a separate component is barred only from parts of the Department not designated as separate. An employee paid according to the Executive Schedule does not benefit from the separation of components. She is barred from representing before the whole Department. 5 C. F.R. § 2641

18 U.S.C. § 207 and 5 C.F.R. § 2637

There are restrictions on an employee receiving compensation, even after she leaves, based on anyone's representations before the Federal government that took place while she was still a government employee.

 18 U.S.C. § 203

Also available is a chart summarizing the post-employment restrictions, a summary of the post employment provisions prepared by the Office of Government Ethics and a summary of the seeking employment and post employment provisions prepared by the Departmental Ethics Office.

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### SEEKING EMPLOYMENT

An employee may not take official action on a matter which can affect the financial interests of an organization with which she is negotiating or has an arrangement for future employment. The remedy is disqualification.

18 U.S.C. § 208

In addition, an employee may have to disqualify herself from working on a matter when she is merely seeking employment, but before actually negotiating for a job. An employee would be considered to be seeking employment if she sends her resume to companies or if she is approached by someone about a position with a company and she responds that she is interested.

5 C.F.R. § 2635.601

effect until January 10, 2004; SES officials paid above \$140,216.50 as of January 9, 2005.

Executive Level personnel are barred from the whole Department. SES personnel and others who worked in a designated separate component are barred only from appearing before their own component; those not from a separate component are barred only from parts of the Department not designated separate including their own components.

Designated separate components are: BOP, DEA, FBI, INS, the Antitrust, Civil, Civil Rights, Criminal, Environment and Tax Divisions, CRS, FCSC, EOUSA and each U.S. Attorney's Office, EOUST and each U.S. Trustee's Office, Independent Counsels appointed by the AG, OJP, Office of the Pardon Attorney, the U.S. Marshals Service and USPC.

**This prohibition is effective for one year.**

CONTACT WITH EXECUTIVE LEVEL OFFICIALS

18 U.S.C. § 207(d) further bars a former cabinet level official from making, with the intent to influence, a communication to or appearance before any Executive Level official in the Executive Branch. **This prohibition is effective for one year.**

There is no parallel bar requirement.

REPRESENTATION OF A FOREIGN ENTITY AS DEFINED IN THE FOREIGN AGENTS REGISTRATION ACT

18 U.S.C. § 207(f) bars all former senior employees from knowingly, with the intent to influence, representing a foreign entity before an agency of the U.S. or aiding or advising a foreign entity.

There is no parallel bar requirement.

CONFIDENTIALITY

There is no parallel statutory requirement, but former employees who had access to National Security information have special responsibilities of confidentiality. (See also 28 CFR 16.21 dealing with the disclosure of Department information in Federal and State proceedings.)

Model Rules 1.6, 1.9 and 1.11(b) require lawyers to keep the confidence and secrets of clients unless waived. Representations of new clients may not be related to confidence of the former client or adverse to his interests. Model Rule 1.11(b) bars subsequent representation by former government lawyers with access to certain types of information without regard to adverseness to the government or its willingness to permit use of the information. This protection extends to third parties. These restrictions never expire but screening may eliminate an imputed law firm disqualification.

(Imputed disqualification)

### PROCUREMENT INTEGRITY RESTRICTIONS (41 U.S.C. § 423)

SUBJECT OF RESTRICTION

ACTIONS REQUIRED OF AGENCY OFFICIALS WHEN CONTACTED BY OFFERORS REGARDING NON-

STATUTORY REQUIREMENTS

An agency official who is participating personally and substantially\* in a Federal agency procurement for a contract in excess of \$100,000 must report any contact with a person who is a bidder or offeror in that procurement if the contact is in regard to non-Federal

FEDERAL EMPLOYMENT

employment. He must report the contact in writing to his supervisor and his agency ethics official. He may reject the offer or disqualify himself in writing to the Head of the Contracting Activity. He may be authorized to resume work if the offeror is no longer a bidder or all discussions have ended without an agreement for employment.  
48 CFR 3.104-4(c)

ACCEPTING COMPENSATION FROM A CONTRACTOR AFTER SERVING IN CERTAIN POSITIONS OR MAKING CERTAIN DECISIONS ON A PROCUREMENT OR A CONTRACT

A former official is prohibited from accepting compensation from a contractor within a period of one year after such official served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement for a contract in excess of \$10 million.

The above restriction also applies to a former official who served as program manager, deputy program manager or administrative contracting officer for a contract in excess of \$10 million.

It applies to a former official who made a decision to award a contract, subcontract, modification, task order or delivery order; to establish overhead or other rates for a contract; to approve issuance of a contract payment or payments; or to pay or settle a claim in excess of \$10 million.  
48 CFR 3.104-4(d)

PROHIBITION ON DISCLOSING PROCUREMENT INFORMATION

A present or former official, or someone acting on behalf of or advising the government with respect to a Federal procurement, who has or had access to contractor bid or proposal information or source selection information is prohibited from disclosing that information before the award of the contract to which the information relates.  
48 CFR 3.104-4(a)

\*Participating personally and substantially in a procurement means active and significant involvement in any of these activities: 1) drafting, reviewing or approving the specification or statement of work; 2) preparing or developing the solicitation; 3) evaluating bids or proposals or selecting a source; 4) negotiating price or terms and conditions of the contract; or 5) reviewing and approving the award of the contract.

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### POST EMPLOYMENT RESTRICTIONS

<u>SUBJECT OF RESTRICTION</u>	<u>STATUTORY REQUIREMENTS</u>	<u>BAR REQUIREMENTS</u>
MATTERS AFFECTING AN ORGANIZATION AN EMPLOYEE IS NEGOTIATING WITH FOR FUTURE EMPLOYMENT	18 U.S.C. § 208 prohibits employees from participating personally and substantially in a particular matter in which an organization they are negotiating with, or have an arrangement with for future employment has a financial interest.	There is no parallel bar requirement.
MATTERS IN WHICH FORMER EMPLOYEE HAD PERSONAL AND SUBSTANTIAL PARTICIPATION	18 U.S.C. § 207(a)(1) bars all former employees from knowingly making, with the intent to influence, any communication to or appearance before a department, agency or court of the U.S. on behalf of anyone other than the U.S. on a particular matter involving specific parties in which they participated personally and substantially while in government. Behind-the-scenes assistance and counseling are permitted. <b>This prohibition never expires.</b>	Model Rule 1.11 prohibits essentially the same conduct as section 207(a)(1) except all aspects of legal representation and counseling are prohibited. These restrictions never expire.
(Imputed disqualification)	None	Imputed to the former employee's law firm. Imputed disqualification can be eliminated by 1) screening the disqualified attorney and 2) giving notice to the Government
MATTERS UNDER FORMER EMPLOYEE'S OFFICIAL RESPONSIBILITY	18 U.S.C. § 207(a)(2) bars all former employees from knowingly making, with the intent to influence, any communication to or appearance before a department, agency or court of the U.S. on behalf of anyone other than the U.S. on a particular matter involving specific parties they know or should know was pending under their official responsibility during the last year of government service. <b>This prohibition is effective for two years.</b>	There is no parallel bar rule and no imputation to the law firm.
TREATIES AND TRADE NEGOTIATIONS UNDER THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 IN WHICH THE FORMER EMPLOYEE PARTICIPATED	18 U.S.C. § 207(b) bars all former employees from knowingly repressing, aiding or advising, on the basis of certain confidential information, any person other than the U.S., on certain ongoing trade or treaty negotiations in which they participated personally and substantially during the last year of government service. <b>This prohibition is effective for one year.</b>	There is no parallel bar rule, but Model Rule 1.11 would apply also.
SHARING FEES FROM ANOTHER'S REPRESENTATION	18 U.S.C. § 203 bars all former employees from sharing in fees for representational services rendered by another at the time of their government employment, on matters in which the U.S. is a party or has a direct and substantial interest.	There is no parallel bar rule.
CONTACT WITH FORMER AGENCY	18 U.S.C. § 207(c) bars senior employees from knowingly making, with the intent to influence, any communication to or appearance before all or part of their former agency on behalf of another person on a matter on which they seek official action. Senior officials include: Executive Level; SES 5 & 6 under the pay system in	There is no parallel bar requirement and no imputation to the law firm.

## **POST-EMPLOYMENT RULES FOR BRAC COMMISSIONERS**

This summary has been prepared for Commissioners appointed to serve on the 2005 Base Closure and Realignment (BRAC) Commission. If you have questions on any of the topics covered in this guidance, you should consult with an attorney in the Office of the General Counsel.

### **Part 1: Personal Lifetime Ban**

1.1 **SIMPLIFIED RULE:** After you leave Government service, you may not represent someone else to the Government regarding particular matters that you worked on while in Government service.

### **Official Responsibility: 2 Year Ban**

1.2 **SIMPLIFIED RULE:** For 2 years after leaving Government service, you may not represent someone else to the Government regarding particular matters that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

### **Trade or Treaty: 1 Year Ban**

1.3 **SIMPLIFIED RULE:** For 1 year after leaving Government service, you may not aid, advise, or represent someone else regarding trade or treaty negotiations that you worked on during your last year of Government service.

### **Part 2: Compensation Ban on Representation by Others**

2.1 **RULE: COMPENSATION FOR REPRESENTATION TO THE GOVERNMENT BY OTHERS:** After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service ( e.g., lobbying, consulting, and law firms).

### **Part 3: Additional Restrictions for Retired Military Personnel and Reservists**

3.1 **SIMPLIFIED RULE: FOREIGN EMPLOYMENT:** Unless you receive prior authorization from your Service Secretary, you may forfeit your military pay during the time you perform compensated services for a foreign government.

### **Part 4: Administrative Reminder**

4.1 **USE OF NONPUBLIC INFORMATION:** After leaving Government service, you still may not use nonpublic information to further your own private interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.

DCN: 12154

OGE Use Only

*United States*  
*Office of Government Ethics*

**2003 AGENCY ETHICS PROGRAM QUESTIONNAIRE**

Your response to this questionnaire will constitute your annual report for 2003. Section 402(e)(1) of the Ethics in Government Act of 1978, as amended, requires that executive agencies submit an annual report to the Office of Government Ethics (OGE) concerning certain aspects of their ethics programs. This annual report shall be filed with OGE on or before February 1 of each year (5 C.F.R. § 2638.602(a)).

Please respond to each question as completely and accurately as possible. Also, please print or type neatly and try to keep your responses confined to the assigned blocks or spaces. Use an [X] where appropriate. You may attach additional sheets as necessary. Be sure to clearly indicate which question you are answering on all attached sheets. Throughout the questionnaire, your responses should reflect the calendar year (i.e., 1/1/03 through 12/31/03) except where specified.

If you have any questions, contact Barbara Mullen-Roth at 202-208-8000.

**DEADLINE: FEBRUARY 1, 2004**

**ORGANIZATION/RESOURCES**

1. Agency \_\_\_\_\_
2. \_\_\_\_\_ Number of full-time agency employees?
3. \_\_\_\_\_ Name and title of the Designated Agency Ethics Official (DAEO)?
4. \_\_\_\_\_ % Approximate percent of the DAEO's time spent on ethics?
5. \_\_\_\_\_ Name and title of the Alternate DAEO?
6. \_\_\_\_\_ % Approximate percent of the Alternate DAEO's time spent on ethics?
7. \_\_\_ Yes \_\_\_ No Does your agency have regional or field office ethics officials?
8. \_\_\_\_\_ Number of ethics officials who worked in the ethics program in 2003? Include employees who worked in the region or field offices.

- \_\_\_\_\_ Number of ethics officials who worked full time on ethics?
- \_\_\_\_\_ Number of ethics officials who worked part time on ethics?

9. \_\_\_\_\_ Number of regional and field office ethics officials?

Functional locations(s) of regional/field ethics officials? Mark all that apply.

- \_\_\_\_\_ Legal office
- \_\_\_\_\_ Human Resources office
- \_\_\_\_\_ Employee Relations office
- \_\_\_\_\_ Other (specify): \_\_\_\_\_

**PROGRAM ADMINISTRATION**

1. Please use the following scale to rate the amount of time you spend to administer each item. Time Spent scale: 1= No time spent to administer to 5 = A great deal of time spent to administer.

	<u>Time spent</u>				
	1	2	3	4	5
a. Public financial disclosure system	1	2	3	4	5
b. Confidential financial disclosure system	1	2	3	4	5
c. Outside activity approval system	1	2	3	4	5
d. Written opinions and counseling	1	2	3	4	5
e. Education and training	1	2	3	4	5
f. Disciplinary process for violations	1	2	3	4	5
g. Special Government employees' activities (See page 8 for definition of special Government employee.)	1	2	3	4	5
h. Developing information technology applications for any aspect of the ethics program	1	2	3	4	5

2. Please indicate which ethics program areas(s) your agency contracted out in 2003. Mark all that apply.

- \_\_\_\_\_ a. Initial ethics orientation
- \_\_\_\_\_ b. Annual ethics training
- \_\_\_\_\_ c. Financial disclosure review
- \_\_\_\_\_ d. Internal program evaluation
- \_\_\_\_\_ e. Advice and counseling
- \_\_\_\_\_ f. Program administration (tracking systems, databases etc.)
- \_\_\_\_\_ g. Other: \_\_\_\_\_

3. Please indicate which part(s) of your ethics program are automated?

- \_\_\_\_\_ a. Initial ethics orientation
- \_\_\_\_\_ b. Annual ethics training
- \_\_\_\_\_ c. Financial disclosure review
- \_\_\_\_\_ d. Internal program evaluation

- e. Advice and counseling
- f. Program administration (tracking systems, databases etc.)
- g. Other: \_\_\_\_\_

4. Did your agency perform an internal ethics program review (self evaluation, IG review, etc.) in 2003?

\_\_\_\_\_ Yes      \_\_\_\_\_ No  
(If yes, please answer a and b)

a. What organization within your agency conducted the review?

- Agency Ethics Official(s)
- Inspector General's Office
- General Counsel's Office
- Other: \_\_\_\_\_

b. Were you provided feedback from the review?

- Yes, written
- Yes, verbal
- No feedback provided

### EDUCATION AND TRAINING

1. \_\_\_\_\_ Number of employees required to receive initial ethics orientation?  
\_\_\_\_\_ Number of employees who received initial ethics orientation?

2. \_\_\_\_\_ Total number of employees who received annual ethics training?  
\_\_\_\_\_ Number of employees required to receive annual ethics training?  
\_\_\_\_\_ Number of required employees who received annual ethics training?

3. How do you ensure that your required employees receive annual ethics training? Check all that apply.

- Attendance rosters
- Training management system
- Training evaluations
- Other \_\_\_\_\_

4. Identify the topical areas in which training was provided:

- 14 Principals of Ethical Conduct
- Gifts
- Impartiality
- Misuse of Position
- Outside and Representational Activities
- Other \_\_\_\_\_
- Conflicting Financial Interests
- Post Employment
- Seeking Employment
- Hatch Act

5. What kinds of training methods and materials did you use for your training? Check all that apply.

- Written materials
  - Copies of the Standards of Conduct and/or agency supplemental regulations
  - Summaries of the Standards of Conduct
  - Pamphlets/Brochures
  - Newsletters
  - Self-study manual
  - Hypothetical case studies
  - Other: \_\_\_\_\_
- Videos
  - OGE produced
  - Agency produced
- Satellite/Videoconferencing
- Classroom instruction
- Individual briefings
- Computer/web-based training
- Other: \_\_\_\_\_

**ETHICS OPINIONS, ADVICE AND COUNSELING**

1. Please use the following scale to rate the topics on the frequency with which you provided opinions, advice and counseling. Frequency Scale: 1= Not at all, 2= Rarely, 3= Periodically, 4= Frequently and 5= Very Frequently.

	<u>Frequency</u>				
	1	2	3	4	5
Outside employment/activities	1	2	3	4	5
Post-employment restrictions	1	2	3	4	5
Conflicting financial interests	1	2	3	4	5
Awards	1	2	3	4	5
Impartiality in performance of official duties	1	2	3	4	5
Misuse of position, Government resources and information	1	2	3	4	5
Travel, subsistence, and related expenses from non-Federal sources	1	2	3	4	5
Gift acceptance, excluding awards and travel, subsistence, and related expenses from non-Federal sources	1	2	3	4	5

2. Who is authorized to provide written advice on standards of conduct and conflict of interest statutes? Mark all that apply. **If the DAEO is the General Counsel, please mark DAEO.**

- DAEO/Alternate DAEO/Deputies/Ethics Officials
- General Counsel/Regional Counsels/Staff Attorneys
- Supervisors
- Directors of Personnel/Staff
- Agency Head
- Other (specify): \_\_\_\_\_

3. How does your ethics office ensure that accurate opinions, advice and counsel are provided to employees? Mark all that apply.

- Review all written opinions
- Discuss verbal opinions prior to providing them to employees
- Review written opinions randomly
- Review ethics officials' phone logs
- Conduct periodic discussions with staff
- Offer training
- Other: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

**ENFORCEMENT OF STANDARDS OF ETHICAL CONDUCT, CRIMINAL AND CIVIL STATUTES**

1. Report the number of disciplinary actions taken in 2003 based wholly or in part upon violations of the standards of ethical conduct provisions (5 C.F.R. part 2635) or the conflict of interest statutes in Title 18 of the United States Code.. For purposes of this question, disciplinary actions include removals, demotions, suspensions, and written reprimands or their equivalents.

- a. Gifts from outside sources
- b. Gifts between employees
- c. Conflicting financial interests
- d. Impartiality in performance of official duties
- e. Seeking other employment
- f. Misuse of position, Government resources, information
- g. Conflicting outside activities
- h. Compensation for teaching, speaking, and writing
- i. Compensation from non-Federal sources
- j. Indebtedness
- k. General principles
- l. Provision(s) in agency supplemental regulation
- m. Other (specify): \_\_\_\_\_

**TOTAL**

2. Which office(s) within your agency make referrals of potential violations of the criminal conflict of interest statutes, 18 U.S.C. §§ 203, 205, 207, 208, and 209, to the Department of Justice (DOJ), including offices of U.S. Attorneys? Mark all that apply.

- DAEO (Ethics Officials)
- Agency Head
- IG
- General Counsel
- Other: \_\_\_\_\_

3. Which office(s) are responsible for notifying OGE when a referral of a potential violation of the criminal conflict of interest statutes (see question 2 above) have been made to the Department of Justice, including the U.S. Attorneys? Mark all that apply.

- DAEO (Ethics Officials)
- Agency Head
- IG
- General Counsel
- Other (specify): \_\_\_\_\_

**PUBLIC FINANCIAL DISCLOSURE**

1. Report the total number of public financial disclosure reports (SF 278) required to be filed in 2003 by permanent full-time employees, excluding special Government employees (see pages 8 and 9), and the total number of reports actually filed. Derive totals for required new entrant/termination reports from the number of appointments to and the number of terminations from positions during 2003. Some totals may include late filings actually received in 2004.

	Nom./New Entrant		Annual		Termination		Combination <sup>1</sup>		TOTAL	
	req.	filed	req.	filed	req.	filed	req.	filed	req.	filed
PAS <sup>2</sup>										
Non- Career SES <sup>3</sup>										
Career SES <sup>3</sup>										
Sched. C										
Other <sup>4</sup>										
<b>TOTAL</b>										

2. \_\_\_\_\_ Number of Schedule C employees exempted from the filing requirement by OGE?

<sup>1</sup> Includes reports filed to satisfy both annual and termination requirements, as well as new entrant and annual requirements.

<sup>2</sup> Presidential appointees confirmed by the Senate.

<sup>3</sup> Senior Executive Service, Senior Foreign Service, Senior Cryptologic Service, Defense Intelligence Senior Executive Service, etc.

<sup>4</sup> Includes members of the Uniformed Services, Administrative Law Judges, etc.

3. \_\_\_\_\_ Number of filers who requested filing extensions?  
 \_\_\_\_\_ Number of filers who were granted filing extensions?
4. \_\_\_\_\_ Number of filers who requested waivers of the late filing fee?  
 \_\_\_\_\_ Number of filers who were granted waivers of the late filing fee?
5. \_\_\_\_\_ Number of filers who paid the late filing fee?
6. \_\_\_\_\_ Number of requests your agency received for public release of 278s?
7. \_\_\_\_\_ Number of individual SF 278 reports requested to be released?  
 \_\_\_\_\_ Number of PAS SF 278 reports requested?  
 \_\_\_\_\_ Number of non-career SES SF 278 reports requested?  
 \_\_\_\_\_ Number of career SES SF 278 reports requested?
8. Number of specific corrective or remedial (nondisciplinary) actions taken by public financial disclosure filers in 2003. Consider as a separate action each holding which has been divested, each outside position which has been terminated, and each entity for which a written disqualification (i.e., recusal) or 18 U.S.C. § 208(b) waiver was obtained.

	Divestiture	Resignation	Written Dis-qualification	18 § 208(b) Waiver	Reassign-ment	TOTAL
PAS						
Non Career SES						
Career SES						
Sched. C						
Other						
TOTAL						

**CONFIDENTIAL FINANCIAL DISCLOSURE**

1. Total number of OGE form 450s required in 2003 and the actual number of OGE form 450s and OGE form 450As filed in 2003 by permanent full-time employees, excluding special Government employees.  
 \_\_\_\_\_ Required OGE form 450s?  
 \_\_\_\_\_ Filed OGE form 450s?  
 \_\_\_\_\_ Filed Alternative OGE 450As?

2. Number of specific corrective or remedial (nondisciplinary) actions taken by confidential financial disclosure filers in 2003. Consider as a separate action each holding which has been divested, each outside position which has been terminated, and each entity for which a written disqualification (i.e., recusal) or 18 U.S.C. § 208(b) waiver was obtained.

\_\_\_\_\_ Divestiture  
 \_\_\_\_\_ Resignation from outside position  
 \_\_\_\_\_ Written disqualification  
 \_\_\_\_\_ 18 U.S.C. § 208(b) waiver  
 \_\_\_\_\_ Reassignment  
 \_\_\_\_\_ **TOTAL**

**ADVISORY COMMITTEES/SPECIAL GOVERNMENT EMPLOYEES<sup>5</sup>**

1. \_\_\_\_\_ Number of Advisory Committee members?
2. \_\_\_\_\_ Number of special Government employees (SGE) in your agency?
3. Number of SGEs who served as advisory committee members or as experts/consultants and who were required to file financial disclosure reports in 2003. Include the total number who actually filed.

	Confidential Reports		Public Reports	
	required	filed	required	filed
Advisory Committee Mem.				
Experts/Consultants				
Board Members				
Commissioners				
Other (specify):				
<b>TOTAL</b>				

<sup>5</sup> For purposes of this questionnaire, the term "special Government employee" (SGE) means an officer or employee who is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for not more than 130 days during any period of 365 consecutive days. In addition to these officers and employees, the term includes:

- ! Part-time United States commissioners
- ! Part-time United States magistrates
- ! Independent counsels appointed under chapter 40 of title 28 and any person appointed by those independent counsels under section 594(c) of title 28, regardless of the number of days of appointment for either of these positions
- ! Reserve officers of the Armed Forces and officers of the National Guard of the United States (unless otherwise officers or employees of the United States) while on active duty solely for training or serving involuntarily

The terms "officer or employee" and "SGE" shall not include enlisted members of the Armed Forces.

3. \_\_\_\_\_ Number of SGEs not required to file a financial disclosure report in 2002?

4. Does your agency provide ethics program services for any boards or commissions that are independent of your agency?

\_\_\_\_\_ Yes (please provide the names of the boards and commissions on the lines below)

\_\_\_\_\_ No

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5. \_\_\_\_\_ Number of § 208(b)(1) granted to special Government employees?

6. \_\_\_\_\_ Number of § 208(b)(3) granted to special Government employees?



**Office of Government Ethics**  
**89 x 14 -- 09/12/89**

**Letter to an Agency General Counsel dated September 12, 1989**

Your letter of August 16, 1989, requested a formal opinion as to whether a former Senior Employee could serve as a member of an advisory committee of the [agency] or participate in its activities, without violating the one-year "cooling off" period on representational appearances before or communications with his former agency, which is imposed by 18 U.S.C. § 207(c). We assume that the additional "switching sides" prohibitions of 18 U.S.C. §§ 207(a) and 207(b) are not applicable or that the former employee is aware of those prohibitions. Having reviewed the issues presented in your letter, we have determined that the request is appropriate for resolution by an informal rather than a formal opinion.

According to the facts which you have presented, the [advisory committee in question] (hereinafter, "Committee") was chartered by [the agency] in 1987, pursuant to the Federal Advisory Committee Act (FACA) at 5 U.S.C. App. 2, to advise it on facts and circumstances regarding [a certain developing technology] and to recommend policies, standards and regulations that would [facilitate the general use of such technology]. This Committee is composed of a parent committee appointed by [the agency], with members chosen to obtain diverse and representative industry viewpoints; three subcommittees, led by appointees of the parent committee's chairman, with general membership open to all interested persons; and a steering committee made up of the subcommittee chairmen and vice-chairmen.

You further indicate that all salaries and expenditures of the Committee are paid by private industry, not [the agency]. While no [agency] employees are Committee members, all meetings of the parent, the steering committee, and the subcommittees are attended by an [agency] employee who is designated pursuant to the FACA. Substantive output of the subcommittees is accomplished by working parties, made up of any interested persons, which are not considered part of the Committee. No [agency] employee is designated to attend meetings of the working parties, although interested [agency] staff members occasionally do attend for informational purposes.

We understand that a former "Senior Employee" of [the agency], as that term is used in 18 U.S.C. § 207(c), is an authority on [this particular technology] and could bring to the Committee important expertise. However, you are concerned that his membership on the Committee, or even participation in its activities or those of its subcommittee working parties, might violate 18 U.S.C § 207(c). Section 207(c) bars a former Senior Employee for a period of one year from representing anyone other than the United States in an appearance before his former agency or its employees, or from making, with the intent to influence, any communication to them, in connection with any particular matter pending before that agency or in which it has a direct and substantial interest. Regulations at 5 C.F.R. § 737.11 implement this statute.

Your analysis suggests that this former Senior Employee should be permitted to make representations before the Committee, which you believe is, in effect, a separate entity from [the agency], similar to a private contractor. You cite OGE informal advisory letter 81 x 5 of February 17, 1981, as authority to conclude that the presence of [the agency] official as a designated attendee at Committee meetings does not transform the former Senior Employee's participation into a representational appearance before an agency employee, unless there is a direct communication between the two on a particular matter. You opine that the designated [agency] employee's presence is no different than if he heard the former Senior Employee's remarks on C-Span or read them in a book or magazine.

We do not view representations to or communications with the Committee as being analogous to the situation in OGE informal advisory letter 81 x 5 to which you allude. The question posed therein was whether a former Senior Employee must screen his audience to determine if employees of his former agency were incidentally present, prior to appearing before forums organized by a third party, such as another agency, the Congress, or a public conference. The Committee, however, is a forum organized by [the agency] and for its benefit, not by or for a third party. Furthermore [the agency] official who is designated to be present at all meetings is not a casual or passive attendee; rather, the FACA and implementing regulations at 41 C.F.R. Part 101-6 require his presence, and he attends in an official capacity. According to those regulations, this person is referred to as the Designated Federal Officer, and an advisory committee is not empowered to meet without his call or approval. Additionally,

the regulations specify that this designee must approve the agenda and be present at all meetings, shall adjourn meetings when in the public interest, and may chair meetings when directed by the agency.

As the cited OGE opinion notes, a former employee at third party forums need only insure that he avoids discussion or debate, designed to influence, with employees of his former agency; however, where the agency helps organize the forum, such as is the case with advisory committees, with at least one agency employee required to be present and functioning as a critical element in its structure, a former Senior Employee's participation must be viewed as a representational appearance before an agency employee, regardless of whether there is a direct exchange of communications. Accordingly, a former Senior Employee would run afoul of 18 U.S.C. § 207(c) if he were to represent private industry (or anyone else other than the United States) as a member of the Committee, or to otherwise participate as an interested person.<sup>1</sup>

You also inquired whether, in the event we found that 18 U.S.C. § 207(c) does bar participation, sections 207(f) or 207(i) might offer exceptions. The first portion of section 207(f) permits lifting the post-employment ban with respect to communications made solely for the purpose of furnishing scientific or technological information, to permit free exchange of information not involving advocacy. Each agency is responsible for implementing that provision, utilizing the regulations at 5 C.F.R. § 737.15. If the former Senior Employee's furnishing of scientific and technological information can be structured to fit the limiting criteria in that regulation and your own procedures, then you may exempt him for that purpose.

Section 207(f) also permits exempting a former employee on a more continuous and comprehensive basis, when the agency certifies in the Federal Register, after consultation with OGE, that the former employee has outstanding scientific or technological qualifications, that such qualifications are needed by the agency in a matter, and that the national interest would be served by the former employee's participation. Implementing regulations are found at 5 C.F.R. § 737.17. In the event that you propose to utilize this broader exemption, you should submit a written request to this Office, discussing in greater detail the individual's special qualifications, justifying the

particular need for those qualifications in terms of the criteria stated in the regulations, and certifying that this exemption would serve the national interest.

With regard to whether a former Senior Employee might also be exempt from the section 207(c) post-employment ban by reason of section 207(i), we assume you are referring to that portion which states that section 207(c) does not prevent the uncompensated making or providing of a statement which is based on the former Senior Employee's special knowledge in a particular area. Examples are found in the regulations at 5 C.F.R. § 737.11(i). This Office has provided additional guidance in its informal advisory letter 81 x 9 of February 25, 1981. The thrust of that opinion is that special knowledge in the particular area must be demonstrated, not just special interest, and the assistance should, therefore, relate to matters more specific than broad policy issues. We do not have enough information from which to ascertain whether the former senior employee about whom you are inquiring would fit the requirements for a section 207(i) exception.

You also inquired whether, even if we determined that a former Senior Employee could not participate with the Committee, he might still serve with the working parties of the subcommittees. In our opinion he could, as these working groups are distinguishable from the Committee. They are organized less formally, not chartered under the FACA, apparently composed exclusively of "all interested persons," and not attended by a designated [agency] employee. Such working parties are more akin to public forums not directly organized by the agency. Any incidental attendance by [agency] employees as interested persons does not, in our opinion, transform a former Senior Employee's involvement at the working party level into a prohibited representational appearance before [the agency] or its employees. The former Senior Employee must, of course, avoid any direct communication, designed to influence, with [agency] employees who might attend as interested parties.

In reaching the opinions expressed above, we have not consulted with the Department of Justice. Nonetheless, I trust that this informal guidance will assist you in determining the extent to which your former Senior Employee might participate in the work of your Advisory Committee.

Sincerely,

Frank Q. Nebeker  
Director

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1 Of course, if the former senior employee were requested by your agency, to act an expert on behalf of the United States and not as a representative of private industry or others, then he would not violate 18 U.S.C. § 207(c). See the legislative history in Senate Report No. 170, 95th Cong., 2nd Sess. 153 (1978), and OGE informal advisory letter 81 x 9 of February 25, 1981. However, we understand from the Committee's charter that all members are appointed to serve as representatives of industry.



*Add cover sheet listing key items and page numbers*

**ETHICS RULES FOR  
BRAC COMMISSIONERS APPOINTED AS SPECIAL  
GOVERNMENT EMPLOYEES (SGEs)**

*stated like this, some commissioners may think they are not SGEs.*

Introduction

*delete bold words*

This summary has been prepared **primarily** for members appointed to serve on the **Defense Base Closure and Realignment (BRAC) Commission**, a Department of Defense (DoD) advisory committee, as Special Government Employees (SGEs). If you have questions on any of the topics covered in this guidance, you should consult **an attorney in the General Counsel's office.**

*our legal advice*

Definition of a Special Government Employee (SGE)

**An SGE** is an officer or employee in the executive branch of the Federal Government who is appointed to perform temporary duties, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days. 18 U.S.C. 202(a). Even if you exceed the 130 days, you will still be considered to be an SGE for the remainder of that 365-day period. All days you work (whether paid or unpaid), and even if you do not work the entire day, counts towards the 130 day limit. The 365-day period begins the day you start working (not the day you were appointed to the BRAC Commission). The SGE status is important because the ethics rules for SGEs are somewhat less restrictive than the rules for other Federal employees and officials.

Financial Disclosure Reporting Requirements

All BRAC Commissioners have been appointed as SGEs, and are required under the Ethics in Government Act, as amended by the Ethics Reform Act of 1989, and 5 C.F.R. Part 2634, to file a financial disclosure report (SF-278 form) when first appointed. *(Committee members also may be required to update the information on the report before each meeting throughout their term of appointment.)*

The information reported **on the SF 278** is used to determine the matters for which a Commissioner must be disqualified under the criminal financial conflict of interest statute, 18 U.S.C. 208(a), and the matters for which a committee member may be granted a waiver under 18 U.S.C. 208(b). Complete **and continuous** reporting are essential to protect the **Commission** member from inadvertently violating any of the criminal conflict of interest statutes, and to assure the public that the advice provided by an HHS advisory committee **and to assure the public that the decisions made by the BRAC Commission are free from any real or perceived conflicts of interest.**

*delete*

The information reported by Commissioners is confidential. However, once you have worked for 60 days or more for the BRAC Commission in any period of 365 consecutive days, this SF-278 form may be released upon an appropriate request. *(See e.g., OGE form 201, Request to Inspect or Receive Copies of SF 278 Executive Branch Personnel Public Financial Disclosure*

DCN: 12154  
*And remember we are not an advisory committee*

*wherever you have committee, you need "commission"*

Report or Other Covered Report. However, the SF-278 form may not be released under Freedom of information (FOIA) requests. **You will be informed of any such request for your SF-278 by the General Counsel.** *You have the ability to inquire and be informed about such requests of your SF-278 form by filing an OGE form 201, or similar form, with the BRAC Legal Office.*

I. Criminal Conflict of Interest Statutes

The following criminal conflict of interest statutes (18 U.S.C. 201-216) apply to SGEs:

- **18 U.S.C. 201.** Section 201, commonly known as the "bribery and illegal gratuities" 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.
- **18 U.S.C. 203.** Section 203 prohibits an SGE from receiving compensation for representational services rendered by the employee or another person before HHS or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party (i) in which the SGE has participated personally and substantially as a Government employee, or (ii) which is pending in the Government agency in which the SGE is serving if the SGE has served for more than 60 days during the immediately preceding 365 days.

Exempted from this rule are representations required in the proper discharge of official duties. Also exempted are representations required in the performance of work under a grant, contract or other agreement with or for the benefit of the Government.

A particular matter involving specific parties is a matter that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Particular matters may include, but are not limited to, reviews of grant proposals or contract applications, other funding decisions, studies or approvals of scientific studies or projects, and other actions that involve deliberation, decision, or action.

Representational services include communications (written or oral) and appearances made on behalf of someone else, generally with the intent to influence or persuade the Government.

An inquiry as to the status of a pending matter is not necessarily a representation, although depending upon the context of the inquiry, it could give rise to the appearance of a prohibited representation.

To avoid appearance problems, during the period in which a committee is in session, Commissioners are advised not to contact Department staff concerning any matters pending before the agency, or as to which the agency has an interest.

- **18 U.S.C. 205.** Section 205 prohibits an SGE from representing a party, with or without compensation, before the BRAC Commission or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party in which the United States is a party or has a direct and substantial interest: (i) that the SGE participated in personally and substantially as a Government employee; or (ii) which is pending in the agency in which the SGE is serving, if the SGE has served for more than 60 days during the immediately preceding 365 days.
- **18 U.S.C. 207.** Section 207, the "post-employment" statute, imposes a lifetime ban on a former SGE from representing another person or entity to the BRAC Commission or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party in which the former SGE participated personally and substantially while serving in the Government. In addition, for two years after terminating Federal employment, an SGE may not make such representational communications to the Government regarding specific party matters that were pending under his or her official responsibility during the last year of Government service.

Moreover, "senior employees," those paid at an annual rate equivalent to level ES-5 in the Senior Executive Service, are subject to a one-year "cooling-off" period which precludes any contacts with their former agency on any matter for which official action is sought, even if the former employee had no involvement with the matter while in Government service. For SGEs, this one-year "cooling-off" period does not apply if the SGE served less than 60 days in the one-year period prior to termination of senior employee status.

- **18 U.S.C. 208.** Section 208(a), the main conflict of interest statute, prohibits an SGE from participating personally and substantially in any particular matter that could affect the financial interests of the SGE, the SGE's spouse, minor child, general partner, an organization in which the SGE serves as an officer, director, trustee, general partner, or employee, or an organization with which the SGE is negotiating or with which the SGE has an arrangement for prospective employment.

A *waiver* for Commissioners may be granted under 18 U.S.C. 208(b)(3). Section 208(b)(3) authorizes issuance of a waiver to an SGE who serves on a committee subject to the Federal Advisory Committee Act if the official responsible for the individual's appointment certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the particular financial interest involved.

The waiver granted is considered a "general" waiver, in that it allows participation in matters that affect all institutions, or types of institutions, similarly. Even with a general waiver, however, SGEs must disqualify themselves from participation in all matters that specifically and uniquely affect their financial interests. The Ethics Official or the Designated Federal Official are available to further explain the procedures for disqualification.

In addition, under regulations issued by the Office of Government Ethics, a regulatory (i.e., automatic) waiver of the disqualification requirement of 18 U.S.C. 208 is available under certain circumstances, including instances involving the following classes of financial interests:

- interests held in broadly diversified investment funds;
- publicly traded securities of \$5,000 or less;
- publicly traded securities of \$25,000 or less if the matter is a general policy matter and the total value of all investments in the affected industry sector is no more than \$50,000;

In addition, there is an automatic exemption which allows SGEs serving on Federal advisory committees to participate in matters of general applicability where the otherwise-disqualifying financial interest arises solely from the committee member's non-Federal employment or 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.

## II. Standards of Ethical Conduct

The following are some of the major Standards of Ethical Conduct regulations (5 C.F.R. Part 2635) that may pertain to BRAC Commissioners during the term of their appointment:

### 1. Teaching, Speaking and Writing in a Personal Capacity (Other Than as a Government Employee)

Generally, during their term of appointment, advisory committee members (such as the BRAC Commissioners) may continue to receive fees, honoraria, and other compensation for teaching, speaking and writing undertaken in their personal or non-Governmental capacities. However, there are some limitations:

- (1) An SGE is prohibited from receiving compensation for teaching, speaking, and writing that "relates to the employee's official duties." 5 C.F.R. 2635.807. The "relatedness" test is met for an SGE if:
  - (1) the activity is undertaken as an official Government duty;
  - (2) the circumstances indicate that the invitation to engage in the activity was extended to the SGE primarily because of the employee's position in the Government rather than the employee's expertise on the particular subject matter;
  - (3) the invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by the performance or

nonperformance of the employee's official duties; or

- (4) the information conveyed through the activity draws substantially on ideas or official data that are confidential or not publicly-available.
- (2) Additionally, if a Commissioner serves for 60 days or less during a one-year period, the SGE may not accept compensation for teaching, speaking, and writing if the subject matter of the teaching, speaking or writing concerns a particular matter, involving specific parties, in which the SGE participated or is participating personally and substantially as a Government employee.
- (3) If a committee member serves for more than 60 days, the SGE is additionally prohibited from receiving compensation for teaching, speaking, and writing if the subject of the activity deals in significant part with any matter to which the SGE is presently assigned or was assigned during the previous one-year period.

#### EXCEPTIONS:

1. This rule does not preclude a committee member from receiving compensation for teaching, speaking, or writing on a subject within the committee member's discipline or inherent area of expertise based on the SGE's educational background or experience. The outside activity must not be about or distinctly related to the work the SGE is providing to the Government.
2. These restrictions also 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 government.

#### III. Gifts

Any gift given to a committee member because of the member's service on the BRAC Commission will raise concerns. The Ethics Official or the Designated Federal Official should be consulted should this situation arise. Gifts given to a Commissioner because of their position or achievements in the private (non-Government) sector may be permitted, depending on the circumstances. (Under the Foreign Gifts and Decorations Act, 5 U.S.C. Sec. 7342, gifts from foreign governments of a minimal value of \$305.00 or less may be accepted, but please consult the Ethics Official concerning this.)

#### IV. Impartiality

Although Commissioners are prohibited under 18 U.S.C. 208(a) from participating in matters in which they have a financial interest, there may be other circumstances in which a committee member's participation in a particular matter involving specific parties would raise a question

regarding the member's impartiality in the matter. For example, a Commissioner's impartiality may be questioned if he or she has business ties to a contractor near a base scheduled for closure or realignment, or has a close personal or professional relationship with such a business concern. In such circumstances, the committee member should discuss the relationship with the Ethics Official or the Designated Federal Official so that a determination may be made as to whether the Commissioner in question should be disqualified from participation in the matter, or should be granted an "authorization" to permit the member to participate in the matter. 5 C.F.R. 2635.502.

#### V. Misuse of Position

Commissioners are also subject to a number of prohibitions intended to address the use, or appearance of use, of "public office for private gain." 5 C.F.R. Part 2635, Subpart G. These prohibitions include:

- (1) Using their BRAC or DoD titles or referring to their Government positions for their own private gain, the private gain of friends, relatives, or anyone with whom they are affiliated in a non-Governmental capacity (including nonprofit organizations which they serve as officers, members, employees, or in any other business relationship), or for the endorsement of any product, service, or enterprise.
- (2) Using their official titles or Government positions to coerce or induce another person to provide any benefit to themselves or another person.
- (3) Using non-public Government information in a financial transaction to further their private interests or those of another, or disclosing confidential or non-public information without authorization.
- (4) Using Government property for unauthorized purposes.

#### VI. Employment by, or Gifts from, Foreign Governments

There are Constitutional limitations on a committee member's employment by a foreign government, including political subdivisions of a foreign government. For SGEs, this provision has particular relevance to positions with foreign universities that are government-operated rather than private institutions. United States Constitution, art. I 9, cl. 8. There are also statutory provisions restricting acceptance of gifts from foreign governments. 5 U.S.C. 7342. Commissioners should consult with the Ethics Official or the Designated Federal Official for details about these restrictions.

#### VII. Lobbying Activities

In their official capacities or as a group, Commissioners are prohibited from engaging in any

activity which directly or indirectly encourages or directs any person or organization to lobby one or more members of Congress. 18 U.S.C. 1913. When authorized, Commissioners may appear before any individual or group for the purpose of informing or educating the public about a particular policy or legislative proposal.

Commissioners also may communicate to Members of Congress at the request of any Representative or Senator. Communications to Members of Congress initiated by individual Commissioners, in their official capacity as members of the BRAC Commission, should be coordinated through the Office of the Chairman.

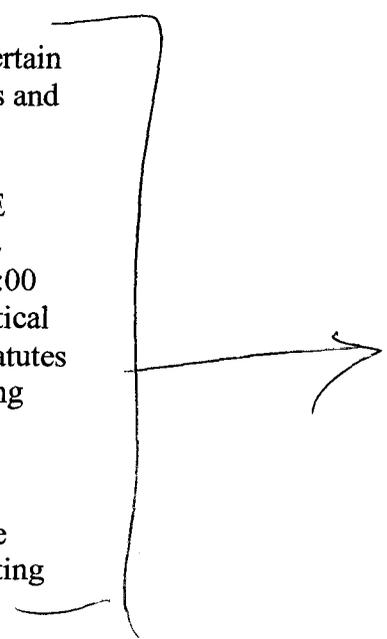
As private citizens, Commissioners may express their personal views (but not the views of the BRAC Commission by stating their affiliation with the Commission, by factually state the committee's official position on the matter (to the extent that non-public information is not used). However, Commissioners may not take new positions and represent those views as the BRAC's position on the matter. Moreover, in expressing their private views, as with all other personal (non-Governmental) activities, Commissioners are not permitted to use Government computers, copiers, telephones, letterhead, staff resources, or other appropriated funds. All personal activities must occur "off duty time."

In addition, committee members are prohibited in their personal capacities from making representations on behalf of others, to the Government, on particular matters involving specific parties in which they were involved as Government employees. (See discussion above under 18 U.S.C. 203 & 205.)

### VIII. Political Activities

The Hatch Act (5 U.S.C. 7321-7328) prescribes the restrictions on certain political activities of Federal employees. Unlike the criminal statutes and most of the other ethics rules which are fully applicable to an SGE throughout the SGE's entire term of appointment, the Hatch Act restrictions apply only during the period of any day in which the SGE actually is performing Government business. For example, if an SGE attends an advisory committee meeting from 8:00 am - 1:00 pm, at 3:00 pm, the SGE could attend a political fund raiser and even solicit political contributions from the attendees. There are also criminal political statutes that apply at all times and prohibit coercion and intimidation regarding political activities.

If you are considering engaging in political activities such as those described below in the chart), please contact the Ethics Official or the Designated Federal Official for guidance before agreeing to or accepting any participation in political activities.





## **AN ETHICS GUIDE FOR CONSULTANTS AND ADVISORY COMMITTEE MEMBERS AT THE DEPARTMENT OF DEFENSE**

At the Department of Defense (DoD), we are fortunate to have many experts and industry leaders from outside of the Government to provide advice to the Secretary as consultants or members of an advisory committee. Because many of you retain extensive links 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.

### **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) 697-1640, or email us at [SOCO@dodgc.osd.mil](mailto:SOCO@dodgc.osd.mil). We also have considerable guidance, including financial disclosure reporting, on our website at: [http://www.defenselink.mil/dodgc/defense\\_ethics](http://www.defenselink.mil/dodgc/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 ethics 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 consultants and all members of advisory committees are appointed as Special Government Employees (SGEs). This means that upon appointment, you assume the responsibilities, obligations, and restrictions that are part of public service. Because SGEs are not full-time employees, several of these restrictions apply to you only in limited circumstances.

Service as an SGE may be compensated or uncompensated, but it is always temporary. In fact, you should not serve for more than 130 days during any period of 365 consecutive days. This 130-day period is an aggregate of all your Federal SGE service, not just your appointment at the Department of Defense. For example, it includes days you have served as an SGE in other Federal agencies or departments, and even days as a military reservist. If you have served in other Federal agencies or departments within the last year, please advise the appropriate committee manager, executive director, or Designated Federal Official (DFO), so that you do not exceed the 130-day period of appointment.

When computing days that you work as an SGE, count each day in which you perform services, even if it does not amount to an entire workday. Brief non-substantive interactions, such as emails or phone calls to set up a meeting, do not have to be counted as a day of duty.

### **3. Financial Disclosure**

You are required to file either a public or confidential financial disclosure report (SF 278 or OGE Form 450) when you are first appointed, and annually thereafter if you are reappointed. As a member of an advisory committee, you may also be required to update the report before each meeting throughout your term of appointment. The purpose of financial disclosure is to protect you from inadvertently violating any of the criminal conflict of interest statutes, discussed below, and to ensure the public and this Department that your advice is free from any real or perceived conflict of interest. The supervisor or DFO, and a DoD ethics official review the reported information, which is not releasable to the public if it is a confidential financial disclosure report, except as authorized by the Privacy Act.

### **4. Criminal Conflict of Interest Statutes**

You are required to comply with various criminal statutes while you are an SGE. These statutes are codified at 18 U.S.C. 201, 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, minor child, 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 or with which you have an arrangement for prospective employment. The primary reason you are required to disclose your financial interests is to alert the supervisor or DFO, and agency ethics official of any potential conflict of interest prior to your participation in a particular matter involving an entity in which you have a financial interest.

For example, you could have a conflict of interest if you were to participate in an advisory committee meeting that reviews whether a certain weapons program should be continued and:

- 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.

Generally, DoD advisory committees address broad policy matters, not particular matters. This greatly reduces the potential for conflicts of interest. In certain instances, however, the committees may address matters that focus on the interests of specific persons or a discrete and identifiable class of persons. For example, an advisory committee may recommend that the Department purchase more unmanned aerial vehicles (UAVs). Since only two or three companies manufacture UAVs, the committee's review and recommendation would constitute a particular matter. If any SGEs had financial interests in these companies, they would have a conflict of interest if they participated in the advisory committee discussion.

If you become aware of such a financial conflict of interest, you must disqualify yourself from acting in a governmental capacity in the matter and notify the DFO, committee manager, or supervisor. You should also consult your ethics official, since there are several regulatory exemptions that permit you to have certain financial interests that cause a conflict of interest. For example, employees are permitted to participate in particular matters affecting companies that they own as part of a diversified mutual trust. Employees may also act in particular matters affecting companies in which the aggregate value of the employee's holdings does not exceed \$15,000. Since there are other exemptions, you should contact your ethics official.

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

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 SGEs, from acting as an agent or attorney for private entities before any agency or court of the Executive or Judicial Branches. For SGEs, section 203 prohibits the receipt of compensation for representational services only in any particular matter involving a specific party: (1) in which the SGE has participated personally and substantially as a Government employee; or (2) which is pending in this Department and the SGE served for more than 60 days during the immediately preceding 365 days. Representational services include written or oral communications and appearances made on behalf of someone else with the intent to influence or persuade the Government. An inquiry into the status of a pending matter is not necessarily a representation, but could give rise to an appearance of a prohibited representation. Examples of such matters include applications for Federal funding, progress reports regarding Cooperative Research and Development

Agreements or clinical trials, and pending investigations. Section 205 parallels section 203, except that even uncompensated representations by employees are prohibited.

### **Limits on Representations After You Leave the Government**

The final statute, 18 U.S.C. 207, prohibits former employees, including SGEs, 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 the former SGE 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 services as an SGE, and your basic rate of pay was \$134,000/year or over (in 2003), and you served 60 days or more as an SGE during the 1-year 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 your 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.

SGEs who qualify for 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.

## **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 DoD SGEs.

### **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.

You are prohibited from receiving compensation for teaching, speaking, or writing (“activity”) that “relates to the employee’s official duties.” 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, 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, 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.

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 identify yourself in connection with your personal teaching, speaking, or writing, whether or not compensated, and if the subject of the teaching, speaking, or writing deals in significant part with any ongoing or announced policy, program, or operation of the Department of Defense, you should make a disclaimer that the views presented are your views and do not necessarily represent the views of this Department or its components.

#### **Acceptance of Gifts from Outside Sources**

Any gift given to you from a DoD prohibited source or because of your service on the advisory committee or as a consultant to this Department will raise concerns and may be prohibited. 5 C.F.R. 2635.202. You may accept gifts given to you because of your personal, outside business, or employment relationships. There are other exceptions, but since they are often fact-specific, you should consult your agency ethics official.

#### **Providing Expert Testimony**

If you participated while a Federal employee in a particular United States judicial or administrative proceeding or in a particular matter that is the subject of the proceeding, you may not serve, except on behalf of the United States, as an expert witness, with or without compensation, in that proceeding if the United States is a party or has a direct and substantial interest. 5 C.F.R. 2635.805. However, such testimony may be authorized by the DoD General Counsel.

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 Department of Defense is a party or has a direct and substantial interest, unless authorized by the DoD General Counsel.

### **Impartiality**

Although you are prohibited by 18 U.S.C. 208(a) from participating in 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.

While the impartiality rule is quite complex and very broad in scope, there are several triggers that are helpful. 5 C.F.R. 2635.502.

1. 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],
2. The circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality, and
3. a) The matter is likely to have a direct and predictable effect on the financial interests of a member of your household, or  
b) someone with whom you have a relationship (such as a relative, a business or financial entity, a former employer, an employer or client of your spouse, or an organization in which you are an active participant) is, or represents, a party to the matter.

Considering the breadth of this prohibition and how much it depends upon the perception of the beholder, if you believe your participation in advisory committee discussions could subject you to criticism, please contact your supervisor, DFO, or agency ethics official to determine whether you should be disqualified from participation in the matter, or granted authorization to participate in the matter.

### **Endorsement of Non-Federal Entities**

Many DoD SGEs 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 or Government 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 consultants and members of advisory committees, actions that may be perceived as the misuse of their public office tend to receive uncommon 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:

1. 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);
2. Using your title, position, or authority to coerce or induce another person to provide any benefit to yourself or any person identified above;
3. 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
4. Using Government property and time for unauthorized purposes.

### **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.

### **Emoluments Clause**

The Constitution prohibits Federal employees, including SGEs, from accepting any compensation from, or employment with, a foreign government or the political subdivision of a foreign government, including a public university, a commercial enterprise owned or operated by a foreign government, or an international organization controlled by a foreign government. The ban does not apply to a foreign privately-owned corporation. U.S. Constitution, Art. 1 § 9, cl. 8. If you have a contract with, or are consulting for, a foreign government, please promptly contact SOCO.

### **Foreign Gifts and Decorations Act**

During the period of your appointment as an SGE, you may not accept a gift above a minimum value (\$305 in 2005) from a foreign government or an international organization. You may be surprised to learn that this prohibition applies to gifts offered to you by foreign governments even if such gifts have no nexus to your Government appointment. The restriction extends to your spouse and dependents, but does not apply to travel and related expenses from a foreign government incurred as part of your official duties. 5 U.S.C. § 7342.

### **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 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.

DCN: 12154

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## **CLICK HERE TO CLOSE THIS WINDOW AND RETURN TO THE COURSE**

EPA ETHICS ADVISORY 97-15

SUBJECT: Annual Ethics Training for Special Government Employees

FROM: Scott C. Fulton  
Principal Deputy General Counsel  
Designated Agency Ethics Official

TO: Deputy Ethics Officials

The purpose of this Ethics Advisory is to establish the procedure for providing training to Special Government Employees (SGEs). This ethics advisory replaces EPA Ethics Advisory 94-18 dated September 30, 1994. As you know, part of the Office of Government Ethics (OGE) Standards of Ethical Conduct for Employees of the Executive Branch require annual ethics training for employees who file public (SF 278) or confidential (SF 450) financial disclosure reports. See Subpart G, 5 C.F.R. Part 2638. All SGEs (Footnote 1) are required to file a financial disclosure report and receive annual ethics training.

OGE regulations provide that an agency may fulfill the training requirement for SGEs without the presence of a qualified individual by presenting the information verbally, by distribution of written materials, or by other means at the agency's discretion. 5 C.F.R. §2638.704(d)(2)(ii).

As the Designated Agency Ethics Official for EPA, it is my determination that the Agency may meet its annual training requirement for SGEs by the distribution of written materials by the responsible Deputy Ethics Official (DEO) or his/her designee. This determination is based on the following factors: (1) the large number of SGEs in EPA (approximately 500), (2) the logistical and cost considerations of conducting annual "face-to-face" training for SGEs in view of the limited duration and intermittent nature of most SGEs' services, and (3) the need to devote the limited ethics training resources to regular employees.

Therefore, annual training for SGEs will be accomplished by the distribution of the following written materials:

(1) a copy of the Office of Government Ethics' (OGE's) August 1992 booklet entitled "Standards of Ethical Conduct for Employees of the Executive Branch";

(2) a copy of EPA Ethics Advisory 96-11 of August 29, 1996, "Transmittal of Government Ethics Newsgram" regarding procurement integrity;

(3) a copy of EPA Ethics Advisory 96-18 of January 10, 1997, "Post-Employment Restrictions"; and

(4) a copy of this Ethics Advisory, including the attachment which compares ethics requirements for SGEs with those of regular employees.

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~~Please direct any questions you may have to Don Nantkes at (202) 260-4556 or Hale Hawbecker at (202) 260-4555.~~ (Note: The new contact for EPA is Ken Wernick at (202) 564-1761)

#### Attachment

### EFFECT OF SPECIAL GOVERNMENT EMPLOYEE STATUS ON APPLICABILITY OF CRIMINAL CONFLICT OF INTEREST STATUTES AND OTHER ETHICS RELATED PROVISIONS

#### Definition

As defined by 18 U.S.C. §202(a), a "special Government employee" (SGE) in the Executive Branch is an officer or employee who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for a period not to exceed 130 days during any period of 365 days, either on a full-time or intermittent basis.

#### Financial Disclosure

An SGE is subject to the financial disclosure provisions of the Ethics in Government Act and 5 C.F.R. Part 2634. If an SGE is expected to serve more than 60 days in any calendar year, and if the SGE is paid at a rate equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General Schedule, the Public Financial Disclosure Report (SF 278) must be filed. 5 C.F.R. §§2634.202(c) and 2634.204. If the salary rate is less than 120% of the minimum rate of basic pay for GS-15 of the General Schedule; or if the SGE, regardless of pay rate, is expected to work 60 days or less in any calendar year; submission of the Confidential Financial Disclosure Report (SF 450) is required. 5 C.F.R. §2634.904(b).

#### SUBSTANTIVE RESTRICTIONS

With significant exceptions outlined below, the criminal conflict of interest statutes, Executive Order 12674 (as amended by E.O. 12731), and the executive branch standards of ethical conduct (5 C.F.R. Part 2635) are applicable to SGEs. Other ethics-related

provisions concerning outside earned income and employment and political activities are wholly or partially inapplicable. The principal distinctions between the rules applicable to regular government employees and those governing SGEs are as follows:

#### I. Criminal Conflict of Interest Statutes

##### a. 18 U.S.C. §203 -- Prohibition of Compensated Representational Activities By Federal Employees Directed Towards the United States

Regular Employee: Section 203 prohibits an employee from seeking, accepting, or agreeing to receive or accept compensation for any representational services, rendered personally or by another, in relation to any particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, or other specified entity.

SGE: The bar applies only in relation to a particular matter involving a specific party or parties --

(1) in which the SGE has at any time, participated personally and substantially as a Government employee; or

(2) if the SGE has served in excess of 60 days during the immediately preceding 365 days, such matter is pending in the department or agency in which such employee is serving.

##### b. 18 U.S.C. §205 -- Prohibition of Uncompensated or Gratuitous Representational Activities By Federal Employees Directed Towards the United States

Regular Employee: Section 205 prohibits an employee, whether or not for compensation, from acting as agent or attorney for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity, in any particular matter in which the United States is a party or has a direct and substantial interest. It also prohibits receipt of any gratuity, or any share of or interest in a claim against the United States, in consideration for assisting in the prosecution of such claim.

SGE: The broad prohibition is narrowed in the same manner as noted above for section 203.

##### c. 18 U.S.C. §207 -- Post-Employment Restrictions

Regular Employee: Section 207 imposes bans of varying durations to prevent communications by former employees made with the intent to influence the Government. The lifetime ban covers particular matters involving specific parties in which the former employee was

personally and substantially involved. A similar two-year ban deals with such matters that were merely pending under the employee's official responsibility during the final year of government service. A one-year ban applies to employees involved in trade or treaty negotiations. Other rules apply to senior personnel (confirmed Presidential appointees, SES employees at grades ES-5 and ES-6, uniformed service officers at grade O-7 and above, and anyone paid at or above the basic daily rate for Level V of the Executive Schedule); such senior employees are subject to a one-year "cooling-off" period precluding any contacts with their former agency on any matter for which official action is sought.

(Note: Senior Clinton Administration appointees must sign an agreement increasing the duration of the "cooling-off" period to five years. The 5-year "cooling-off" period prescribed by E.O. 12834 of January 22, 1993, is applicable only to full-time, non-career senior appointees.)

SGE: The one-year "cooling-off" period for senior employees is not applicable to an SGE who served less than 60 days in the one-year period prior to termination. The 5-year ban also is not applicable. All other prohibitions are applicable to SGEs.

#### d. 18 U.S.C. §208 – Conflict of Interest Provisions

Regular Employee: Section 208 proscribes personal and substantial participation in any "particular matter" which will have a direct and predictable effect on an employee's own financial interests or on the financial interests of the employee's spouse; dependent child; general partner; organization in which the employee is serving as officer, director, trustee, general partner, or employee; or any person or organization with whom the employee is negotiating or has any arrangement regarding prospective employment. The term "particular matter" can include rulemaking or policy matters as well as "specific party" matters such as contracts and permits. A waiver under section 208(b)(1) permitting official action in such matters may be obtained from the Designated Agency Ethics Official (DAEO) if the financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect." Certain other interests, such as interests in diversified mutual funds, are exempted by general regulation as "too remote or too inconsequential to affect the integrity of the services."

SGE: The same rules apply to SGEs. However, for SGEs who are members of advisory committees, the standard for waiver focuses on whether the need for the SGE's services outweighs the potential for conflict of interest rather than the value of the financial interest. In addition, the Environmental Education Act

at 20 U.S.C. §5501 provides that members of the National Environmental Education Advisory Council are permitted to take part in matters which affect their employers' financial interests, even without a waiver. However, 18 U.S.C. §208(a) continues to apply to members' own financial interests.

e. 18 U.S.C. §209 -- Ban on Supplementation of Salary

Regular Employee: Section 209 generally prohibits an employee from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a government employee.

SGE: This provision does not apply.

f. 18 U.S.C. §219 and the "Emoluments Clause" of the Constitution-- Foreign Agents and Receiving Anything of Value From a Foreign Government

Regular Employee: Section 219 bars any "public official" from being or acting as an agent of a foreign government who is required to register under the Foreign Agents Registration Act of 1938 at 22 U.S.C. §611 et seq.. Furthermore, the "Emoluments Clause" of the Constitution provides that no person who holds an office of "profit or trust" under the United States may receive any money, award or other thing of value from a foreign government or hold a position in a foreign government, except where permitted by statute.

SGE: An April 29, 1991 opinion of the Department of Justice Office of Legal Counsel (OLC) concluded that Section 219 applies to members of federal advisory committees-- both SGEs and "representative" members. However this provision can be waived for SGEs if EPA certifies that their employment is "necessary in the national interest" and sends a copy of the certification to the Attorney General for filing with the registration statement. The April 29, 1991 OLC opinion also concluded that the "Emoluments Clause" of the Constitution applies to members of advisory committees-- both SGEs and "representative members."

II. Other Ethics Related Statutes

a. 5 U.S.C. App. 7, §501(a) -- Outside Earned Income Limitation

Regular Employee: Section 501(a), and implementing regulations at 5 C.F.R. §§2636.301 through 2636.304, provide that a non-career employee paid at a rate in excess of a GS-15 may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1

of such calendar year.

SGE: This provision is not applicable.

b. 5 U.S.C. App. 7, §502(a) -- Limitations on Outside Professional Employment and Teaching

Regular Employee: Section 502(a), and implementing regulations at 5 C.F.R. §§2636.305 through 2636.307, prohibit a non-career employee paid at a rate in excess of a GS-15 from receiving any compensation for: (1) practicing a profession which involves a fiduciary relationship; (2) affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary relationship; (3) serving as an officer or member of the board of any association, corporation or other entity; or (4) teaching without prior approval.

SGE: This provision is not applicable.

c. 5 U.S.C. §§7321 - 7328 -- Hatch Act Political Activity Restrictions

Regular Employee: The "Hatch Act Reform Amendments of 1993" permit most EPA employees (i.e., non-career Senior Executive Service employees, Schedule C appointees, and GS/GM-15 level employees and below) to take an active part in political management and campaigns. This is a significant change from earlier provisions, which generally prohibited such activity. However the following activities remain prohibited: (1) running for partisan office, (2) soliciting political contributions from the general public, (3) engaging in political activity (including wearing buttons) while on duty, or in a government office, or while using a government vehicle, and (4) collecting political contributions unless both the donor and the collector are members of the same federal labor organization or employee organization and the person solicited is not a subordinate employee. Career employees in the Senior Executive Service and Administrative Law Judges remain subject to the earlier (and more restrictive) Hatch Act provisions. See EPA Ethics Advisory 96-09 of August 5, 1996 for further Hatch Act information.

SGE: SGEs are covered by the Act only during the 24-hour period of any day in which they are actually performing government business.

III. Executive Branch Standards of Ethical Conduct

The government-wide Standards of Ethical Conduct at 5 C.F.R. Part 2635, are fully applicable to both regular and special government employees. An SGE is covered by the standards even though the individual does not perform official duties on a given day.

SGEs are subject to the following provision in EXACTLY THE SAME WAY as regular employees:

a. 5 C.F.R. Part 2635, Subpart B, Gifts from Outside Sources

With certain exceptions listed at §2635.204, employees may not accept gifts from "prohibited sources" (generally persons or organizations affected by EPA actions) or given because of the employee's government position.

b. 5 C.F.R. Part 2635, Subpart C, Gifts Between Employees

With certain exceptions listed at §2635.304, employees may not give or contribute toward a gift for an official superior or receive a gift from an employee who receives less pay.

c. 5 C.F.R. Part 2635, Subpart E, Impartiality in Performing Official Duties

Employees may not participate in "specific party" matters where a "reasonable person with knowledge of the relevant facts" would question their impartiality. Consultation with an employee's Deputy Ethics Official (generally Office Director, Staff Office Director, Laboratory Director, or Regional Administrator) is strongly advised where the employee suspects a problem or where the matter will involve any of the following "covered relationships":

(1) persons or organizations with which the employee has business relationships,

(2) members of the employee's household or relatives with whom the employee has a close personal relationship,

(3) employers or prospective employers of spouses, parents, or dependent children,

(4) recent (within one year) former employers or clients, and

(5) organizations in which the employee is an "active participant."

The employee's Deputy Ethics Official may authorize participation if "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." 5 C.F.R. §2635.502(d).

d. 5 C.F.R. Part 2635, Subpart F, Seeking Other

## Employment

Employees may not participate in any "particular matter" (including a rulemaking or policy matter) which directly and predictably affects the financial interest of any person or organization with which the employee has had any contact regarding future employment (or relationships equivalent to employment, such as contracts and consultancies,) unless the employee's Deputy Ethics Official authorizes such participation under the same standards as in the Impartiality provisions of Subpart E discussed above. (Note: If the communications amount to "negotiating" for future "employment," the statutory restriction at 18 U.S.C. §208(a) applies, and employees may not participate in such matters unless the DAEO (not the Deputy Ethics Official) has granted a waiver under 18 U.S.C. §208(b)(1).)

SGEs are subject to the following restrictions to A LESSER DEGREE than regular employees:

### a. 5 C.F.R. §2635.805 -- Service as an Expert Witness

**Regular Employee:** An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless authorized by the DAEO.

**SGE:** The bar against expert testimony applies only if the individual has participated as a federal employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

If an SGE has been appointed by the President; serves on a commission established by statute; or has served or is expected to serve for more than 60 days in a period of 365 consecutive days, an additional restriction applies. These SGEs cannot serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the individual's employing agency is a party or has a direct and substantial interest, unless authorized by the DAEO.

### b. 5 C.F.R. §2635.807 -- Teaching, Speaking, and Writing

**Regular Employee:** Except for certain teaching activities, an employee shall not receive compensation from any source other than the Government for teaching, speaking, and writing that relates to the employee's official duties. The "relatedness" test is met if: (A) the activity is undertaken as an official government duty; (B) the circumstances indicate that the

invitation to engage in the activity was extended to the employee primarily because of the employee's official position rather than the employee's expertise on the particular subject matter;

(C) the invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance or nonperformance of the employee's official duties; (D) the information conveyed through the activity draws substantially on ideas or official data that are nonpublic information; or (E) the subject of the activity deals in significant part with:

(1) Any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period;

(2) Any ongoing or announced policy, program or operation of the agency; or

(3) In the case of certain noncareer employees, the general subject matter area, industry, or economic sector primarily affected by the programs and operations of the employee's agency.

SGE: The restrictions in paragraphs (2) and (3) above do not apply to an SGE. The restriction in paragraph (1) applies only during the current appointment of an SGE; except that if the SGE has not served or is not expected to serve for more than 60 days during the first year or any subsequent one year period of that appointment, the restriction applies only to "specific party" matters (such as contracts, licenses, and lawsuits) in which the SGE has participated or is participating personally and substantially.

#### c. 5 C.F.R. §2635.808 -- Fundraising Activities

Regular Employee: An employee may engage in fundraising in a personal capacity provided that the individual does not personally solicit funds or other support from a subordinate, or from any person known to the employee to be one of the five types of prohibited sources specified in section 2635.203(d) (generally persons or entities affected by EPA actions.)

An employee may participate in fundraising activities in an official capacity if authorized to do so as part of official duties. Such authorization can come from statutes, Executive Orders, or regulations. 5 C.F.R. §2635.808(b). One example of authorized official fundraising is the Combined Federal Campaign (CFC).

SGE: An SGE may engage in fundraising in a personal capacity provided that the individual does not personally solicit funds or other support from a subordinate, or from any person known to the employee

to be a prohibited source whose interests may be substantially affected by the performance or nonperformance of the employee's official duties. An SGE may also participate in authorized official fundraising such as the CFC.

(Footnote 1) SGEs are employees who are appointed to perform services, temporarily or intermittently, for not more than 130 days in any 365 day period. See 18 U.S.C. §202.

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## SUBPART G: EXECUTIVE AGENCY ETHICS TRAINING PROGRAMS

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### SUBPART G: EXECUTIVE AGENCY ETHICS TRAINING PROGRAMS

#### Sec. 2638.701 Executive agency ethics training programs; generally

Each executive branch agency shall maintain a program of ethics training designed to ensure that all of its employees are aware of the Federal conflict of interest statutes and principles of ethical conduct. As a minimum, each agency program shall consist of initial ethics orientation required by Sec. 2638.703 of this subpart and annual ethics training required by Sec. 2638.704 of this subpart. For purposes of this subpart, the term "employee" shall include special Government employees (as defined in 18 U.S.C. 202 (a)) and officers of the uniformed services.

#### Sec. 2638.702 Responsibilities of the designated agency ethics official; review by the Office of Government Ethics

(a) It shall be the responsibility of the designated agency ethics official of each executive agency or his or her designee to make any written determinations provided for in this subpart and to:

(1) Direct the agency ethics training program to ensure that it meets the requirements of E.O. 12674 (as modified by E.O. 12731) and of this subpart and that the course content is legally correct;

(2) Ensure the availability of qualified individuals to provide the annual training required by Sec. 2638.704 of this subpart. For the purposes of this subpart, the following shall be considered qualified individuals:

(i) The designated agency ethics official described in Sec. 2638.201;

(ii) The alternate agency ethics official described in Sec. 2638.202(b);

(iii) A deputy ethics official described in Sec. 2638.204;

(iv) Any employee of the Office of Government Ethics whose services are made available by the Office of Government Ethics; and

(v) An individual determined by the designated agency ethics official or his or her designee to possess sufficient familiarity with the conflict of interest statutes and standards of ethical conduct regulations applicable to agency employees to respond to routine questions raised during training; and

(3) Furnish to the Office of Government Ethics by August 31 of each year a written plan for annual ethics training by the agency for the following calendar year. The first written plan for annual ethics training for calendar year 1993 shall be submitted by August 31, 1992. Each training plan shall include:

(i) An estimate of the total number of agency employees described in Sec. 2638.704

(b) of this subpart who must be provided annual ethics training;

(ii) An estimate of the number of agency employees to whom the annual ethics training course will be presented without the presence of a qualified individual under the exception provided at Sec. 2638.704(d)(2)(i) of this subpart, together with a written description of the basis for allowing an exception;

(iii) Estimates of the number of special Government employees and the number of officers in the uniformed services to whom the annual ethics training course will be presented without the presence of a qualified individual under the exceptions provided at Sec. 2638.704 (d)(2) (ii) and (iii) of this subpart;

(iv) An estimate of the number of training classes to be provided during the calendar year;

(v) An estimate of the average class size; and

(vi) Any other information that the designated agency ethics official believes will facilitate OGE's review of the agency's planned program of ethics training.

(b) Each agency's annual ethics training plan will be reviewed by the Office of Government Ethics and any deficiencies shall be communicated in writing to the designated agency ethics official concerned by November 15 of each year, or 75 days after receipt of the agency plan, whichever occurs later.

#### Sec. 2638.703 Initial agency ethics orientation

(a) Each agency employee shall, on or before January 2, 1993, be provided:

(1) A copy of part I of Executive Order 12674, Principles of Ethical Conduct for Government Officers and Employees, dated April 12, 1989, as amended by E.O. 12731, 3 CFR, 1990 Comp., p. 306;

(2) The names, titles, office addresses, and telephone numbers of the designated agency ethics official and other agency ethics officials available to answer questions regarding the employee's ethical responsibilities; and

(3) A minimum of one hour of official duty time for the purpose of permitting the employee to review the written materials furnished pursuant to this section. Where, within the period specified, the agency provides an ethics training course during official duty time, including annual ethics training provided in accordance with Sec. 2638.704 of this subpart, or a new entrant receives ethics training provided by the Office of Government Ethics or the White House Office, the period of official duty time set aside for individual review may be reduced by the time spent in such training.

(b) Each new agency employee who enters on duty after May 7, 1992, shall, within 90 days of the date of his or her entrance on duty, or on or before January 2, 1993, whichever is later, be provided with the materials and time specified in paragraph (a) of this section.

(c) When copies of the material described in paragraph (a)(1) of this section are retained and readily accessible in the employee's immediate office for use by several employees, the requirement of paragraph (a)(1) of this section may be met by furnishing each employee a copy

for the purpose of review.

Sec. 2638.704 Annual agency ethics training

(a) Annual ethics training. Executive branch agencies must provide each employee identified in paragraph (b) of this section with ethics training every calendar year. This training must meet the content requirements contained in paragraph (c) of this section and the presentation requirements contained in paragraph (d) of this section. Except as provided in paragraphs (d)(2)(ii) and (d)(2)(iii) of this section, employees must be provided a minimum of one hour of official duty time for this training.

(b) Employees covered. Executive branch agency employees to whom this section applies include all of the following:

(1) Employees appointed by the President;

(2) Employees employed within the Executive Office of the President ;

(3) Employees required to file public financial disclosure reports under part 2634 of this chapter;

(4) Employees required to file confidential (nonpublic) financial disclosure reports under subpart I of part 2634 of this chapter or any supplemental regulation or addendum of the concerned agency (agency employees who are excluded from the confidential financial disclosure requirements through the use of an alternative procedure approved by the Office of Government Ethics pursuant to Sec. 2634.905(c) of this chapter must also receive annual ethics training from their agency pursuant to the paragraph);

(5) Contracting officers within the meaning of 41 U.S.C. 423(p)(4);

(6) Procurement officials within the meaning of 41 U.S.C. 423(p)(3); and (7) Other agency employees designated by the head of the agency or his or her designee based on a determination that such training is desirable in view of their particular official duties.

(c) Course content. Agencies are encouraged to vary the emphasis and course content of annual agency ethics training courses from year to year as necessary within the context of their ethics programs. However, each training course must include, as a minimum:

(1) A reminder of the employees' responsibilities under part I of Executive Order 12674, as modified, the Standards of Ethical Conduct for Employees of the Executive Branch, part 2635 of this chapter, and any supplemental regulation thereto by the concerned agency;

(2) A reminder of the employees' responsibilities under the conflict of interest statutes contained in 18 U.S.C. chapter 11; and

(3) The names, titles, office addresses, and telephone numbers of the designated agency ethics official and other agency ethics officials available to answer questions regarding the employees' ethical responsibilities.

(d) Course presentation. The training course shall be presented in accordance with the following

requirements:

(1) Except as provided in paragraph (d)(2) of this section, annual ethics training shall be presented verbally, either in person or by telecommunications, computer-based methods, or recorded means. A qualified individual, as defined in Sec. 2638.702(a)(2) of this subpart, shall:

(i) Present the training, if the training is presented in person; or

(ii) Prepare the recorded materials or presentation, if the training is presented by telecommunication, computer-based methods or recorded means.

(2) An agency may provide annual ethics training by means other than those specified in paragraph (d)(1) of this section under the following circumstances:

(i) Where the designated agency ethics official, or his or her designee, has made a written determination that circumstances make it impractical to provide training to a particular employee or group of employees in accordance with paragraph (d)(1) of this section. In such cases, annual ethics training may be presented by means of written materials, provided that a minimum of one hour of official duty time is set aside for employees to attend the presentation or review written materials;

(ii) In the case of special Government employees covered by paragraph (b) of this section, an agency may meet the annual training requirement by distribution of written materials, or by other means at the agency's discretion. For special Government employees who are expected to work fewer than 60 days in a calendar year, the requirement that the employee be provided with one hour of official duty time for annual ethics training is waived; and

(iii) In the case of officers in the uniformed services who serve on active duty for 30 or fewer consecutive days and who are covered by paragraph (b) of this section, an agency may meet the annual training requirement by distribution of written materials, or by other means at the agency's discretion. For these officers, the requirement that the officers be provided with one hour of official duty time for annual ethics training is waived.

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**CONFLICT OF INTEREST AND THE SPECIAL  
GOVERNMENT EMPLOYEE**  
**A Summary of Ethical Requirements Applicable to SGEs**

The Office of Government Ethics (OGE) frequently receives questions about the ethical requirements applicable to special Government employees (SGE). Many agencies use SGEs, either as advisory committee members or as individual experts or consultants, and OGE knows that these SGEs pose unique challenges for agency ethics officials. SGEs typically are recruited for temporary service to the Government because they provide outside expertise or perspectives that might be unavailable among an agency's regular employees. Frequently, however, these SGEs have substantial outside activities and financial interests that may raise difficult ethics questions. In order to help agencies resolve such questions, OGE is issuing this summary, which attempts to digest, in one place, the various conflict of interest laws and ethics regulations applicable to SGEs.

**Definition of SGE**

The SGE category was created by Congress as a way to apply an important, but limited, set of conflict of interest requirements to a group of individuals who provide important, but limited, services to the Government. SGEs were originally conceived as a "hybrid" class, in recognition of the fact that the "simple categories of 'employee' and 'non-employee' are no longer adequate to describe the multiplicity of ways in which modern government gets its work done." B. Manning, *Federal Conflict of Interest Law* 30 (1964). It is crucial to distinguish SGEs both from regular employees and from individuals who are not Federal employees at all. These distinctions are important because SGEs are subject to less restrictive conflict of interest requirements than regular employees, but are subject to more restrictive requirements than non-employees, who generally are not covered by the conflict of interest laws at all.

The first and perhaps most important point to emphasize is that SGEs *are* Government employees, for purposes of the conflict of interest laws. Specifically, an SGE is defined, in 18 U.S.C. § 202(a), as "an *officer or employee* . . . who is retained, designated, appointed, or employed" by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days.

The terms “officer” and “employee” are not themselves defined in section 202(a). Nevertheless, the definitions of those terms in Title 5 of the United States Code have long been consulted for general guidance in determining whether a given individual should be considered an SGE or a non-employee. See 4B Op. O.L.C. 441, 442 (1980).<sup>1</sup> Three criteria for Government employment are identified in 5 U.S.C. §§ 2104 and 2105: (1) appointment in the civil service; (2) performance of a Federal function; and (3) supervision by a Federal official. With respect to the appointment element, however, it has been held that an appointment or other formal employment paperwork, “while perhaps the norm, is not a condition of special government employment as statutorily defined,” *Association of American Physicians and Surgeons v. Clinton*, 187 F.3d 655, 662 (D.C. Cir. 1999); in order for an individual to be “retained, designated, appointed or employed” as an SGE, under section 202(a), it is sufficient that the circumstances indicate “a firm mutual understanding that a relatively formal relationship existed.” 1 Op. O.L.C. 20, 21 (1977).<sup>2</sup> Moreover, with the respect to the supervision element, it should be remembered that SGEs, who often work as “specialists for short-term projects,” sometimes need not be subject to the same level of “close supervision” as regular employees. *Aluminum Co. of America v. FTC*, 589 F. Supp. 169, 175-76 (S.D.N.Y. 1984).<sup>3</sup> Nevertheless, supervision or operational control remains an important attribute of employee status, and an agency may consider numerous factors when determining whether an individual is subject to the requisite degree of supervision to be deemed an SGE.<sup>4</sup>

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<sup>1</sup> As the Office of Legal Counsel has observed, “the Title 5 definition is frequently used as a starting point for any analysis of whether the conflict of interest laws apply to a particular individual . . . although the Title [5] definition is not necessarily conclusive for conflicts purposes.” 17 Op. O.L.C. 150, 154 n.12 (1993)(quoting Memorandum of Assistant Attorney General, Office of Legal Counsel, to Deputy General Counsel, Department of Commerce, at 10 (Dec. 15, 1982)).

<sup>2</sup> See also OGE Informal Advisory Letter 95 x 8 (possibility of *de facto* SGEs); Manning at 29-30 (occasional informal advice vs. more formal services).

<sup>3</sup> In a similar vein, it is recognized in various contexts that the “threshold level of control necessary to find employee status is generally lower when applied to professional services than when applied to nonprofessional services.” *Weber v. Comm’r of IRS*, 60 F.3d 1104, 1111 (4th Cir. 1995).

<sup>4</sup> E.g., OGE Informal Advisory Letter 82 x 22, at 334-35 (focusing on degree of agency scrutiny and guidance); 17 Op. O.L.C. at 155-56 (looking to limits on power of removal and other aspects of specific legislation creating particular Federal position); see generally GAO, *Civilian Personnel Manual*, Title I, Chapter 10, at 14-15 (1990) (discussing six factors indicating supervision for certain Federal personnel purposes); *Juliard v. Comm’r of IRS*, 61 T.C.M. (CCH) 2683 (1991) (various factors indicating sufficient agency control over professional employee for certain tax purposes); *Hospital Resource Personnel, Inc. v. United States*, 68 F.3d 421, 427-28 (11th Cir. 1995) (discussing non-exclusive list of twenty common law factors identified by IRS for purpose of determining supervision); *Restatement (Second) of Agency* § 220(2) (1958) (ten factors to determine control).

Two of the more common types of non-employees from which SGEs must be distinguished are “representatives” and independent contractors. Representatives, as described more fully in OGE Informal Advisory Letter 82 x 22, typically serve on advisory bodies, and they represent specific interest groups, such as industry, consumers, labor, etc. Like SGEs, representatives can be appointed by the Government for a specified term on a Federal advisory committee, and they may make policy recommendations to the Government. See OGE Informal Advisory Letter 93 x 30. However, representatives can provide only advice. Moreover, unlike SGEs and other Federal employees, representatives are not expected to render disinterested advice to the Government. Rather, they are expected to “represent a particular bias.” OGE Informal Advisory Letter 93 x 14. Therefore, representatives are not deemed employees of the Government for purposes of the conflict of interest laws.

Likewise, independent contractors are not deemed Government employees. True independent contractors are not employees because they are not subject to the supervision or operational control, described more fully above, that is necessary to create an “employer-employee relationship” with the Government. OGE Informal Advisory Letter 82 x 21. It should be noted, however, that persons who truly function like Federal employees will not avoid the application of the conflict of interest laws merely because their agency fails to designate them as employees or designates them as contractors. See 4B Op. O.L.C. at 441-42; Association of the Bar of New York City, *Conflict of Interest and Federal Service* 239-40 (1960).

Even though SGEs clearly are employees, agencies must be careful to differentiate them from regular Government employees. For most purposes, SGEs are distinguished from regular Government employees on the basis of the number of days of expected service to the Government.<sup>5</sup> Specifically, an SGE is expected to perform temporary duties for no more than 130 days during any period of 365 consecutive days. 18 U.S.C. § 202(a).

The determination of SGE status must be made prospectively, at the time the individual is appointed or retained. Employees should be designated as SGEs only where the agency makes an advance estimate of the number of days the employee is expected to serve during the ensuing 365-day period. This is done so that employees are on notice with respect to the rules that will apply to them. As the Office of Legal

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<sup>5</sup> The full definition of SGE also includes employees and officers in certain miscellaneous positions who are deemed SGEs *per se*, without regard to the number of days of service. 18 U.S.C. § 202(a). See *United States v. Baird*, 29 F.3d 647, 650 (D.C. Cir. 1994). In addition, individuals occupying other positions are specifically designated as SGEs in certain organic legislation. See, e.g., 42 U.S.C. § 12651b(e) (members of Board of Directors, Corporation for National and Community Service).

Counsel has stated, “as a general matter, employees are *presumed to be regular government employees* unless their appointing Department is comfortable with making an estimate that the employee will be needed to serve 130 days or less.” 7 Op. O.L.C. 123, 126 (1983)(emphasis added). If an agency designates an employee as an SGE, based on a good faith estimate, but the employee unexpectedly serves more than 130 days during the ensuing 365-day period, the individual still will be deemed an SGE for the remainder of that period. However, upon the commencement of the next 365-day period, the agency should reevaluate whether the employee is correctly designated as an SGE, i.e., expected to serve no more than 130 days. Indeed, any time an SGE serves beyond one year, the agency should perform a new estimate of the expected number of days of service for the next 365-day period; this is true whether the employee is actually reappointed for a new one-year term, which is the ordinary procedure, or is merely completing an indefinite or multiyear term. *See, e.g.*, OGE Informal Advisory Letter 81 x 24.

The executive branch has long observed certain criteria for counting the number of days of expected service, based on a Presidential interpretation of 18 U.S.C. § 202(a) published shortly after enactment. Presidential Memorandum, “Preventing Conflicts of Interest on the Part of Special Government Employees,” 28 Federal Register 4539, 4541 (May 2, 1963); *see also* Federal Personnel Manual, Chapter 735, Appendix C (sunset); 3 Op. O.L.C. 78, 81-82 (1979); OGE Informal Advisory Letter 84 x 4.<sup>6</sup> OGE continues to use the same criteria, as follows: A part of a day is counted as an entire day. Work to be performed on weekends or holidays is counted. Where an employee is expected to serve in more than one agency, the expected number of days for both agencies must be aggregated in order for the employee to be considered an SGE for either agency. Where the second position commences at a later date, the number of days already served in the first agency must be added to the number of days expected to be served in both agencies for the remainder of the first 365-day period, in order to determine whether the employee may be considered an SGE for either agency during that remaining period.

A word is in order concerning two fairly common questions pertaining to SGE status and the applicability of the conflict of interest requirements. First, SGEs (and others) sometimes ask whether the ethics restrictions apply to them if they receive no pay

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<sup>6</sup> The Presidential Memorandum was drafted by the Office of Legal Counsel, Department of Justice, and “reflects a contemporaneous interpretation” of the 1962 conflict of interest legislation. 2 Op. O.L.C. 151, 155 n.3 (1978). The history of the Presidential Memorandum, including its rescission and replacement by other documents, is described in OGE Informal Advisory Letter 82 x 22, at 329-32. Much of the substance of the Presidential Memorandum was reproduced in Appendix C, Chapter 735 of the Federal Personnel Manual (FPM), itself now sunset. To the extent that much of the guidance contained in these documents reflects longstanding interpretations of 18 U.S.C. § 202(a) and other provisions of the conflict of interest laws, OGE continues to follow many of the same principles.

from the Government. It is important to remember that the definition of SGE expressly includes those who serve “without compensation.” 18 U.S.C. § 202(a). SGEs generally are covered by the ethics laws and regulations without regard to their pay status.<sup>7</sup>

Second, SGEs occasionally may ask whether the restrictions on their outside activities apply on days when they perform no Government services. SGEs must be advised clearly that any restrictions concerning their private activities (representational services, expert witness activities, etc.) apply equally on days when they serve the Government and days when they do not.<sup>8</sup> Where the Government has not used an individual’s services for some time, but has not specified a termination date in the appointment or otherwise, the individual might question whether he or she even remains an SGE. In such cases, the individual must seek a formal resolution of the matter before engaging in conduct prohibited for an SGE. As one early commentator observed, “presumably the consultant will remain an employee until the expiration of the designated term,” but a “special government employee whose appointment is for a long or indefinite period would be well advised to submit a written resignation as soon as he thinks there may be a substantial hiatus in his services.” R. Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1126 (1963).

### **Criminal Conflict of Interest Statutes and Related Restrictions**

Agency ethics officials regularly deal with five conflict of interest statutes found in Chapter 11, Title 18 of the United States Code: 18 U.S.C. §§ 203, 205, 207, 208, 209. Each of these criminal statutes makes at least some special provision for the treatment of SGEs. The application of these statutes is discussed below, in addition to certain related requirements found in other provisions of law.

#### **a. Restrictions on Representation**

Two statutes, 18 U.S.C. §§ 203 and 205, impose related restrictions on the outside activities of SGEs, particularly activities involving the representation of others before the Federal Government. Section 203 prohibits an employee from receiving, agreeing to receive, or soliciting compensation for representational services, rendered

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<sup>7</sup> One obvious exception would be certain narrow post-employment restrictions applicable only to employees paid at relatively high levels, as discussed below.

<sup>8</sup> In this respect, the conflict of interest restrictions differ from the restrictions on employee political activity described in 5 C.F.R. part 734 (Hatch Act regulations). See 5 C.F.R. § 734.601 (SGE subject to restrictions on political activity only “when he or she is on duty”).

either personally or by another, before any court or Federal agency or other specified Federal entity, in connection with any particular matter in which the United States is a party or has a direct and substantial interest. It should be noted that section 203 applies not only to representational services provided by the employee personally, but also to services provided by another person with whom the employee is associated, provided that the employee shares in the compensation for such services, for example, through partnership income or profit-sharing arrangements. See 4B Op. O.L.C. 603 (1980).

Section 205 prohibits an employee from personally representing anyone before any court or Federal agency or other specified Federal entity, in connection with any particular matter in which the United States is a party or has a direct and substantial interest. See 18 U.S.C. § 205(a)(2). Unlike section 203, this prohibition in section 205(a)(2) applies whether or not the employee receives any compensation for his or her representational activity. Furthermore, section 205(a)(1) prohibits an employee from representing anyone in the prosecution of a claim against the United States, or from receiving any gratuity, or share or interest in a claim, as consideration for assistance in prosecuting the claim.

Both section 203 and section 205 are limited, however, in their application to SGEs. 18 U.S.C. § 203(c) and 18 U.S.C. § 205(c) contain identical provisions that substantially narrow the prohibitions with respect to SGEs. One of the most significant limitations is that SGEs are restricted by sections 203 and 205 only in connection with “particular matters involving specific parties.” Such matters typically involve a specific proceeding affecting the legal rights of parties, or an isolatable transaction or related set of transactions between identified parties; examples would include contracts, grants, applications, requests for rulings, litigation, or investigations. Unlike regular employees, SGEs may represent others or receive compensation for representational services in connection with particular matters of general applicability--such as broadly applicable policies, rulemaking proceedings, and legislation--which do not involve specific parties. See 14 Op. O.L.C. 79 (1990); 5 C.F.R. § 2640.102(l)(m); 5 C.F.R. § 2637.201(c)(1).

Furthermore, the restrictions on SGEs are narrowly drawn to focus only on those matters in which the SGE actually participated for the Government, as well as, in some cases, those matters actually pending in the SGE’s own agency. More specifically, all SGEs are subject to the prohibitions of sections 203 and 205 with respect to those matters in which the SGE “at any time participated personally and substantially as a Government employee or special Government employee.” 18 U.S.C. §§ 203(c)(1), 205(c)(1). Guidance on what constitutes personal and substantial participation may be found in regulations construing the same phrase in related conflict of interest statutes. See 5 C.F.R. § 2640.103(a)(2); 5 C.F.R.

§ 2637.201(d). Likewise, guidance on what constitutes participation in the *same particular matter* as the matter with respect to which an SGE seeks to provide representational services may be found in regulations construing the analogous requirement in 18 U.S.C. § 207(a). See 5 C.F.R. § 2637.201(c)(4).<sup>9</sup>

SGEs who have served the Government for more than 60 days during the immediately preceding period of 365 consecutive days are subject to an additional restriction. Such SGEs are subject to the prohibitions of sections 203 and 205 in connection with any covered matter that “is pending in the department or agency of the Government in which [the SGE] is serving.” 18 U.S.C. §§ 203(c)(2), 205(c)(2). It should be noted that the 60-day standard for determining the application of this additional restriction is a standard of actual past service, as contrasted with the 130-day standard of estimated future service for determining SGE status discussed above.<sup>10</sup> Thus, for example, an SGE may represent another person before the agency in which he or she serves until the point at which the SGE has actually served 60 days in any prior period of 365 days; once the 61st day of service is reached, the SGE must discontinue the representation.

Beyond these basic limitations on the application of sections 203 and 205, SGEs also may be eligible for a special waiver that permits certain representational activity in connection with work under Federal grants and contracts. Identical provisions, in 18 U.S.C. §§ 203(e) and 205(f), allow an agency head to authorize an SGE to represent another before the Government “in the performance of work under a grant by, or a contract with or for the benefit of, the United States.” The legislative history indicates that the purpose of this exception is “to take care of any situations involving the national interest where an intermittent employee’s special knowledge or skills may be required by his employer or other private person to effect the proper performance of a Government contract [or grant] but where his services may be unavailable in the absence of a waiver.” S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. 3852, 3860. Such a waiver may be granted

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<sup>9</sup> The regulatory guidance found in 5 C.F.R. part 2637 was promulgated prior to amendments to section 207 enacted by the Ethics Reform Act of 1989 and thereafter; however, “[e]xcept where the underlying statutory provision has changed, part 2637 remains persuasive concerning the interpretation of the newer version of 18 U.S.C. § 207.” OGE Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (Nov. 5, 1992).

<sup>10</sup> Nevertheless, certain similar rules apply to counting the number of days: a partial day worked should be counted as a full day, and work performed on weekends and holidays should be counted. However, unlike the 130-day standard for determining SGE status, the 60-day standard under sections 203(c) and 205(c) does not require that service at more than one agency be aggregated; in other words, only service at the agency before which the SGE intends to represent someone should be counted in determining whether the 60-day standard has been exceeded with respect to that agency.

only by the agency head and must be based on a written certification, published in the Federal Register, that it is required by the national interest. Such a waiver covers representation only during the “performance of work under” a grant or contract and therefore would not apply to representational activity prior to the awarding and commencement of work on a grant or contract. *See* Presidential Memorandum, 28 Federal Register at 4542 (waiver provision covers “situation which may arise *after* a Government grant or contract has been negotiated”).<sup>11</sup>

Finally, even where the narrow restrictions of section 203 and section 205 are inapplicable, agencies should be aware that certain representational activities of SGEs may implicate 5 C.F.R. § 2635.702, which prohibits the use of public office for private gain. The need for administrative action to prevent SGEs from abusing their inside position for the benefit of private persons was addressed in the legislative history of sections 203 and 205, as well as in subsequent issuances and opinions of the executive branch.<sup>12</sup> In some circumstances, private representational activity by SGEs can raise at least the appearance that they are using their official position to gain special access or attention from Government decisionmakers, which would be unavailable to the general public. *Cf.* 91 x 17 (appearance that SGE made certain contacts through Government connections for benefit of outside organization). Such concerns are more likely to arise when the subject matter of the private representation is related to the subject matter of the SGE’s official duties and the representational contacts are made to the SGE’s own agency, especially to the same agency personnel with whom the SGE works in an official capacity. These issues must be addressed on a case-by-case basis, with adequate consideration of the legitimate interests and demands of an SGE’s outside professional life.

b. Post-Employment Restrictions

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<sup>11</sup> SGEs, like regular employees, also may be eligible for other exceptions to sections 203 and 205. *See* 18 U.S.C. §§ 203(d),(f), 205(d), (e), (g), (i).

<sup>12</sup> Discussing proposed sections 203 and 205, the Senate Report stated that, beyond the limited criminal prohibitions, “agency watchfulness and regulation” may be necessary to “make certain that persons serving [an agency] part time who also appear on behalf of outside organizations do not abuse their access to the agency for the benefit of those organizations.” S. Rep. No. 2213, 1962 U.S.C.C.A.N. 3859. Similar concerns were voiced in a Presidential Memorandum issued shortly after the legislative enactment: “It is desirable that a consultant or adviser or other individual who is a special Government employee, even when not compelled to do so by sections 203 and 205, should make every effort in his private work to avoid any personal contact with respect to negotiations for contracts or grants with the department or agency which he is serving if the subject matter is related to the subject matter of his consultancy or other service.” 28 Federal Register at 4542. The Presidential Memorandum recognized that it may not be practicable for SGEs to avoid all such representational activity, depending on the circumstances, but advised that SGEs at least alert a “responsible government official” when contemplating such activities. *Id.*; *see also* Federal Personnel Manual (sunset), Chapter 735, Appendix C, at 3; 10 Op. O.L.C. at 82-83; 7 Op. O.L.C. at 125 n.3.

The criminal post-employment statute, 18 U.S.C. § 207, imposes a number of different restrictions on the activities of former Government employees. Several of these restrictions provide no special treatment for SGEs. The provisions of section 207 that apply in the same way to both SGEs and regular employees include:

- (1) 18 U.S.C. § 207(a)(1), the lifetime prohibition on representing others in connection with the same particular matter involving specific parties in which the former employee participated personally and substantially;
- (2) 18 U.S.C. § 207(a)(2), the two-year prohibition on representing others in connection with the same particular matter involving specific parties that was pending under the employee's official responsibility during the last year of Government employment; and
- (3) 18 U.S.C. § 207(b), the one-year prohibition on representing, aiding, or advising others about certain ongoing trade or treaty negotiations on the basis of certain nonpublic information.<sup>13</sup>

Other parts of section 207 do contain special provisions for SGEs. The most significant provision is found in section 207(c), the so-called "one year cooling off period" for former "senior employees." Section 207(c) prohibits former senior employees from representing anyone before their former agency or department for one year after terminating their senior position, in connection with any matter. This restriction generally applies to: positions for which the rate of pay is fixed according to the Executive Schedule; positions for which the rate of basic pay is equal to or greater than the rate of basic pay for level 5 of the Senior Executive Service;<sup>14</sup> positions with appointment by the President under 3 U.S.C. § 105(a)(2)(B) or by the Vice President under 3 U.S.C. § 106(a)(1)(B); and positions held by an active duty commissioned officer of the uniformed services serving at pay grade 0-7 or above. 18 U.S.C. § 207(c)(2). However, with respect to SGEs, the application of

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<sup>13</sup> Additionally, 18 U.S.C. § 207(d) imposes a one-year prohibition on "very senior employees" against representing others before their former agency or before any official appointed to an Executive Schedule position. On its face, section 207(d) makes no special provision for SGEs; however, it is unclear whether an SGE would occupy a position that falls within the "very senior" category, as described in the statute. See 18 U.S.C. § 207(d)(1). Agencies with specific questions concerning the applicability of section 207(d) to a particular SGE or class of SGEs are advised to consult with OGE or the Office of Legal Counsel, Department of Justice.

<sup>14</sup> Because SGEs often are paid on an hourly or daily basis, it may be necessary to prorate the basic pay for level 5 of the SES, either on an hourly or a daily basis, in order to determine whether the SGE's hourly or daily rate is equivalent.

section 207(c) is limited, based on the number of days the individual served during the last year in a senior position. Specifically, the one year cooling off period applies only to former SGEs who served 60 days or more during the one-year period before terminating their services as a senior employee.<sup>15</sup>

Section 207(f), which restricts certain post-employment activities with foreign entities, is similarly limited with respect to SGEs. Section 207(f) generally imposes a one-year prohibition on representing, aiding, or advising certain covered foreign entities in connection with any official decision of an officer or employee of the United States. However, section 207(f) applies only to "senior employees" who are subject to section 207(c) and "very senior employees" who are subject to section 207(d). Therefore, SGEs who are not subject to section 207(c) or section 207(d)--for example, "senior employees" who served fewer than 60 days during the last year before they terminated from their senior position--are likewise exempt from section 207(f).<sup>16</sup>

Apart from 18 U.S.C. § 207, Executive Order 12834 (January 20, 1993) imposes a number of related post-employment restrictions on "senior appointees" and certain trade negotiators. These restrictions include, among other things, certain five-year cooling off requirements that are similar in scope to the one-year restrictions of 18 U.S.C. §§ 207(c) and 207(b), as well as a lifetime ban on certain activities as a foreign agent. The requirements of Executive Order 12834 apply only to "full-time, non-career appointees." Although it is possible for an SGE to provide temporary services on a "full-time" basis, pursuant to 18 U.S.C. § 202(a), and certain SGEs could be considered "non-career" for certain purposes,<sup>17</sup> SGEs are not covered by the requirements of Executive Order 12834. The Executive order was not intended to cover employees who perform only temporary duties. It was not contemplated that the significant contractual obligations imposed by the Executive order would apply to persons who serve in the relatively limited capacity of an SGE.

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<sup>15</sup> The Director of OGE also has authority to waive the prohibition of section 207(c) with respect to certain senior positions, under limited circumstances. *See* 18 U.S.C. § 207(c)(2)(C); 5 C.F.R. § 2641.201(d).

<sup>16</sup> Additionally, SGEs, like all employees, may be eligible for a number of exceptions to the various restrictions of 18 U.S.C. § 207. *See* 18 U.S.C. § 207(h),(j),(k).

<sup>17</sup> *See* OGE Informal Advisory Letter 90 x 22 (Presidentially appointed member of board of directors of agency is noncareer officer or employee and may be SGE depending on estimate of number of days of service); *see generally* OGE Informal Advisory Letter 89 x 16 (indicia of non-career status).

Finally, former SGEs are subject to the provisions of the Procurement Integrity Act, 41 U.S.C. § 423, to the same extent as all former Federal employees. *See* 48 C.F.R. § 3.104-3 (definition of “official” includes SGEs). The act prohibits a former SGE from accepting compensation as an employee, officer, director, or consultant of a contractor within the one-year period after the SGE participated in certain procurement matters pertaining to that contractor. *See* 41 U.S.C. § 423(d). This statute also imposes certain sanctions, including criminal penalties, on former SGEs who disclose certain information pertaining to Federal procurements. *See* 41 U.S.C. § 423(a), (e).

c. Financial Conflicts of Interest

18 U.S.C. § 208 prohibits all employees, including SGEs, from participating personally and substantially in any particular matter that has a direct and predictable effect on their own financial interests or the financial interests of others with whom they have certain relationships. In addition to an employee’s own personal financial interests, the financial interests of the following persons or organizations are also disqualifying: spouse; minor child; general partner; organization which the individual serves as officer, director, trustee, general partner or employee; person or organization with which the employee is negotiating or has any arrangement concerning prospective employment.<sup>18</sup> Because SGEs typically have substantial outside employment and other interests, which are often related to the subject areas for which the Government desires their services, issues under section 208 frequently arise.

In certain circumstances, however, SGEs are eligible for special treatment under section 208. SGEs who serve on advisory committees, within the meaning of the Federal Advisory Committee Act (FACA), 5 U.S.C. app., are uniquely eligible for a particular waiver of the prohibitions of section 208(a). Under 18 U.S.C. § 208(b)(3), an SGE serving on a FACA committee may be granted a waiver where the official responsible for his or her appointment certifies in writing that the need for the SGE’s services outweighs the potential for a conflict of interest posed by the financial interest involved. 18 U.S.C. § 208(b)(3). The standard for granting such

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<sup>18</sup> Related provisions in the Standards of Ethical Conduct for Executive Branch Employees also disqualify an employee, including an SGE, from participating in matters affecting the financial interests of a person or organization with which the employee is “seeking” employment, even if there have been no actual negotiations or arrangements for prospective employment, within the meaning of section 208. *See* 5 C.F.R. part 2635, Subpart F. Furthermore, a provision in the Procurement Integrity Act, which applies equally to SGEs and regular employees, imposes disqualification and reporting requirements on employees who participate in certain agency procurement matters and who receive employment contacts from bidders or offerors in those procurements. *See* 41 U.S.C. § 423(c).

waivers is more liberal than the standard for other employees, under 18 U.S.C. § 208(b)(1), which requires a determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services. *Compare* 5 C.F.R. § 2640.301 (requirements for waivers under section 208(b)(1)); 5 C.F.R. § 2640.302 (requirements for waivers under section 208(b)(3)). Agencies should remember that Congress reserved this special waiver authority only for those SGEs who serve on advisory committees; SGEs who do not serve in connection with a FACA committee may be granted a waiver only in accordance with section 208(b)(1). *See* Report of The President's Commission on Federal Ethics Law Reform 30 (1989) (advisory committees warrant different approach under section 208 because FACA provides important safeguards and members only make nonbinding recommendations).

SGEs serving on FACA committees also are covered by certain exemptions from section 208 that have been promulgated by OGE, pursuant to 18 U.S.C. § 208(b)(2). The most significant of these is 5 C.F.R. § 2640.203(g), which pertains to certain financial interests arising from the SGE's outside employment. Specifically, this exemption permits SGEs serving on FACA committees to participate in particular matters of general applicability--such as the development of general regulations, policies, or standards--where the disqualifying interest arises from the SGE's non-Federal employment or prospective employment. Agencies should note, however, that this exemption is subject to several important limitations: (1) the matter cannot have a "special or distinct effect" on either the SGE or the SGE's non-Federal employer, other than as part of a class;<sup>19</sup> (2) the exemption does not cover interests arising from the ownership of stock in the employer; (3) and the non-Federal employment must involve an actual employee/employer relationship, as opposed to an independent contractor relationship (such as certain consulting positions). *See* 61 Federal Register at 66838. Furthermore, it should be emphasized that section 2640.203(g) does not apply to all SGEs, but only to those serving on advisory committees within the meaning of FACA.

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<sup>19</sup> When we promulgated this exemption, we explained the "special or distinct effect" limitation as follows: "[I]t is not OGE's intent that the exemption apply only where the effect of the matter on members within a class is identical. Normally, the matter would have a 'special or distinct effect' when its impact would be unique to the employee or his employer, or where the effect would be clearly out of proportion in comparison to the effect on other members of the class." 61 Federal Register 66829, 66839 (December 18, 1996). Although the examples following section 2640.203(g) do not specifically address the "special or distinct effect" limitation, guidance as to the meaning of that phrase may be found in an example following another exemption that uses the same language. *See* 5 C.F.R. § 2640.203(b) (Example 2) (even though grant announcement open to all universities, employee's university one of just two or three likely to receive grant because very few universities known to have necessary facilities and equipment).

Two other exemptions also specifically cover SGEs serving on FACA committees, although these are much more narrow in scope. One covers certain SGEs participating in matters pertaining to medical products, 5 C.F.R. § 2640.203(i), and the other covers a very limited class of SGEs serving on certain advisory committees of the Food and Drug Administration, 5 C.F.R. § 2640.203(j). Additionally, OGE expects to promulgate other exemptions in the near future, some of which may apply to specific situations involving SGEs serving on certain advisory committees.

Another exemption, 5 C.F.R. § 2640.203(c), is not specifically limited to SGEs but can be helpful in resolving certain issues particularly common among SGEs. Section 2640.203(c) permits any employee to participate in a particular matter affecting one campus of a multi-campus institution of higher education, where the disqualifying interest arises from the individual's employment with a separate campus of the same institution, provided that the individual has no multicampus responsibilities at the institution. SGEs frequently are drawn from universities, including large universities with multiple campuses. These SGEs may be called upon to participate in official matters--such as grants, contracts, applications, and other particular matters--that affect the financial interests of another campus in the same university system where they are employed. Hence, section 2640.203(c) may have particular utility for many SGEs.<sup>20</sup>

Finally, because divestiture of a disqualifying interest is one of the remedies for a potential violation of section 208, it is important to note that SGEs are *not* eligible for a Certificate of Divestiture (CD). A CD is a tax benefit that allows the deferral or nonrecognition of capital gain where an employee divests a financial interest in order to comply with conflict of interest requirements. However, Congress specifically excluded SGEs from the definition of "eligible person," and consequently SGEs may not take advantage of this benefit. 26 U.S.C. § 1043(b)(1)(A).

d. Supplementation of Federal Salary

18 U.S.C. § 209 prohibits Federal employees from receiving "any salary, or any contribution to or supplementation of salary" from an outside source as compensation for their Government services. SGEs, however, are completely exempt from this prohibition. 18 U.S.C. § 209(c). This means, for example, that SGEs may continue to collect their regular salary from an outside employer for days on which they are

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<sup>20</sup> Of course, SGEs also may take advantage of the other generally applicable exemptions promulgated by OGE, including the exemptions for certain interests in publicly traded securities. *See* 5 C.F.R. part 2640, Subpart B.

providing services to the Government (whether their Government service is paid or unpaid).

SGEs should be advised, nevertheless, that there may be other restrictions on the receipt of compensation in connection with the performance of their official duties. For example, 5 C.F.R. § 2635.807 prohibits all Federal employees, including SGEs, from receiving outside compensation for teaching, speaking, or writing when “the activity is undertaken as part of the employee’s official duties.” 5 C.F.R. § 2635.807(a)(2)(i)(A). SGEs also are subject to the criminal bribery and illegal gratuity statute, which prohibits, under certain circumstances, the receipt of anything of value in connection with official acts. 18 U.S.C. § 201(b), (c).

### **Other Ethics Statutes**

Apart from the five major criminal conflict of interest statutes in Chapter 11 of Title 18, there are other ethics statutes, some of which apply to SGEs and some of which do not.

As discussed above, SGEs are subject to the bribery and illegal gratuity statute, 18 U.S.C. § 201. SGEs also are covered by 5 U.S.C. § 7353, which prohibits the acceptance of gifts from certain sources. Likewise, SGEs are subject to 5 U.S.C. § 7351, which prohibits certain gifts to official superiors and gifts from employees receiving less pay. Both section 7353 and section 7351 are specifically implemented by the Standards of Ethical Conduct for Employees of the Executive Branch, discussed more fully below. *See* 5 C.F.R. part 2635, subparts B and C. Similarly, SGEs are covered by the financial disclosure provisions of the Ethics in Government Act of 1978, 5 U.S.C. app. §§ 101-111, as implemented by 5 C.F.R. part 2634, discussed below. The restrictions of the Procurement Integrity Act, 41 U.S.C. § 423, also apply to SGEs, as discussed above.<sup>21</sup>

Agencies also should note that SGEs are subject to 18 U.S.C. § 219, a criminal statute that prohibits employees from acting as an agent of a foreign principal under certain circumstances. Unlike regular employees, however, SGEs may be eligible for a special exemption from the prohibitions of section 219, where the agency head

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<sup>21</sup> Also in the procurement area, we note that SGEs are covered by a provision in the Federal Acquisition Regulation that generally prohibits the award of Federal contracts “to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more government employees.” 48 C.F.R. § 3.601(a). However, unlike regular employees, SGEs are covered by this prohibition only if: (1) the contract arises directly out of the SGE’s official activities; (2) the SGE is in a position to influence the award of the contract in his or her official capacity; or (3) some other conflict of interest is determined to exist. 48 C.F.R. § 3.601(b).

certifies that employment of the SGE “is required in the national interest.” 18 U.S.C. § 219(b). The Department of Justice also has held that SGEs may be subject to the Emoluments Clause of the United States Constitution, U.S. Const., art. I, § 9, cl. 8, which prohibits persons who “hold offices of profit or trust” in the Federal Government from having any position in or receiving any payment from a foreign government. *See* 15 Op. O.L.C. 65 (1991); 17 Op. O.L.C. 114 (1993). OGE does not render opinions concerning section 219 or the Emoluments Clause, and agencies are advised to consult with Department of Justice if they have any questions about the application of these provisions to SGEs.

SGEs are not, however, subject to 5 U.S.C. app. § 501, which imposes limits on the outside earned income of certain noncareer employees. *See* 5 U.S.C. app. § 505(2)(B).<sup>22</sup> Nor are SGEs covered by 5 U.S.C. app. § 502, which imposes a number of restrictions on the outside activities of certain noncareer employees. *See id.* Moreover, as discussed above, SGEs are not covered by the statutory provision authorizing certificates of divestiture for the nonrecognition of capital gain in cases where employees sell property to comply with ethics requirements. *See* 26 U.S.C. § 1043(b)(A). SGEs also are not subject to 26 U.S.C. § 4941, which imposes tax sanctions on certain Government employees who engage in specified acts of “self-dealing” in connection with a private foundation. *See* 26 U.S.C. § 4946(c).

### **Standards of Ethical Conduct for Employees of the Executive Branch**

Generally, SGEs are treated the same as regular employees under the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635. *See* 5 C.F.R. § 2635.102(h) (“employee” includes SGEs, and employee status not affected by fact that SGE does not perform official duties on given day). There are, however, a few notable exceptions. Only those exceptions, as well as a few other items of particular relevance to SGEs, will be discussed below.<sup>23</sup>

#### **a. Gifts from Outside Sources**

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<sup>22</sup> Similarly, SGEs are not subject to the related prohibition on outside earned income applicable to certain Presidential appointees, under Executive Order 12674, § 102 (1989), as modified by Executive Order 12731 (1990). This provision, which covers certain “full-time non-career” appointees, is inapplicable to SGEs for reasons similar to those discussed above with respect to the applicability of Executive Order 12834.

<sup>23</sup> *See* also the discussion above of 5 C.F.R. § 2635.702, in connection with the representational activities of SGEs.

SGEs, like all employees, are subject to 5 C.F.R. § 2635.202(a), which prohibits the acceptance of gifts from a “prohibited source” and gifts given because of an employee’s official position. The definition of “prohibited source” includes any person seeking official action from the employee’s agency, doing or seeking to do business with the employee’s agency, conducting activities regulated by the employee’s agency, or having interests that may be substantially affected by the employee’s official duties; the definition also includes organizations the majority of whose members fall within any of the aforementioned categories. 5 C.F.R. § 2635.203(d). From this definition, it should be immediately apparent that SGEs pose unique issues, because many SGEs are employed by, or have substantial professional and business relationships with, such prohibited sources. For this reason, OGE originally proposed an exception, 5 C.F.R. § 2635.204(e)(2), specifically to permit SGEs to accept various benefits resulting from outside business or employment activities, where it is clear that such benefits are not offered or enhanced because of the employee’s official position. *See* 56 Federal Register 33777, 33782 (July 23, 1991). Although the final version of section 2635.204(e)(2) was broadened to cover all employees, not just SGEs, this exception continues to be of particular importance to SGEs.

**b. Presidential Appointees and Covered Noncareer Employees**

5 C.F.R. § 2635.804 references certain outside earned income restrictions on specified Presidential appointees and other covered noncareer employees. These restrictions are inapplicable to SGEs.<sup>24</sup>

**c. Outside Expert Witness Activities**

Employees generally may not participate as an expert witness, other than on behalf of the United States, in any proceeding before a Federal court or agency in which the United States is a party or has a direct and substantial interest. 5 C.F.R. § 2635.805(a). This prohibition applies whether or not the employee receives compensation for the activity. The Designated Agency Ethics Official may authorize an employee to serve as an expert witness where such service is determined to be in the interest of the Government or where the subject matter of the testimony is determined to be unrelated to the employee’s official duties. 5 C.F.R. § 2635.805(c).

For SGEs, the restrictions of section 2635.805 are substantially narrowed. With respect to most SGEs, section 2635.805 applies only where the SGE actually participated officially in the same proceeding or in the particular matter that is the

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<sup>24</sup> See footnote 22 and accompanying text.

subject of the proceeding. 5 C.F.R. § 2635.805(a). A somewhat more restrictive standard applies to a smaller class of SGEs who are deemed to have particularly significant Federal positions, i.e., those either appointed by the President, serving on a commission established by statute, or serving (or expected to serve) for more than 60 days in a period of 365 days. 5 C.F.R. § 2635.805(b). For this class of SGEs, the restriction on expert service also applies to any proceeding in which the SGE's own agency is a party or has a direct and substantial interest.

d. Outside Teaching, Speaking and Writing

5 C.F.R. § 2635.807(a) generally prohibits an employee from receiving outside compensation for speaking, teaching or writing activities that relate to the employee's official duties. Such activities may relate to an employee's official duties in several different ways: if the activity is performed as part of the employee's official duties (discussed above in connection with supplementation of Federal salary); if the invitation to engage in the activity was extended primarily because of the employee's official position rather than expertise in the subject matter; if the invitation or offer of compensation was extended by someone with interests that may be affected substantially by the employee's duties; or if the information conveyed through the activity draws substantially on nonpublic information obtained through the employee's Government service. 5 C.F.R. § 2635.807(a)(2)(i)(A)-(D). SGEs, like all employees, are prohibited from receiving compensation for activities that are related to their official duties in any of these ways.

Additionally, pursuant to paragraph (E) of the definition of relatedness, there are several other ways in which teaching, speaking and writing may relate to an employee's official duties, and SGEs receive special treatment in this connection. *See* 5 C.F.R. § 2635.807(a)(2)(i)(E). Under paragraph (E)(1), an activity is related if it deals, in significant part, with any matter to which the employee is currently assigned or has been assigned during the previous year. Under paragraph (E)(2), an activity is related to an employee's official duties if it deals, in significant part, with any ongoing or announced policy, program or operation of the employee's agency. Moreover, under paragraph (E)(3), with respect to certain noncareer employees, an activity is related to the employee's duties if it deals, in significant part, with "the general subject matter area, industry, or economic sector primarily affected by the programs and operations" of the employee's agency.

The scope of paragraph (E) is substantially narrowed, however, with respect to SGEs. First, SGEs are completely exempt from paragraphs (E)(2) and (E)(3). *See* 5 C.F.R. § 2635.807(a)(2)(i)(E)(4). Thus, for example, nothing in section 2635.807(a)(2)(i)(E) prohibits an SGE from accepting compensation for

speaking, teaching, or writing simply because the activity relates to the programs or the general subject area of the SGE's agency. Second, even with respect to paragraph (E)(1), which covers matters in which the employee has been personally involved during the past year, the restriction is limited. For all SGEs, paragraph (E)(1) is limited only to the matters to which the SGE is currently assigned or had been assigned during his or her current appointment. Moreover, for SGEs who have not served (or are not expected to serve) more than 60 days during the first year of appointment or any subsequent one-year period of appointment, the restriction is even narrower: paragraph (E)(1) applies only to "particular matters involving specific parties" in which the SGE "has participated or is participating personally and substantially." Thus, for example, nothing in section 2635.807(a)(2)(i)(E) prohibits an SGE from accepting compensation simply because the activity pertains to a policy matter that does not involve specific parties, even though the SGE may be assigned to such matter.<sup>25</sup>

Another provision in section 2635.807 has special significance for SGEs, even though it applies equally to regular employees. There is a specific exception to the ban on compensation for activities that are related to an employee's duties under either section 2635.807(a)(2)(i)(B)(invitation primarily because of official position) or section 2635.807(a)(2)(i)(E)(activity deals with personal assignments, etc.). This exception permits employees to accept compensation, otherwise prohibited by these two provisions, for teaching a course requiring multiple presentations offered as part of: (a) the regularly established curriculum of various specified types of educational institutions; or (b) educational or training programs sponsored and funded by Federal, State, or local government. 5 C.F.R. § 2635.807(a)(3). Because SGEs so often are employed by universities and other institutions of higher learning, on a full-time or adjunct basis, this exception may have particular relevance.

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<sup>25</sup> As discussed above (under "Supplementation of Federal Salary"), however, section 2635.807 still prohibits an SGE from receiving compensation for teaching, speaking or writing activities that are undertaken as part of the employee's official duties.

e. Fundraising

All employees, including SGEs, are equally subject to certain restrictions on personal fundraising for nonprofit organizations. These include restrictions on the use of official title, position and authority, and the solicitation of subordinates. 5 C.F.R. § 2635.808(c). Additionally, employees may not personally solicit funds or other support from a person known by the employee to be a “prohibited source.” (The definition of prohibited source is discussed in more detail above, under “Gifts from Outside Sources.”) With respect to SGEs, however, this restriction is limited to a narrower subset of the definition of prohibited source. SGEs are prohibited only from personally soliciting persons whose interests may be affected substantially by the performance or nonperformance of the SGE’s official duties. 5 C.F.R. § 2635.808(c)(1)(ii).

### **Financial Disclosure**

As a general rule, all SGEs must file either a public financial disclosure statement or a confidential financial disclosure statement.

a. Public Reporting

SGEs are required to file a public financial disclosure report if they meet two criteria. First, they must perform the duties of their office, or be expected to perform those duties, for more than 60 days in the calendar year. *See* 5 C.F.R. § 2634.204. Second, they must meet the pay conditions for public filing, i.e., they must be paid at least the equivalent of 120% of the minimum rate of basic pay for GS-15 of the General Schedule (or, if they are members of the uniformed service, they must be at or above pay grade 0-7). *See* 5 C.F.R. § 2634.202(c). SGEs meeting both of these criteria file the same new entrant, incumbent, and termination reports as regular employees. Additionally, any prospective SGE who is nominated by the President to a position requiring Senate confirmation--regardless of pay level or expected number of service days--may be required by the confirming committee to file an initial “nominee” report. *See* 5 U.S.C. app. § 101(b)(1).

Unlike regular employees, certain SGEs may be eligible for a special waiver of the public availability of their financial disclosure reports. In “unusual circumstances,” the Director of OGE may grant a waiver of the public availability requirement for a financial disclosure report submitted by an SGE who has neither performed, nor is expected to perform, official duties for more than 130 days in a calendar year. 5 C.F.R. § 2634.205(a). Such a waiver may be granted only if the Director determines that the individual is able to provide services specially needed by the

Government, it is unlikely that the SGE's outside employment or financial interests will create a conflict of interest, and public financial disclosure is not otherwise necessary. *Id.* Requests for such waivers are subject to a number of very specific procedural requirements, including deadlines for submissions, so SGEs and their agencies should consult 5 C.F.R. § 2634.205(b) carefully. Moreover, it should be understood that such waivers are rarely granted.

b. Confidential Reporting

Generally, any SGE not required to file a public financial disclosure report must file a confidential financial disclosure report. 5 C.F.R. § 2634.904(b). The SGE must submit the standardized OGE Form 450 and any OGE-approved supplement, unless the SGE's agency has received approval to use an alternative reporting system. 5 C.F.R. §§ 2634.907(standard form prescribed by OGE); § 2634.905(c) (OGE-approved alternative). However, SGEs may not use the standardized OGE Optional Form 450-A (Confidential Certificate of No New Interests). 5 C.F.R. § 2634.905(d)(1).

SGEs must file a new entrant report no later than 30 days after assuming the position or office. 5 C.F.R. §§ 2634.903(b)(1). However, an SGE serving on an advisory committee may be required to file even earlier, *i.e.*, before any advice is rendered by the individual and prior to the first meeting of the committee. 5 C.F.R. § 2634.903(b)(3).

SGEs do not file incumbent confidential reports. Instead, they are required to file an additional new entrant report each year, upon their "reappointment or redesignation" as an SGE for a new 365-day period. 5 C.F.R. § 2634.903(b)(1). In cases where an SGE is appointed for a term in excess of one year, the agency still must at least "redesignate" the individual as an SGE annually by estimating the number of days the employee is expected to serve in the next 365-day period (as discussed in more detail under "Definition of SGE" above). Ordinarily, this would mean that each SGE with a multiyear term would file an additional new entrant report each year within 30 days of the anniversary of that employee's appointment date. However, OGE recognizes that agencies with many SGEs might have to keep track of multiple filing dates for these "follow-on" reports, corresponding to the multiple appointment anniversaries of different SGEs. Therefore, in order to reduce administrative burden, OGE permits agencies to specify one date each year on which to collect follow-on new entrant reports from all SGEs (or discrete groups of SGEs, such as all members of a given advisory committee) who serve for terms in excess of one year. OGE DAEOgram DO-95-019 (April 11, 1995).

Finally, an SGE may be excluded from any confidential reporting requirement, under appropriate circumstances. An agency may exclude an SGE from such reporting requirements where it determines, based on the duties of the SGE's position, that: (1) the possibility of a real or apparent conflict of interest is remote, or (2) the SGE's level of responsibility is sufficiently low to make reporting unnecessary. 5 C.F.R. § 2634.905(a),(b).



## **AN ETHICS GUIDE FOR CONSULTANTS AND ADVISORY COMMITTEE MEMBERS AT THE DEPARTMENT OF DEFENSE**

At the Department of Defense (DoD), we are fortunate to have many experts and industry leaders from outside of the Government to provide advice to the Secretary as consultants or members of an advisory committee. Because many of you retain extensive links 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.

### **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) 697-1640, or email us at [SOCO@dodgc.osd.mil](mailto:SOCO@dodgc.osd.mil). We also have considerable guidance, including financial disclosure reporting, on our website at: [http://www.defenselink.mil/dodgc/defense\\_ethics](http://www.defenselink.mil/dodgc/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 ethics 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 consultants and all members of advisory committees are appointed as Special Government Employees (SGEs). This means that upon appointment, you assume the responsibilities, obligations, and restrictions that are part of public service. Because SGEs are not full-time employees, several of these restrictions apply to you only in limited circumstances.

Service as an SGE may be compensated or uncompensated, but it is always temporary. In fact, you should not serve for more than 130 days during any period of 365 consecutive days. This 130-day period is an aggregate of all your Federal SGE service, not just your appointment at the Department of Defense. For example, it includes days you have served as an SGE in other Federal agencies or departments, and even days as a military reservist. If you have served in other Federal agencies or departments within the last year, please advise the appropriate committee manager, executive director, or Designated Federal Official (DFO), so that you do not exceed the 130-day period of appointment.

When computing days that you work as an SGE, count each day in which you perform services, even if it does not amount to an entire workday. Brief non-substantive interactions, such as emails or phone calls to set up a meeting, do not have to be counted as a day of duty.

### **3. Financial Disclosure**

You are required to file either a public or confidential financial disclosure report (SF 278 or OGE Form 450) when you are first appointed, and annually thereafter if you are reappointed. As a member of an advisory committee, you may also be required to update the report before each meeting throughout your term of appointment. The purpose of financial disclosure is to protect you from inadvertently violating any of the criminal conflict of interest statutes, discussed below, and to ensure the public and this Department that your advice is free from any real or perceived conflict of interest. The supervisor or DFO, and a DoD ethics official review the reported information, which is not releasable to the public if it is a confidential financial disclosure report, except as authorized by the Privacy Act.

### **4. Criminal Conflict of Interest Statutes**

You are required to comply with various criminal statutes while you are an SGE. These statutes are codified at 18 U.S.C. 201, 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, minor child, 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 or with which you have an arrangement for prospective employment. The primary reason you are required to disclose your financial interests is to alert the supervisor or DFO, and agency ethics official of any potential conflict of interest prior to your participation in a particular matter involving an entity in which you have a financial interest.

For example, you could have a conflict of interest if you were to participate in an advisory committee meeting that reviews whether a certain weapons program should be continued and:

- 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.

Generally, DoD advisory committees address broad policy matters, not particular matters. This greatly reduces the potential for conflicts of interest. In certain instances, however, the committees may address matters that focus on the interests of specific persons or a discrete and identifiable class of persons. For example, an advisory committee may recommend that the Department purchase more unmanned aerial vehicles (UAVs). Since only two or three companies manufacture UAVs, the committee's review and recommendation would constitute a particular matter. If any SGEs had financial interests in these companies, they would have a conflict of interest if they participated in the advisory committee discussion.

If you become aware of such a financial conflict of interest, you must disqualify yourself from acting in a governmental capacity in the matter and notify the DFO, committee manager, or supervisor. You should also consult your ethics official, since there are several regulatory exemptions that permit you to have certain financial interests that cause a conflict of interest. For example, employees are permitted to participate in particular matters affecting companies that they own as part of a diversified mutual trust. Employees may also act in particular matters affecting companies in which the aggregate value of the employee's holdings does not exceed \$15,000. Since there are other exemptions, you should contact your ethics official.

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

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 SGEs, from acting as an agent or attorney for private entities before any agency or court of the Executive or Judicial Branches. For SGEs, section 203 prohibits the receipt of compensation for representational services only in any particular matter involving a specific party: (1) in which the SGE has participated personally and substantially as a Government employee; or (2) which is pending in this Department and the SGE served for more than 60 days during the immediately preceding 365 days. Representational services include written or oral communications and appearances made on behalf of someone else with the intent to influence or persuade the Government. An inquiry into the status of a pending matter is not necessarily a representation, but could give rise to an appearance of a prohibited representation. Examples of such matters include applications for Federal funding, progress reports regarding Cooperative Research and Development

Agreements or clinical trials, and pending investigations. Section 205 parallels section 203, except that even uncompensated representations by employees are prohibited.

### **Limits on Representations After You Leave the Government**

The final statute, 18 U.S.C. 207, prohibits former employees, including SGEs, 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 the former SGE 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 services as an SGE, and your basic rate of pay was \$134,000/year or over (in 2003), and you served 60 days or more as an SGE during the 1-year 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 your 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.

SGEs who qualify for 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.

## **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 DoD SGEs.

### **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.

You are prohibited from receiving compensation for teaching, speaking, or writing (“activity”) that “relates to the employee’s official duties.” 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, 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, 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.

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 identify yourself in connection with your personal teaching, speaking, or writing, whether or not compensated, and if the subject of the teaching, speaking, or writing deals in significant part with any ongoing or announced policy, program, or operation of the Department of Defense, you should make a disclaimer that the views presented are your views and do not necessarily represent the views of this Department or its components.

#### **Acceptance of Gifts from Outside Sources**

Any gift given to you from a DoD prohibited source or because of your service on the advisory committee or as a consultant to this Department will raise concerns and may be prohibited. 5 C.F.R. 2635.202. You may accept gifts given to you because of your personal, outside business, or employment relationships. There are other exceptions, but since they are often fact-specific, you should consult your agency ethics official.

#### **Providing Expert Testimony**

If you participated while a Federal employee in a particular United States judicial or administrative proceeding or in a particular matter that is the subject of the proceeding, you may not serve, except on behalf of the United States, as an expert witness, with or without compensation, in that proceeding if the United States is a party or has a direct and substantial interest. 5 C.F.R. 2635.805. However, such testimony may be authorized by the DoD General Counsel.

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 Department of Defense is a party or has a direct and substantial interest, unless authorized by the DoD General Counsel.

### **Impartiality**

Although you are prohibited by 18 U.S.C. 208(a) from participating in 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.

While the impartiality rule is quite complex and very broad in scope, there are several triggers that are helpful. 5 C.F.R. 2635.502.

1. 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],
2. The circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality, and
3.
  - a) The matter is likely to have a direct and predictable effect on the financial interests of a member of your household, or
  - b) someone with whom you have a relationship (such as a relative, a business or financial entity, a former employer, an employer or client of your spouse, or an organization in which you are an active participant) is, or represents, a party to the matter.

Considering the breadth of this prohibition and how much it depends upon the perception of the beholder, if you believe your participation in advisory committee discussions could subject you to criticism, please contact your supervisor, DFO, or agency ethics official to determine whether you should be disqualified from participation in the matter, or granted authorization to participate in the matter.

### **Endorsement of Non-Federal Entities**

Many DoD SGEs 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 or Government 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 consultants and members of advisory committees, actions that may be perceived as the misuse of their public office tend to receive uncommon 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:

1. 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);
2. Using your title, position, or authority to coerce or induce another person to provide any benefit to yourself or any person identified above;
3. 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
4. Using Government property and time for unauthorized purposes.

### **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.

### **Emoluments Clause**

The Constitution prohibits Federal employees, including SGEs, from accepting any compensation from, or employment with, a foreign government or the political subdivision of a foreign government, including a public university, a commercial enterprise owned or operated by a foreign government, or an international organization controlled by a foreign government. The ban does not apply to a foreign privately-owned corporation. U.S. Constitution, Art. 1 § 9, cl. 8. If you have a contract with, or are consulting for, a foreign government, please promptly contact SOCO.

### **Foreign Gifts and Decorations Act**

During the period of your appointment as an SGE, you may not accept a gift above a minimum value (\$285 in 2004) from a foreign government or an international organization. You may be surprised to learn that this prohibition applies to gifts offered to you by foreign governments even if such gifts have no nexus to your Government appointment. The restriction extends to your spouse and dependents, but does not apply to travel and related expenses from a foreign government incurred as part of your official duties. 5 U.S.C. § 7342.

### **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 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.

DCN: 12154

# **Keeping Committees Clear of Ethical Problems:**

## **An Ethics Guide for Designated Federal Officials Of DoD Advisory Committees**

**DoD General Counsel  
Standards of Conduct Office  
(703) 695-3422  
[SOCO@dodgc.osd.mil](mailto:SOCO@dodgc.osd.mil)  
Pentagon 3D941**

**Introduction:**

As a director or manager of a Department of Defense (DoD) advisory committee, you are a Designated Federal Official (DFO) and are largely responsible for the successful operation of the committee and the completion of the committee's mission. While you have substantial administrative and regulatory duties, ensuring that the committee's deliberations and recommendations are free from conflicts of interest and other ethical problems cannot be overemphasized. Many hours of hard work may be nullified if the findings of the committee are challenged because of allegations that even one of the members had a conflict of interest, was not impartial, or was otherwise improperly influenced.

To help you to protect the integrity of the advisory committee's work, the Standards of Conduct Office (SOCO) of the Office of the DoD General Counsel offers this guide. Our goal is to bring to your attention issues, such as conflicts of interest, that have caused problems for past committees, and to assist you in preventing or resolving these problems. Since dealing with such issues is a major task of our office, please don't hesitate to contact us at the number on the front page. **While it is our job to help you to resolve these issues, we depend upon you to alert us when such issues, conflicts of interest, or appearances of conflicts arise in your committee.**

### **Appointment as a Special Government Employee**

DoD appoints all consultants and committee members as Special Government Employees (SGEs). By doing so, these personnel become Government employees, who must follow many Federal ethics rules and are required to file financial disclosure reports.

### **Financial Disclosure Report**

A Government-wide regulation, 5 C.F.R. 2634, and chapter 7 of the DoD 5500.7-R (Joint Ethics Regulation) require that all SGEs file either a public or confidential financial disclosure report (SF 278 or OGE Form 450) prior to their appointment (and yearly thereafter if reappointed), and in any event no later than assuming duties, giving advice, or attending their first advisory committee meeting.

The timing is essential so that the DFO and this office may review the reports prior to any possibility of an inadvertent violation to determine if there are any conflicts that the SGEs may have between their financial interests and their duties and responsibilities on the advisory committee. **This review by the DFO is crucial.** We depend on you to compare each SGEs financial interests with the agenda and topics of discussion of the committee, and note potential conflicts of interest. If you identify a potential conflict of interest, please contact an ethics official in SOCO immediately so that we may help resolve the issue. You should also perform this review before each meeting.

If there are no conflicts, you should sign the financial disclosure report as the "supervisor" of the SGE, and forward the report to this office, where we will review it for completeness, regulatory compliance, and conflicts of interest. Please remember, however, that we are not aware of the content of advisory committee discussions, so our ability to detect potential conflicts of interest is very limited. For that, we rely on the DFO. A copy of the OGE

Form 450, the report most likely filed, is included as Attachment A. We recommend using the form in Excel format that is posted on the SOCO web site, at [http://www.defenselink.mil/dodgc/defense\\_ethics/](http://www.defenselink.mil/dodgc/defense_ethics/), under the Ethics Resource Library, Forms, OGE Form 450. By using this form and saving the information, the SGE will be able to file the report in subsequent years merely by updating the current form rather than completing an entirely new form. The computer-generated form is also easier to read.

### **What's a Conflict of Interest?**

A conflict of interest or the appearance of loss of impartiality occurs when a Federal employee, who has an interest in a particular matter, takes some official action that has a direct and predictable affect on that interest. Official actions by the employee that affect the interests of persons with a relationship to the employee, such as spouses, children, business associates, and employers, may also trigger a conflict of interest.

For example, an employee may have a conflict of interest or the appearance of a loss of impartiality if she participates in an advisory committee meeting that reviews whether a certain weapons program should be continued and:

- the employee owns stock in the prime or subcontractor that supplies the weapon;
- the spouse of the employee owns stock in, or works for, the contractor(s);
- the employee is a consultant, employee, or former employee of the contractor(s);  
or
- the employee is a member of the board of directors of the contractor(s).

Official participation in particular matters that are part of the conflict is generally barred by either a criminal statute or regulation. The above examples illustrate a very important point: employees may participate in official matters in which they have a conflict of interest without realizing they have such a conflict. They either may be unaware that the particular matter conflicts with their personal financial interests, or that the interests of persons with whom they have a relationship may also cause a conflict. A lack of intent to defraud the Government or improperly profit from their official duties does not absolve them from prosecution.

### **Conflict of Interest Rules**

The conflict of interest statute most commonly involved is 18 U.S.C. 208(a), which prohibits Government employees, including SGEs,

- from officially participating personally and substantially (including making a recommendation, giving advice, or performing an investigation)
- in any particular matter (such as a dispute, contract, license, or agreement)
- that could affect, to their knowledge, their financial interests
  - as well as the financial interests of their spouse, minor child, general partner, an organization in which they serve as an officer, director, trustee, general partner, or employee, or an organization with which they are

negotiating or with which they have an arrangement for prospective employment.

The regulation dealing with the appearance of a loss of impartiality is 5 C.F.R. 2635.502, which prohibits Government employees, including SGEs,

- from officially participating personally and substantially (including making a recommendation, giving advice, or performing an investigation)
- in any particular matter involving specific parties (such as a dispute, contract, license, or agreement)
- that, to their knowledge,
  - is likely to have a direct and predictable effect on the financial interests of a member of their household, or
  - has a party, or representative of a party, with whom he has a covered relationship
    - “Covered relationships” include: relative with close personal relationship; person with whom the employee has a business, contractual, or financial relationship; organization in which employee is an active participant; any person for whom either the employee has served in the last year, or 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.
- where a reasonable person with knowledge of the relevant facts would question the employee’s impartiality.

### **Preventing Conflicts of Interest**

To prevent conflicts of interest, we take several precautions:

1. Consultants and committee members are appointed as Special Government Employees (SGEs), whether or not they are compensated.
2. All SGEs file a financial disclosure report that discloses their financial interests.
3. All SGEs sign a written statement disqualifying them from participation in particular matters that may affect any financial interest disclosed on their report.
4. DFOs and a DoD ethics official review financial disclosure reports to screen SGEs from matters in which they may have conflicts of interest.
5. All SGEs complete a foreign activities questionnaire to prevent violation of the U.S. Constitution.
6. Written ethics training material is provided to SGEs prior to appointment to inform them about conflicts of interest and other Government standards of conduct.
7. We orally brief committee members at meetings to remind them of these requirements.
8. DoD Ethics officials are readily available to SGEs and DFOs to answer questions or otherwise assist.

## Resolving Conflicts of Interest

Generally, DoD advisory committees address broad policy matters, not particular matters. This greatly reduces the potential for conflicts of interest. In certain instances, however, the committees may address matters that focus on the interests of specific persons or a discrete and identifiable class of persons. For example, an advisory committee may recommend that the Department purchase more unmanned aerial vehicles (UAVs). Since only two or three companies manufacture UAVs, such a recommendation would constitute a particular matter. Under the law, if an SGE has any of the interests discussed above in relation to one or more of those manufacturers, the SGE may have a conflict of interest.

If a conflict of interest is determined to exist, please consult with your ethics official to determine if a regulatory exemption exists. Such exemptions, for example, cover interests held in diversified mutual funds, or securities with aggregate values of less than \$15,000. There are other exemptions, as well.

If no exemption exists, the conflict is usually resolved by **disqualification**, meaning that the SGE does not participate in the particular matters. Commonly, the SGE simply leaves the room during such discussions. **DFOs should ensure that advisory committee minutes reflect that the SGE was not present during the relevant discussions.** SGEs are aware of the requirement to disqualify themselves because, when they submitted their financial disclosure reports, they also submitted written disqualifications from participating in particular matters affecting their financial interests. A copy of this form is included as Attachment B.

If it is not possible to disqualify an SGE, another (but less favored) option is to obtain a waiver from the Government official responsible for appointing the SGE. Such waivers are possible when the interest is not so substantial as to be deemed likely to affect the integrity of expected services. SOCO drafts waivers, which are ultimately reviewed by another Federal agency, the U.S. Office of Government Ethics. Employment interests generally cannot be waived. Stock interests may be waived if the stock is worth less than 5% of the SGE's total financial portfolio.

## Foreign Activities Questionnaire

SGEs must also complete the Foreign Activities Questionnaire. This document is required to determine if the SGE has accepted a position, title, or pay from a foreign government, all of which are prohibited by the Emoluments Clause of the U.S. Constitution. If an SGE declines to give up such a position or pay, he or she cannot serve on the advisory committee or as a Federal employee. The Questionnaire, DD Form 2859, is available on the DoD web site, at [http://www.defenselink.mil/dodgc/defense\\_ethics/](http://www.defenselink.mil/dodgc/defense_ethics/), under Ethics Resource Library, Forms. A copy is attached, along with the DoD General Counsel's cover letter, and a set of examples to assist you when advising SGEs. See Attachment C.

## **Training**

SGEs are required to receive initial ethics training pursuant to 5 C.F.R. 2638. Initial ethics training may be accomplished by providing instructional materials. (A copy, Attachment D, is attached.) In addition, ethics officials from SOCO seek to address each advisory committee at least annually. We use these briefings to highlight recent changes to regulations, remind the SGEs of how regulations apply to their personal and official activities, and answer questions from the SGEs. These in-person briefings are very useful for drawing out questions and assisting the SGEs in applying the regulations to their individual circumstances.

## **Bottom Line**

You, as the DFO, play a key role in preventing conflicts of interest. We, in SOCO, will assist, but we need your eyes and ears to alert us to potential problems. If you help us, we'll help you. Give us a call.

### **Attachments:**

- OGE Form 450
- Sample Disqualification Statement
- Foreign Activities Questionnaire
- Training Material

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May 14, 2005

**Hatch Act for Federal Employees**

The Hatch Act restricts the political activity of executive branch employees of the federal government, District of Columbia government and some state and local employees who work in connection with federally funded programs. In 1993, Congress passed legislation that significantly amended the Hatch Act as it applies to federal and D.C. employees (5 U.S.C. §§ 7321-7326). (These amendments did not change the provisions that apply to state and local employees. 5 U.S.C. §§ 1501- 1508.) Under the amendments most federal and D.C. employees are now permitted to take an active part in political management and political campaigns. A small group of federal employees are subject to greater restrictions and continue to be prohibited from engaging in partisan political management and partisan political campaigns.

OSC has developed a number of booklets, posters and fact sheets that explain the application of the Hatch Act. Copies of the booklets and posters can be ordered from the Government Printing Office. The fact sheet may be downloaded or emailed directly from the OSC website. Additionally, OSC has created a PowerPoint presentation - "Political Activity and the Federal Employee" - which covers the rules and regulations of the Hatch Act.

- Permitted/Prohibited Activities for Employees Who May Participate in Partisan Political Activity
- Agencies/Employees Who Are Prohibited From Engaging in Partisan Political Activity
- Permitted/Prohibited Activities for Employees Who May Not Participate in Partisan Political Activity
- Hatch Act Regulations
- Penalties for Violating the Hatch Act
- Advisories for Federal Employees
- Frequently Asked Questions and Answers for Employees Who May Engage in Partisan Political Activity

Federal employees should also be aware that certain political activities may also be criminal offenses under title 18 of the U.S. Code. See 18 U.S.C. §§ 210, 211, 594, 595, 600, 601, 602, 603, 604, 605, 606, 607, 610.

[\[Top\]](#)**Permitted/Prohibited Activities for Employees Who May Participate in Partisan Political Activity**

These federal and D.C. employees ***may***-

- be candidates for public office in nonpartisan elections
- register and vote as they choose
- assist in voter registration drives
- express opinions about candidates and issues
- contribute money to political organizations
- attend political fundraising functions
- attend and be active at political rallies and meetings
- join and be an active member of a political party or club
- sign nominating petitions
- campaign for or against referendum questions, constitutional amendments, municipal ordinances
- campaign for or against candidates in partisan elections
- make campaign speeches for candidates in partisan elections
- distribute campaign literature in partisan elections
- hold office in political clubs or parties

These federal and D.C. employees ***may not***-

- use official authority or influence to interfere with an election
- solicit or discourage political activity of anyone with business before their agency
- solicit or receive political contributions (may be done in certain limited situations by federal labor or other employee)

- organizations)
- be candidates for public office in partisan elections
- engage in political activity while:
  - on duty
  - in a government office
  - wearing an official uniform
  - using a government vehicle
- wear partisan political buttons on duty

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### **Agencies/Employees Prohibited From Engaging in Partisan Political Activity**

Employees of the following agencies (or agency components), or in the following categories, are subject to more extensive restrictions on their political activities than employees in other Departments and agencies:

Administrative Law Judges (positions described at 5 U.S.C. § 5372)  
Central Imagery Office  
Central Intelligence Agency  
Contract Appeals Boards (positions described at 5 U.S.C. § 5372a)  
Criminal Division (Department of Justice)  
Defense Intelligence Agency  
Federal Bureau of Investigation  
Federal Elections Commission  
Merit Systems Protection Board  
National Security Agency  
National Security Council  
Office of Criminal Investigation (Internal Revenue Service)  
Office of Investigative Programs (Customs Service)  
Office of Law Enforcement (Bureau of Alcohol, Tobacco and Firearms)  
Office of Special Counsel  
Secret Service  
Senior Executive Service (career positions described at 5 U.S.C. § 3132(a)(4))

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### **Permitted/Prohibited Activities for Employees Who May Not Participate in Partisan Political Activity**

These federal employees **may**-

- register and vote as they choose
- assist in voter registration drives
- express opinions about candidates and issues
- participate in campaigns where none of the candidates represent a political party
- contribute money to political organizations or attend political fund raising functions
- attend political rallies and meetings
- join political clubs or parties
- sign nominating petitions
- campaign for or against referendum questions, constitutional amendments, municipal ordinances

These federal employees **may not**-

- be candidates for public office in partisan elections
- campaign for or against a candidate or slate of candidates in partisan elections
- make campaign speeches
- collect contributions or sell tickets to political fund raising functions
- distribute campaign material in partisan elections
- organize or manage political rallies or meetings
- hold office in political clubs or parties
- circulate nominating petitions

- work to register voters for one party only
- wear political buttons at work

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**Hatch Act Regulations**

Date	Title	Format
1/1/01	Political Activity - Federal Employees Residing in Designated Localities [5CFR733]	 
1/1/01	Political Activities of Federal Employees [5CFR734]	 

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**Penalties for Violating the Hatch Act**

An employee who violates the Hatch Act shall be removed from their position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Merit Systems Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board.

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**Advisories for Federal Employees**

Date	Title	Format
8/9/04	Candidate Visits to Federal Agencies	 
5/3/04	D.C. Employee Serving as an Officer of a Campaign Committee	 
4/30/04	Federal Reserve Bank Board of Directors Not Covered	 
5/25/04	Voter Registration Drives in the Workplace(2)	 
4/14/04	Voter Registration Drives in the Workplace	 
3/18/03	Wearing Antiwar or Nonpartisan Buttons in the Workplace	 
6/04/02	Running for Political Party Office	 
5/30/02	Use of electronic messaging devices (e.g., e-mail) to engage in political activity	 
4/30/02	Appointment to Public Office	 
4/30/02	Candidacy in a Non Partisan Election	 
1/18/02	Designated Localities and Independent Candidacy Transforms to a Partisan Candidacy	 
1/16/02	Non-Partisan Election Transformed to Partisan Election	 

6/27/01	Temporary, Part-Time and Emergency Employees	 
4/23/01	Write-In Candidacy	 
2/14/01	Retirement of campaign debt	 
1/10/01	When does candidacy begin (2)	 
7/19/00	Irregularly Scheduled Employee Running for Public Office	 
2/25/00	Reimbursement of de minimis expenses for PAS employees	 
2/11/00	Serving as an officer for an organization that has a PAC	 
3/19/99	When does candidacy begin	 
12/30/98	Elected official accepting federal employment	 
5/20/98	Candidacy in a partisan election	 
3/2/98	Working for a partisan campaign	 
12/17/97	Nonappropriated fund employees	 
11/25/97	Candidacy for regularly scheduled employees	 
11/25/97	Displaying political signs in federal housing	 
11/18/97	Serving as a treasurer of a campaign	 
10/16/97	Restricted employee becoming a member of a partisan political group	 
3/28/97	Receipt of political material at work	 
10/16/96	Solicitation of services from subordinate employees	 
7/8/96	Salary allotments	 
5/8/96	Taking a leave of absence to work on a campaign	 
3/20/96	Restricted employee working on a campaign	 
2/13/96	Testing the waters	 
2/9/96	Serving as a delegate to a party convention	 

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**Frequently Asked Questions and Answers For Employees Who May Engage in Partisan Political Activity**

Listed below are answers to some of the most frequently asked questions received by OSC about political activity by federal

employees.

**Question: Can I make a contribution to the campaign of a partisan candidate, or to a political party or organization?**

*Answer: Yes. A federal employee may contribute to the campaign of a partisan candidate, or to a political party or organization.*

**Question: If I have a bumper sticker on my personal car, am I allowed to park the car in a government lot or garage, or in a private lot/garage if the government subsidizes my parking fees?**

*Answer: Yes. An employee is allowed to park his or her privately owned vehicle with bumper sticker in a government lot or garage. An employee may also park the car with a bumper sticker in a private lot or garage for which the employee receives a subsidy from his or her agency.*

**Question: Can I help organize a political fundraiser?**

*Answer: An employee is allowed to organize a fundraiser, including supplying names for the invitation list, as long as he or she does not personally solicit, accept, or receive contributions.*

**Question: Can my name appear on invitations to a political fundraiser as a sponsor or point of contact?**

*Answer: No. An employee's name may not be shown on an invitation to such a fundraiser as a sponsor or point of contact.*

**Question: Can I speak at a political fundraiser?**

*Answer: An employee is allowed to give a speech or keynote address at a political fundraiser, as long as he or she is not on duty, and does not solicit political contributions.*

**Question: If I'm going to speak at a political fundraiser, what information about me can be printed on the invitations?**

*Answer: An employee's name can be shown as a guest speaker. However, the reference should not in any way suggest that the employee solicits or encourages contributions. Invitations to the fundraiser may not include the employee's official title; although an employee who is ordinarily addressed with a general term of address such as "The Honorable" may use, or permit the use of, that term of address on the invitation.*

**Question: Can I attend a state or national party convention? If so, in what capacity?**

*Answer: Yes. A federal employee may serve as a delegate, alternate, or proxy to a state or national party convention.*

**Question: If I run as a candidate for public office in a nonpartisan election, does the Hatch Act allow me to ask for and accept political contributions?**

*Answer: An employee who is a candidate for public office in a nonpartisan election is not barred by the Hatch Act from soliciting, accepting, or receiving political contributions for his or her own campaign.*

**Question: May I distribute brochures for a political party to people arriving at a polling place on Election Day?**

*Answer: Yes. An employee may stand outside a polling place on Election Day and hand out brochures on behalf of a partisan political candidate or political party.*

Answers to other questions about allowable political activity by federal employees can also be found in Hatch Act regulations in title 5 of the Code of Federal Regulations. Questions not answered above, or in the regulations, can be submitted to OSC for an advisory opinion.

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## ***ETHICS RULES FOR ADVISORY COMMITTEE MEMBERS AND OTHER INDIVIDUALS APPOINTED AS SPECIAL GOVERNMENT EMPLOYEES (SGEs)***

### Introduction

This summary has been prepared primarily for members appointed to serve on the Base Realignment and Closure (BRAC) Commission, a Department of Defense (DoD) advisory committee, as Special Government Employees (SGEs). If you have questions on any of the topics covered in this guidance, you should consult with the General Counsel, David Hague, the Ethics official, Rumu Sarkar, or the Designated Federal Official, Dan Cowhig, of the legal office of the BRAC Commission.

### Definition of a Special Government Employee (SGE)

An "SGE," or "special Government employee," is an officer or employee in the executive branch of the Federal Government who is appointed to perform temporary duties, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days. 18 U.S.C. 202(a). Even if you exceed the 130 days, you will still be considered to be an SGE for the remainder of that 365-day period. All days you work (whether paid or unpaid), and even if you do not work the entire day, counts towards the 130 day limit. The 365-day period begins the day you start working (not the day you were appointed to the BRAC Commission). The SGE status is important because the ethics rules for SGEs are somewhat less restrictive than the rules for other Federal employees and officials.

### Financial Disclosure Reporting Requirements

All BRAC Commissioners have been appointed as SGEs, and are required under the Ethics in Government Act, as amended by the Ethics Reform Act of 1989, and 5 C.F.R. Part 2634, to file a financial disclosure report (SF-278 form) when first appointed. (Committee members also may be required to update the information on the report before each meeting throughout their term of appointment.)

The information reported is used to determine the matters for which a Commissioner must be disqualified under the criminal financial conflict of interest statute, 18 U.S.C. 208(a), and the matters for which a committee member may be granted a waiver under 18 U.S.C. 208(b). Complete reporting is essential to protect the committee member from inadvertently violating any of the criminal conflict of interest statutes, and to assure the public that the advice provided by an HHS advisory committee is free from any real, or perceived, conflicts of interest.

The information reported by Commissioners is confidential. However, once you have worked for 60 days or more for the BRAC Commission in any period of 365 consecutive days, this SF-278 form may be released upon an appropriate request. (See e.g., OGE form 201, *Request to*

*Inspect or Receive Copies of SF 278 Executive Branch Personnel Public Financial Disclosure Report or Other Covered Report.*) However, the SF-278 form may not be released under Freedom of information (FOIA) requests. You have the ability to inquire and be informed about such requests of your SF-278 form by filing an OGE form 201, or similar form, with the BRAC Legal Office.

I. Criminal Conflict of Interest Statutes

The following criminal conflict of interest statutes (18 U.S.C. 201-216) apply to SGEs:

- **18 U.S.C. 201.** Section 201, commonly known as the "bribery and illegal gratuities" 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.
- **18 U.S.C. 203.** Section 203 prohibits an SGE from receiving compensation for representational services rendered by the employee or another person before HHS or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party (i) in which the SGE has participated personally and substantially as a Government employee, or (ii) which is pending in the Government agency in which the SGE is serving if the SGE has served for more than 60 days during the immediately preceding 365 days.

Exempted from this rule are representations required in the proper discharge of official duties. Also exempted are representations required in the performance of work under a grant, contract or other agreement with or for the benefit of the Government.

A particular matter involving specific parties is a matter that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Particular matters may include, but are not limited to, reviews of grant proposals or contract applications, other funding decisions, studies or approvals of scientific studies or projects, and other actions that involve deliberation, decision, or action.

Representational services include communications (written or oral) and appearances made on behalf of someone else, generally with the intent to influence or persuade the Government.

An inquiry as to the status of a pending matter is not necessarily a representation, although depending upon the context of the inquiry, it could give rise to the appearance of a prohibited representation.

To avoid appearance problems, during the period in which a committee is in session, Commissioners are advised not to contact Department staff concerning any matters pending before the agency, or as to which the agency has an interest.

- **18 U.S.C. 205.** Section 205 prohibits an SGE from representing a party, with or without compensation, before the BRAC Commission or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party in which the United States is a party or has a direct and substantial interest: (i) that the SGE participated in personally and substantially as a Government employee; or (ii) which is pending in the agency in which the SGE is serving, if the SGE has served for more than 60 days during the immediately preceding 365 days.
- **18 U.S.C. 207.** Section 207, the "post-employment" statute, imposes a lifetime ban on a former SGE from representing another person or entity to the BRAC Commission or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party in which the former SGE participated personally and substantially while serving in the Government. In addition, for two years after terminating Federal employment, an SGE may not make such representational communications to the Government regarding specific party matters that were pending under his or her official responsibility during the last year of Government service.

Moreover, "senior employees," those paid at an annual rate equivalent to level ES-5 in the Senior Executive Service, are subject to a one-year "cooling-off" period which precludes any contacts with their former agency on any matter for which official action is sought, even if the former employee had no involvement with the matter while in Government service. For SGEs, this one-year "cooling-off" period does not apply if the SGE served less than 60 days in the one-year period prior to termination of senior employee status.

- **18 U.S.C. 208.** Section 208(a), the main conflict of interest statute, prohibits an SGE from participating personally and substantially in any particular matter that could affect the financial interests of the SGE, the SGE's spouse, minor child, general partner, an organization in which the SGE serves as an officer, director, trustee, general partner, or employee, or an organization with which the SGE is negotiating or with which the SGE has an arrangement for prospective employment.

A *waiver* for Commissioners may be granted under 18 U.S.C. 208(b)(3). Section 208(b)(3) authorizes issuance of a waiver to an SGE who serves on a committee subject to the Federal Advisory Committee Act if the official responsible for the individual's appointment certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the particular financial interest involved. The waiver granted is considered a "general" waiver, in that it allows participation in matters that affect all institutions, or types of institutions, similarly. Even with a general waiver, however, SGEs must disqualify themselves from participation in all matters that specifically and uniquely affect their financial interests. The Ethics Official or the Designated Federal Official are available to further explain the procedures for disqualification.

In addition, under regulations issued by the Office of Government Ethics, a regulatory (i.e., automatic) waiver of the disqualification requirement of 18 U.S.C. 208 is available under certain circumstances, including instances involving the following classes of financial interests:

- interests held in broadly diversified investment funds;
- publicly traded securities of \$5,000 or less;
- publicly traded securities of \$25,000 or less if the matter is a general policy matter and the total value of all investments in the affected industry sector is no more than \$50,000;

In addition, there is an automatic exemption which allows SGEs serving on Federal advisory committees to participate in matters of general applicability where the otherwise-disqualifying financial interest arises solely from the committee member's non-Federal employment or 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.

## II. Standards of Ethical Conduct

The following are some of the major Standards of Ethical Conduct regulations (5 C.F.R. Part 2635) that may pertain to BRAC Commissioners during the term of their appointment:

### 1. Teaching, Speaking and Writing in a Personal Capacity (Other Than as a Government Employee)

Generally, during their term of appointment, advisory committee members (such as the BRAC Commissioners) may continue to receive fees, honoraria, and other compensation for teaching, speaking and writing undertaken in their personal or non-Governmental capacities. However, there are some limitations:

- (1) An SGE is prohibited from receiving compensation for teaching, speaking, and writing that "relates to the employee's official duties." 5 C.F.R. 2635.807. The "relatedness" test is met for an SGE if:
  - (1) the activity is undertaken as an official Government duty;
  - (2) the circumstances indicate that the invitation to engage in the activity was extended to the SGE primarily because of the employee's position in the Government rather than the employee's expertise on the particular subject matter;
  - (3) the invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by the performance or

- nonperformance of the employee's official duties; or
- (4) the information conveyed through the activity draws substantially on ideas or official data that are confidential or not publicly-available.
  - (2) Additionally, if a Commissioner serves for 60 days or less during a one-year period, the SGE may not accept compensation for teaching, speaking, and writing if the subject matter of the teaching, speaking or writing concerns a particular matter, involving specific parties, in which the SGE participated or is participating personally and substantially as a Government employee.
  - (3) If a committee member serves for more than 60 days, the SGE is additionally prohibited from receiving compensation for teaching, speaking, and writing if the subject of the activity deals in significant part with any matter to which the SGE is presently assigned or was assigned during the previous one-year period.

#### EXCEPTIONS:

1. This rule does not preclude a committee member from receiving compensation for teaching, speaking, or writing on a subject within the committee member's discipline or inherent area of expertise based on the SGE's educational background or experience. The outside activity must not be about or distinctly related to the work the SGE is providing to the Government.
2. These restrictions also 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 government.

#### III. Gifts

Any gift given to a committee member because of the member's service on the BRAC Commission will raise concerns. The Ethics Official or the Designated Federal Official should be consulted should this situation arise. Gifts given to a Commissioner because of their position or achievements in the private (non-Government) sector may be permitted, depending on the circumstances. (Under the Foreign Gifts and Decorations Act, 5 U.S.C. Sec. 7342, gifts from foreign governments of a minimal value of \$305.00 or less may be accepted, but please consult the Ethics Official concerning this.)

#### IV. Impartiality

Although Commissioners are prohibited under 18 U.S.C. 208(a) from participating in matters in which they have a financial interest, there may be other circumstances in which a committee member's participation in a particular matter involving specific parties would raise a question

regarding the member's impartiality in the matter. For example, a Commissioner's impartiality may be questioned if he or she has business ties to a contractor near a base scheduled for closure or realignment, or has a close personal or professional relationship with such a business concern. In such circumstances, the committee member should discuss the relationship with the Ethics Official or the Designated Federal Official so that a determination may be made as to whether the Commissioner in question should be disqualified from participation in the matter, or should be granted an "authorization" to permit the member to participate in the matter. 5 C.F.R 2635.502.

#### V. Misuse of Position

Commissioners are also subject to a number of prohibitions intended to address the use, or appearance of use, of "public office for private gain." 5 C.F.R. Part 2635, Subpart G. These prohibitions include:

- (1) Using their BRAC or DoD titles or referring to their Government positions for their own private gain, the private gain of friends, relatives, or anyone with whom they are affiliated in a non-Governmental capacity (including nonprofit organizations which they serve as officers, members, employees, or in any other business relationship), or for the endorsement of any product, service, or enterprise.
- (2) Using their official titles or Government positions to coerce or induce another person to provide any benefit to themselves or another person.
- (3) Using non-public Government information in a financial transaction to further their private interests or those of another, or disclosing confidential or non-public information without authorization.
- (4) Using Government property for unauthorized purposes.

#### VI. Employment by, or Gifts from, Foreign Governments

There are Constitutional limitations on a committee member's employment by a foreign government, including political subdivisions of a foreign government. For SGEs, this provision has particular relevance to positions with foreign universities that are government-operated rather than private institutions. United States Constitution, art. I 9, cl. 8. There are also statutory provisions restricting acceptance of gifts from foreign governments. 5 U.S.C. 7342. Commissioners should consult with the Ethics Official or the Designated Federal Official for details about these restrictions.

#### VII. Lobbying Activities

In their official capacities or as a group, Commissioners are prohibited from engaging in any activity which directly or indirectly encourages or directs any person or organization to lobby one or more members of Congress. 18 U.S.C. 1913. When authorized, Commissioners may appear before any individual or group for the purpose of informing or educating the public about a particular policy or legislative proposal.

Commissioners also may communicate to Members of Congress at the request of any Representative or Senator. Communications to Members of Congress initiated by individual Commissioners, in their official capacity as members of the BRAC Commission, should be coordinated through the Office of the Chairman.

As private citizens, Commissioners may express their personal views (but not the views of the BRAC Commission by stating their affiliation with the Commission, by factually state the committee's official position on the matter (to the extent that non-public information is not used). However, Commissioners may not take new positions and represent those views as the BRAC's position on the matter. Moreover, in expressing their private views, as with all other personal (non-Governmental) activities, Commissioners are not permitted to use Government computers, copiers, telephones, letterhead, staff resources, or other appropriated funds. All personal activities must occur "off duty time."

In addition, committee members are prohibited in their personal capacities from making representations on behalf of others, to the Government, on particular matters involving specific parties in which they were involved as Government employees. (See discussion above under 18 U.S.C. 203 & 205.)

#### VIII. Political Activities

The Hatch Act (5 U.S.C. 7321-7328) prescribes the restrictions on certain political activities of Federal employees (see chart below). Unlike the criminal statutes and most of the other ethics rules which are fully applicable to an SGE throughout the SGE's entire term of appointment, the Hatch Act restrictions apply only during the period of any day in which the SGE actually is performing Government business. For example, if an SGE attends an advisory committee meeting from 8:00 am - 1:00 pm, at 3:00 pm, the SGE could attend a political fund raiser and even solicit political contributions from the attendees. There are also criminal political statutes that apply at all times and prohibit coercion and intimidation regarding political activities.

If you are considering engaging in political activities such as those described below in the chart), please contact the Ethics Official or the Designated Federal Official for guidance before agreeing to or accepting any participation in political activities.



<i>Permissible Activities</i>	<i>Prohibited Activities (while on duty)</i>
<ul style="list-style-type: none"> <li>* <i>May be candidates for public office in nonpartisan elections</i></li> <li>* <i>May register and vote as they choose.</i></li> <li>* <i>May assist in voter registration drives.</i></li> <li>* <i>May express opinions about candidates and issues.</i></li> <li>* <i>May contribute money to political organizations.</i></li> <li>* <i>May attend political fund raising functions.</i></li> <li>* <i>May attend and be active at political rallies and meetings.</i></li> <li>* <i>May join and be an active member of a political party or club.</i></li> <li>* <i>May sign nominating petitions.</i></li> <li>* <i>May campaign for or against referendum questions, constitutional amendments, municipal ordinances.</i></li> <li>* <i>May campaign for or against candidates in partisan elections.</i></li> <li>* <i>May distribute campaign literature in partisan elections.</i></li> <li>* <i>May hold office in political clubs or parties (except Treasurer).</i></li> </ul>	<ul style="list-style-type: none"> <li>* <i>May not use their official authority to interfere with an election.</i></li> <li>* <i>May not collect political contributions, unless both individuals are members of the same Federal labor organization and the one solicited is not a subordinate employee.</i></li> <li>* <i>May not knowingly solicit or discourage the political activity of any person who has business before the agency.</i></li> <li>* <i>May not engage in political activity while on duty.</i></li> <li>* <i>May not engage in political activity in any Government office.</i></li> <li>* <i>May not engage in political activity while wearing an official uniform.</i></li> <li>* <i>May not engage in political activity while using a Government vehicle.</i></li> <li>* <i>May not solicit political contributions from the general public.</i></li> <li>* <i>May not actively participate candidate for public office in a partisan election.</i></li> </ul>



# POST-GOVERNMENT SERVICE EMPLOYMENT RESTRICTIONS

## (RULES AFFECTING YOUR NEW JOB AFTER DoD)

For Military Personnel E-1 through O-6 and  
Civilian Personnel whose rate of basic pay is less than 86.5% of the rate  
for

Executive Schedule Level II (less than \$140,216.50 in 2005)

IMPORTANT NOTICE: This information was prepared to assist Department of Defense (DoD) personnel who receive their ethics support from the DoD Standards of Conduct Office (SOCO) and who are planning to leave Government service. It identifies statutes and regulations that restrict or otherwise affect activities of Government personnel after they leave Government service. Because restrictions are dependent on specific facts, and because this information is a summary of the rules, DoD personnel should contact SOCO at (703) 695-3422 or by e-mail at [soco@dodgc.osd.mil](mailto:soco@dodgc.osd.mil) to discuss their particular situations. DoD personnel served by other ethics offices should consult with their ethics officials. Of course, if you want, you may also consult with private counsel.

Advice from ethics officials with respect to these matters is advisory only, and is provided in accordance with 5 C.F.R. 2635.107 and 41 U.S.C. 423 (Procurement Integrity Act). Ethics officials are acting on behalf of the United States, and not as your personal representative. There is no attorney-client relationship created by the consultation.

## **Part 1: Employment Restrictions After Leaving DoD**

### ***Personal Lifetime Ban***

1.1 **SIMPLIFIED RULE**: After you leave Government service, you may not represent someone else to the Government regarding *particular matters* that you worked on while in Government service.

1.1.1 **RULE**: Former Government officers and employees may not knowingly make a communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of any Federal agency or court in connection with a *particular matter* in which the officer or employee *personally and substantially* participated, which involved a *specific party* at the time of the participation and representation, and in which the U.S.

is a party or has a direct and substantial interest. (18 U.S.C. 207(a) (1)) (This rule does not apply to former military enlisted personnel.)

1.1.1.1 "Particular Matter" - matters that involve deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons. These matters may include a contract, claim, application, judicial, or other proceeding, request for a ruling or other determination, controversy, investigation, or charge. A Particular matter could even include legislation or policy-making that is narrowly focused on the interests of a discrete and identifiable group of parties or organizations, e.g., DoD policy affecting only military aircraft manufacturers. For this statute, particular matters must also involve "specific parties." This means that identifiable parties exist. For example, a procurement may be a Particular matter, but it may not become one involving Specific parties until the first bid is received.

1.1.1.2 Personal and substantial participation - This means that you are directly participating in the matter or that one or more of your subordinates, whom you are directing, is participating. Also, the participation must be of significance to the matter, which may be based on the amount and importance of your effort. One act, such as approving a critical step, may be substantial. Likewise, if you have to review and approve a certain step, and work would stop if you didn't approve, then your participation is substantial, even though it may have seemed like a paperwork exercise to you. On the other hand, an entire series of peripheral acts might not be substantial.

If you merely have knowledge of the matter, routine or superficial involvement, or involvement on a peripheral or administrative issue, you are not Substantially involved. If you are not involved in the substantive merits, you may not be substantially involved, even though you put a lot of time into the matter. If you are merely responsible for reviewing the matter for compliance with administrative or budgetary considerations, you are also not substantially involved.

1.1.2 This ban remains for the lifetime of the Particular matter.

### ***Official Responsibility 2 Year Ban***

1.2 **SIMPLIFIED RULE**: For 2 years after leaving Government service, you may not represent someone else to the Government regarding *particular matters* that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

1.2.1 **RULE**: For a period of 2 years after termination of Government service, former Government officers and employees may not knowingly make a communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of any Federal agency or court, in connection with a particular matter which the employee reasonably should have known was actually pending under his or her *official*

*responsibility* within 1 year before the employee left Government service, which involved a specific party at that time, and in which the U.S. is a party or has a direct and substantial interest. (18 U.S.C. 207(a) (2)) (This rule does not apply to former military enlisted personnel.)

1.2.1.1 "Official responsibility" - direct administrative or operating authority to approve, disapprove, or otherwise determine, Government actions. It includes a supervisor at any level having responsibility for the actions of a subordinate employee who actually participates in a matter.

1.2.2 Although you may have been disqualified from personally acting on a particular matter when you were in Government service, this section of the statute will still apply to you. (Example: Because you owned stock in IBM while in Federal service, you were disqualified from reviewing a particular contract with IBM, which was reviewed by one of your subordinates. Under this statute, because the particular matter was under your responsibility during your last year of service, you are prohibited from representing others regarding that contract.)

### ***Trade or Treaty 1 Year Ban***

1.3 **SIMPLIFIED RULE**: For *1 year* after leaving Government service, you may not aid, advise, or represent someone else regarding trade or treaty negotiations that you worked on during your last year of Government service.

1.3.1 **RULE**: For a period of 1 year after leaving Government service, former employees or officers may not knowingly represent, aid, or advise someone else on the basis of *covered information*, concerning any ongoing *trade or treaty negotiation* in which the employee participated personally and substantially in his last year of Government service. (18 U.S.C. 207(b)) (This rule does not apply to former military enlisted personnel.)

1.3.1.1 Trade negotiations are those undertaken pursuant to the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 2902). Treaties are international agreements that require the advice and consent of the Senate.

1.3.1.2 "Covered information" - agency records accessible to the employee but exempt from disclosure under the Freedom of Information Act.

1.4 **EXCEPTIONS**: There are exceptions to the restrictions of 18 U.S.C. 207, including acts pursuant to official Government duties; and aiding, advising, or representing certain international organizations with prior Secretary of State certification. Restrictions under 18 U.S.C. 207(a) do not apply to communications that furnish scientific or technological information with prior, published certification by the Secretary of Defense. There are special rules regarding testimony under oath. Consult SOCO for specific guidance.

## **Part 2: Compensation Ban on Representation by Others**

2.1 **RULE: COMPENSATION FOR REPRESENTATION TO THE GOVERNMENT BY OTHERS:** After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service. (Examples: Lobbying, consulting, and law firms). (18 U.S.C. 203). (This rule does not apply to former enlisted military personnel.)

## **Part 3: Additional Restrictions for Retired Military Personnel and Reservists**

3.1 **SIMPLIFIED RULE: FOREIGN EMPLOYMENT:** Unless you receive prior authorization from your Service Secretary, you may forfeit your military pay during the time you perform compensated services for a foreign government.

3.1.1 **RULE:** The U.S. Constitution prohibits retired military personnel and reservists from receiving pay from *foreign governments* without Congressional authorization. In some cases this includes receipt of pay from a U.S. contractor or subcontractor for providing services to a foreign government. In 37 U.S.C. 908, Congress authorizes the Secretary of State and Secretary of the appropriate military department to approve such receipt of pay. Each military service has implementing directives. Retired personnel and reservists who violate this Constitutional proscription may forfeit pay equal in amount to their foreign pay.

3.1.1.1 "Foreign Governments" - include educational and commercial institutions that are owned or controlled by foreign governments, as well as corporations that are owned by foreign governments and have a unity of interest with the government. Corporations that maintain a separate identity and are not mere agents or instrumentalities of the foreign government, even if owned by a foreign government, are not considered to be part of a foreign government.

3.2 **RULE: EMPLOYMENT BY DOD:** To avoid the appearance of favoritism, 5 U.S.C. 3326 prohibits the appointment of retired military personnel to civil service positions (including a nonappropriated fund activities) in any DoD component for 6 months after retirement. (However, this restriction has been waived during the current period of national emergency existing since 9/12/01.)

3.2.1 The Secretary concerned may waive this prohibition.

3.2.2 DoD Directive 1402.1 requires the Secretary concerned to conduct intensive external recruitment before granting the waiver.

3.3 **RULES: EMPLOYMENT DURING TERMINAL LEAVE:**

3.3.1 **HOLDING A CIVIL OFFICE IN STATE OR LOCAL GOVERNMENT:**  
While on active duty (including terminal leave) military *officers* are prohibited by 10 U.S.C. 973(b) from holding a "civil office" with a state or local government.

3.3.2 **CIVILIAN POSITION IN THE U.S. GOVERNMENT:** Military personnel on terminal leave are authorized to accept a civilian position in the U.S. Government and receive the pay and allowances of that position as well as their military pay and allowances. (5 U.S.C. 5534a).

3.3.3. Please remember that while on terminal leave, you are still an active-duty service member, and the restrictions that apply to you while on active duty still apply. For example:

3.3.3.1. Restrictions on political activities.

3.3.3.2. Restriction on representing others to the Federal Government.  
(You may not represent anybody outside the Government to the Government on any particular matter involving the Government. 18 U.S.C. 205)

3.3.3.3. Outside employment. (If you are currently required to obtain permission prior to engaging in outside employment, that requirement will most likely carry over to you during terminal leave. Check with your supervisor.)

## **Part 4: Administrative Reminders**

4.1 **FINANCIAL DISCLOSURE REPORT:** DoD personnel who have been filing an SF 278, Public Financial Disclosure Report, must file a final report not later than the 30 days after termination. If, within that period, you accept another U.S. Government position subject to the filing requirement, no final report is required. You should give your new ethics official a copy of your last SF 278. If you file more than 30 days late, you are subject to a \$200 late filing fee. In addition, if you knowingly and willfully fail to file this report, we must refer your name to the Attorney General, who may sue you in U.S. District Court and subject you to substantial civil penalties.

4.2 **USE OF NONPUBLIC INFORMATION:** Even though you have left Government service, you still may not use nonpublic information to further your own private interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.

4.3 **IF YOU ACCEPTED A BUY-OUT:** If you accepted a "buy-out" or separation payment, you have re-employment restrictions. Please contact your personnel office if you are unsure of those measures.

4.4 **QUESTIONS? PLEASE CALL US:** If you have questions, even *after* you leave Government service, please call the DoD Standards of Conduct Office: (703) 695-3422. Fax: (703) 697-1640. E-mail: [soco@dodgc.osd.mil](mailto:soco@dodgc.osd.mil). We would much rather talk to you before you take action, than read adverse reports about you (from the IG or in the media) after you have taken the action.

4.5 Thank you for your service to your country.

*(This guidance was produced by the DoD General Counsel's Office [Standards of Conduct Office], [SOCO@DODGC.OSD.MIL](mailto:SOCO@DODGC.OSD.MIL) or (703)695-3422).*

DCN: 12154

## **ETHICS RULES FOR ADVISORY COMMITTEE MEMBERS AND OTHER INDIVIDUALS APPOINTED AS SPECIAL GOVERNMENT EMPLOYEES (SGEs)**

### Introduction

This summary has been prepared primarily for individuals appointed to serve as "special Government employees" (SGEs) on Department of Health and Human Services (HHS) advisory committees or Presidential boards, councils, or commissions that are attached to HHS for purposes of administration. The information also will be useful to other SGEs without advisory committee responsibilities, such as "experts or consultants" or "personal services contractors."

New appointees, especially those that provide temporary, intermittent services only a few days a year, often are surprised by, or even resentful of, the complexity of the rules governing Federal employees. The ethics rules do not appear to many people to be logical, intuitive, or even, fair. Ignoring these rules, however, can result in serious consequences or embarrassment, both personally and for the Department. Criminal conflict of interest violations are "strict liability" offenses, and even an inadvertent, "technical" violation will require the initiation of an Inspector General investigation and possible referral to the Department of Justice. Moreover, the entire matter in which a violator participates may be considered so compromised that the Department may have to nullify, cancel, or retract any agency action that is perceived as tainted by the conflict. Therefore, if you have questions on any of the topics covered in this guidance, you should consult with the Designated Federal Official responsible for your committee or the Deputy Ethics Counselor assigned to your operating or staff division.

### Definition of a Special Government Employee (SGE)

A "special Government employee" is an officer or employee in the executive branch of the Federal Government who is appointed to perform temporary duties, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days. 18 U.S.C. § 202(a). This status is important because the ethics rules for SGEs are somewhat less restrictive than the rules for other Federal employees and officials. Some members of advisory committees are appointed for a multi-year term. During each year of their term of appointment, committee members generally will not be expected to perform work for HHS in excess of 130 days during any period of 365 consecutive days. Thus, most committee members will be considered "SGEs."

In addition, individuals who provide advice as an "expert or consultant" or render assistance under a "personal services contract" for a period that is not expected to exceed 130 days do so as the functional equivalent of an employee and thus are treated as SGEs for ethics purposes. Only "true" independent contractors are excluded from the definition. Although several factors are evaluated to determine independent contractor status, this category, for the most part, comprises individuals who produce a defined "end product" or "deliverable" without detailed supervision by a Federal employee.

Office of the General Counsel  
Ethics Division  
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### Financial Disclosure Reporting Requirements

HHS advisory committee members appointed as SGEs are required under the Ethics in Government Act, as amended by the Ethics Reform Act of 1989, and 5 C.F.R. Part 2634, to file a financial disclosure report when first appointed and annually thereafter on the anniversary date of their appointment. Committee members also may be required to update the information on the report before each meeting throughout their term of appointment. (Certain committee members are permitted to utilize an alternative reporting system, e.g., FDA Form 3410, that focuses solely on each filer's assets and associational interests that are directly implicated by the subjects on the meeting agenda.) The information reported is used to determine the matters for which a committee member must be disqualified under the criminal financial conflict of interest statute, 18 U.S.C. § 208(a), and the matters for which a committee member may be granted a waiver under 18 U.S.C. § 208(b).

Complete reporting is essential to protect the committee member from inadvertently violating any of the criminal conflict of interest statutes, and to assure the public that the advice provided by an HHS advisory committee is free from any real, or perceived, conflicts of interest. The information reported by committee members is confidential and may not be released except under the limited circumstances described in the Privacy Act notice provided with the report or by order of a Federal court. (SGEs who serve more than 60 days in any period of 365 consecutive days and who are compensated at certain pay levels may be required to file a publicly available financial disclosure report.)

### Criminal Conflict of Interest Statutes

The following **criminal** conflict of interest statutes apply to SGEs:

**18 U.S.C § 201.** Section 201, commonly known as the "bribery and illegal gratuities" 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.

**18 U.S.C. § 203.** Section 203 prohibits an SGE from receiving compensation for representational services rendered by the employee or another person before HHS or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party (i) in which the SGE has participated personally and substantially as a Government employee, or (ii) which is pending in the Government agency in which the SGE is serving if the SGE has served for more than 60 days during the immediately preceding 365 days.

Exempted from this rule are representations required in the proper discharge of official duties. Also exempted are representations determined by the head of the agency to be required in the performance of work under a grant, contract or other agreement with or for the benefit of the Government.

A particular matter involving specific parties is a matter that is focused upon the interests of identified persons in a specific proceeding or an isolatable transaction or related set of transactions. Examples include, but are not limited to, reviews of grant proposals or contract applications, or similar funding decisions; recommendations or approvals of scientific studies, projects, clinical trials, new drug applications; and other actions that involve deliberation, decision, or action affecting the legal rights of identified parties.

In contrast, a particular matter of general applicability is a matter that is focused on the interests of a discrete and identifiable class of persons or entities, but does not involve specific parties. Examples include recommendations or consideration of legislative proposals, regulatory initiatives, or policy development that affect an industry, group of manufacturers, or health care providers.

Pay close attention to which type of particular matter is involved in your assignment because the ethics rules may differ depending upon whether a "specific party matter" or a "general policy matter" is involved. The terms "matter" or "particular matter," without more description, are deemed to encompass both types.

Representational services include communications (written or oral) and appearances made on behalf of someone else, generally with the intent to influence or persuade the Government. An inquiry as to the status of a pending matter is not necessarily a representation, although depending upon the context of the inquiry, it could give rise to the appearance of a prohibited representation.

To avoid appearance problems, during the period in which a committee is in session, committee members are advised not to contact Department staff concerning any matters pending before the agency, or as to which the agency has an interest. Such matters would include, for example, applications for Federal funding, progress reports regarding Cooperative Research and Development Agreements (CRADAS) or clinical trials, and pending drug investigations or applications.

**18 U.S.C. § 205.** Section 205 prohibits an SGE from representing a party, with or without compensation, before HHS or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party in which the United States is a party or has a direct and substantial interest: (i) that the SGE participated in personally and substantially as a Government employee; or (ii) which is pending in the agency in which the SGE is serving, if the SGE has served for more than 60 days during the immediately preceding 365 days.

**18 U.S.C. § 207.** Section 207, the "post-employment" statute, imposes a lifetime ban on a former SGE from representing another person or entity to HHS or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party in which the former SGE participated personally and substantially while serving in the Government. In addition, for two years after terminating Federal employment, an SGE may not make such representational communications to the Government regarding specific party matters that were pending under his or her official responsibility during the last year of Government service. Moreover, "senior employees," those paid at an annual rate equivalent to level ES-5 in the Senior Executive Service, are subject to a one-year "cooling-off" period which precludes any contacts with their former agency on any matter for which official action is sought, even if the former employee had no involvement with the matter while in Government service. For SGEs, this one-year "cooling-off" period does not apply if the SGE served less than 60 days in the one-year period prior to termination of senior employee status.

**18 U.S.C. § 208.** Section 208(a), the main conflict of interest statute, prohibits an SGE from participating personally and substantially in any particular matter that could affect the financial interests of the SGE, the SGE's spouse, minor child, general partner, an organization in which the SGE serves as an officer, director, trustee, general partner, or employee, or an organization with which the SGE is negotiating or with which the SGE has an arrangement for prospective employment.

Under this statute, for example, an SGE would be prohibited from reviewing a grant application submitted by a researcher from the same university in which the SGE is employed, or a contract proposal from an association for which the SGE serves as a member of the board of directors. In these instances, the SGE would be required to recuse from participation in the reviews.

Section 208 might also prohibit the SGE from participating in setting standards for grantees or contractors in general, to the extent that the SGE's university (or any organization with which the SGE is affiliated as an officer or board member) would be affected by those standards. (Under this scenario, however, a waiver could be issued to permit the SGE to participate in such general policy matters. Also, a regulatory waiver might apply to this situation. See discussion below.)

A waiver for advisory committee members may be granted under 18 U.S.C. § 208(b)(3). Section 208(b)(3) authorizes issuance of a waiver to an SGE who serves on a committee subject to the Federal Advisory Committee Act if the official responsible for the individual's appointment certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the particular financial interest involved. The waiver granted is considered a "general" waiver, in that it allows participation in matters that affect all institutions, or types of institutions, similarly. Even with a general waiver, however, SGEs must disqualify themselves from participation in all matters that specifically and uniquely affect their financial interests.

The Designated Federal Official responsible for a committee will explain the procedures for disqualification. SGEs who do not serve on advisory committees are subject to more exacting waiver requirements in 18 U.S.C. § 208(b)(1), and a Deputy Ethics Counselor should be consulted.

In addition, under regulations issued by the Office of Government Ethics, a regulatory (i.e., automatic) waiver of the disqualification requirement of 18 U.S.C. § 208 is available under certain circumstances, including instances involving the following classes of financial interests:

- interests held in broadly diversified investment funds;
- publicly traded securities of \$15,000 or less;
- publicly traded securities of \$25,000 or less if the matter is a general policy matter and the total value of all investments in the affected industry sector is no more than \$50,000;
- employment in one campus of a multi-campus state university if the matter affects only another campus and the employee does not have multi-campus responsibilities.

In addition, there is an automatic exemption which allows SGEs serving on Federal advisory committees to participate in particular matters of general applicability where the otherwise disqualifying financial interest arises solely from the committee member's non-Federal employment or 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. This exemption is unavailable if the employee (or those persons whose interests are imputed to the employee) owns stock, stock options, or has some other financial interest in the employer other than his or her employment interest.

**18 U.S.C § 219.** Section 219 prohibits an SGE from acting as an "agent of a foreign principal" as defined under the Foreign Agents Registration Act (FARA) or a "lobbyist" on behalf of a foreign entity that is required to register under the Lobbying Disclosure Act of 1995 (LDA).

The ban on participating in foreign agent activities covered by FARA prohibits representation of foreign governments or foreign political parties before the United States Government, as well as a number of other activities conducted within the United States on behalf of such entities: (1) political activities; (2) public relations counseling; (3) publicity agent activities; (4) information services; (5) political consulting; and (6) solicitation or disbursement of contributions, loans, money, or other things of value; where such services are rendered with the intent to influence the American public or the Government, with reference to formulating the domestic or foreign policies of the United States, or with reference to the political or public interests, policies or relations of a government of a foreign country or a foreign political party.

There are certain FARA exceptions related to trade or commerce, legal representation, humanitarian fundraising, and religious, scholastic, or scientific pursuits. The head of an agency may authorize the employment of an agent for a foreign entity as a special Government employee upon a certification that such action is in the national interest. The LDA ban prohibits certain lobbying of covered legislative and executive branch officials on behalf of foreign corporations, associations, or other organizations.

### Standards of Ethical Conduct

In addition to criminal statutes, the conduct of SGEs is governed by a series of ethics rules that apply 24 hours per day and even on days during which the SGE provides no Federal services. The following are some of the major Standards of Ethical Conduct regulations (5 C.F.R. Part 2635) that pertain to HHS SGE advisory committee members during the term of their appointment:

**I. *Teaching, Speaking and Writing in a Personal Capacity (i.e., Other Than as a Government Employee)***

Generally, during their term of appointment, committee members may continue to receive fees, honoraria, and other compensation for teaching, speaking and writing undertaken in their personal or non-Governmental capacities. However, there are some limitations:

- (A) An SGE is prohibited from receiving compensation for teaching, speaking, and writing that "relates to the employee's official duties." 5 C.F.R. § 2635.807. The "relatedness" test is met for an SGE if:
- (1) the activity is undertaken as an official Government duty;
  - (2) the circumstances indicate that the invitation to engage in the activity was extended to the SGE primarily because of the employee's position in the Government rather than the employee's expertise in the particular subject matter;
  - (3) the invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by the performance or nonperformance of the employee's official duties; or
  - (4) the information conveyed through the activity draws substantially on ideas or official data that are confidential or not publicly-available.
- (B) Additionally, if a committee member serves for 60 days or less during a one-year period, the SGE may not accept compensation for teaching, speaking, and writing if the subject matter of the teaching, speaking or writing concerns a particular matter involving specific parties in which the SGE participated or is participating personally and substantially as a Government employee.

For example, an AIDS researcher has been appointed to a four-year term as a member of an advisory committee established for the purpose of surveying and recommending modification of procedures that deter the development of treatments for HIV infection and HIV-related diseases. The committee member is not expected to serve more than 60 days each year during her four-year term of appointment.

The committee member may accept compensation for an article or speech about the deterrent effect of certain procedures required for clinical investigations and trial designs even though such issues are being discussed by the advisory committee. Clinical procedures in general are not a particular matter involving specific parties. The committee member could not accept compensation for an article or speech which recounts committee deliberations that took place in a closed meeting, or which relies upon other, non-public information. In addition, the committee member could not accept compensation for an article or speech about specific collaborations in the HIV drug development process which were discussed by the committee, since the collaborations are considered a particular matter involving specific parties.

- (C) If a committee member serves for **more** than 60 days, the SGE is additionally prohibited from receiving compensation for teaching, speaking, and writing if the subject of the activity deals in significant part with any matter to which the SGE is presently assigned or was assigned during the previous one-year period.

EXCEPTIONS:

1. This rule does not preclude a committee member from receiving compensation for teaching, speaking, or writing on a subject within the committee member's discipline or inherent area of expertise based on the SGE's educational background or experience. The outside activity must not be about or distinctly related to the work the SGE is providing to the Government.
2. These restrictions also 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 government.

**II. Gifts**

Any gift given to a committee member because of the member's service on an HHS advisory committee would raise concerns. The Designated Federal Official responsible for the committee should be consulted should this situation arise. Gifts given to an SGE because of the SGE's position or achievements in the private (non-Government) sector generally are not problematic.

**III. Charitable Fundraising**

A committee member may engage in charitable fundraising in a personal capacity as long as the committee member does not personally solicit funds or other support from any person or entity known to the committee member to be a person or entity whose interests may be substantially affected by the performance or nonperformance of the committee member's Federal duties.

5 C.F.R. § 2635.808. If specific questions concerning particular fundraising events or activities should arise, the Designated Federal Official responsible for the committee should be consulted.

**IV. Expert Witness**

A committee member cannot serve as an expert witness, in a proceeding before a United States court or agency in which the United States is a party or has a direct and substantial interest, except on behalf of the United States, if the committee member participated, while a Federal employee, in the particular proceeding, unless authorized by the HHS Designated Agency Ethics Official (DAEO), who can be reached at (202) 690-7258.

In addition, a committee member who was appointed by the President, serves on a commission established by statute, or has served or is expected to serve for more than 60 days in a period of 365 consecutive days, cannot serve, other than 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 committee members's employing agency is a party or has a direct and substantial interest unless authorized by the DAEO. 5 C.F.R. § 2635.805.

**V. Impartiality**

Although committee members are prohibited under 18 U.S.C. § 208(a) from participating in matters in which they have a financial interest, there may be other circumstances in which a committee member's participation in a particular matter involving specific parties would raise a question regarding the member's impartiality in the matter. For example, a committee member asked to review a grant application submitted

by the SGE's mentor, or someone with whom the SGE has a close personal or professional relationship, would raise a concern about the committee member's impartiality in the review. In such circumstances, the committee member should discuss the relationship with the Designated Federal Official responsible for the committee and a determination will be made as to whether the member should be disqualified from participation in the specific party matter, or should be granted an "authorization" to permit the member to participate in such matter. 5 C.F.R § 2635.502.

#### **VI. *Misuse of Position***

Committee members are subject to a number of prohibitions intended to address the use, or appearance of use, of "public office for private gain." 5 C.F.R. Part 2635, Subpart G. These prohibitions include:

- (A) Using their HHS titles or referring to their Government positions for their own private gain, the private gain of friends, relatives, or anyone with whom they are affiliated in a non-Governmental capacity (including nonprofit organizations which they serve as officers, members, employees, or in any other business relationship), or for the endorsement of any product, service, or enterprise.
- (B) Using their HHS titles or Government positions to coerce or induce another person to provide any benefit to themselves or another person.
- (C) Using non-public Government information in a financial transaction to further their private interests or those of another, or disclosing confidential or non-public information without authorization.
- (D) Using Government property for unauthorized purposes.

#### Employment by, or Gifts from, Foreign Governments

The Constitution prohibits a committee member's employment by a foreign government, including political subdivisions of a foreign government. For SGEs, this provision has particular relevance to positions with foreign universities that are government-operated, as opposed to private institutions. United States Constitution, art. I § 9, cl. 8. There are also statutory provisions restricting acceptance of gifts from foreign governments. 5 U.S.C. § 7342. Committee members should consult with the Designated Federal Official responsible for their committee for details about these restrictions. Employment or consultation with a foreign entity for the purpose of providing foreign agent representation or lobbying is barred by a criminal statute; see the discussion above concerning 18 U.S.C. § 219. All SGEs are required to complete HHS Form 697, Foreign Activities Questionnaire, for the purpose of determining whether a committee member's foreign connections are incompatible with Federal service.

#### Lobbying Activities

In their official capacities or as a group, committee members are prohibited from engaging in any activity which directly or indirectly encourages or directs any person or organization to lobby one or more members of Congress. 18 U.S.C. § 1913. When authorized, committee members may appear before any individual or group for the purpose of informing or educating the public about a particular policy or legislative proposal. Committee members also may communicate to Members of Congress at the request of any Representative or Senator. Communications to Members of Congress initiated by committee members, in their official capacity as members of the committee, should be coordinated through the Office of the Assistant Secretary for Legislation.

As private citizens, committee members may express their personal views (but not the views of the committee as a whole or the opinions of HHS) to anyone. In doing so, committee members may state their affiliation with the 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 take new positions and represent those views as the committee's position on the matter. Moreover, in expressing their private views, as with all other personal (non-Governmental) activities, committee members are not permitted to use Government computers, copiers, telephones, letterhead, staff resources, or other appropriated funds. All personal activities must occur "off duty time."

Committee members are prohibited in their personal capacities from making representations on behalf of others, to the Government, on particular matters involving specific parties in which they were involved as Federal employees. (See discussion above under 18 U.S.C. §§ 203 and 205.)

### Political Activities

The Hatch Act (5 U.S.C. §§ 7321-7328) prescribes the restrictions on certain political activities of Federal employees (see the explanatory chart on the following page). Unlike the criminal conflict of interest statutes and the ethics rules which are fully applicable to an SGE throughout the SGE's entire term of appointment, the Hatch Act restrictions apply only during the period of any day in which the SGE actually is performing government business. For example, if an SGE attends an advisory committee meeting from 8:00 a.m. - 1:00 p.m., the SGE could attend a political fund raiser at 3:00 p.m. and even solicit political contributions from the attendees.

**A series of criminal political statutes (18 U.S.C. §§ 595, 600-603, 606-607, 610) applies to SGEs even on non-duty hours. These sections, which focus on patronage crimes and election offenses, prohibit coercive "political shakedowns," intimidation regarding political activities, campaign fundraising on Federal property, and the use of public office or authority for the purpose of affecting the outcome of an election.**

**HATCH ACT POLITICAL ACTIVITY RESTRICTIONS**

<b>Permissible Activities</b>	<b>Prohibited Activities (while on duty)</b>
<ul style="list-style-type: none"> <li>* <i>May be candidates for public office in nonpartisan elections</i></li> <li>* <i>May register and vote as they choose.</i></li> <li>* <i>May assist in voter registration drives.</i></li> <li>* <i>May express opinions about candidates and issues.</i></li> <li>* <i>May contribute money to political organizations.</i></li> <li>* <i>May attend political fund raising functions.</i></li> <li>* <i>May attend and be active at political rallies and meetings.</i></li> <li>* <i>May join and be an active member of a political party or club.</i></li> <li>* <i>May sign nominating petitions.</i></li> <li>* <i>May campaign for or against referendum questions, constitutional amendments, municipal ordinances.</i></li> <li>* <i>May campaign for or against candidates in partisan elections.</i></li> <li>* <i>May distribute campaign literature in partisan elections.</i></li> <li>* <i>May hold office in political clubs or parties (except Treasurer).</i></li> </ul>	<ul style="list-style-type: none"> <li>* <i>May not use their official authority to interfere with an election.</i></li> <li>* <i>May not collect political contributions, unless both individuals are members of the same Federal labor organization and the one solicited is not a subordinate employee.</i></li> <li>* <i>May not knowingly solicit or discourage the political activity of any person who has business before the agency.</i></li> <li>* <i>May not engage in political activity while on duty.</i></li> <li>* <i>May not engage in political activity in any Government office.</i></li> <li>* <i>May not engage in political activity while wearing an official uniform.</i></li> <li>* <i>May not engage in political activity while using a Government vehicle.</i></li> <li>* <i>May not solicit political contributions from the general public.</i></li> <li>* <i>May not actively participate as a candidate for public office in a partisan election.</i></li> </ul>



July 29, 2004

**SUMMARY OF POST-EMPLOYMENT RESTRICTIONS OF 18 U.S.C. § 207****I. INTRODUCTION**

Since its enactment in 1962, 18 U.S.C. § 207 has remained the primary source of post-employment restrictions applicable to officers and employees of the executive branch. Unlike certain other post-employment laws, most of the provisions of section 207 apply to individuals regardless of the executive department or agency in which they served while employed by the Government and regardless of the particular duties they performed.

Section 207 has been amended several times over the years. For example, section 207 was substantially revised by the Ethics Reform Act of 1989. As a consequence of these amendments, former employees are subject to varying post-employment restrictions depending upon the date of their termination from Government service or from certain high-level positions.

Individuals who terminated service prior to January 1, 1991, should continue to consult the regulations published at Part 2637 of title 5, Code of Federal Regulations, for guidance concerning applicable provisions of section 207. Individuals terminating service on or after January 1, 1991, should consult this summary pending completion of revised regulatory guidance at 5 C.F.R. Part 2641. As of this date, Part 2641 contains guidance concerning 18 U.S.C. § 207(c) only. (Except where the underlying statutory provision has changed, Part 2637 remains persuasive concerning the interpretation of the newer version of 18 U.S.C. § 207.)

This summary was prepared by the U.S. Office of Government Ethics (OGE) in 1990, was redistributed in November 1992, was updated and reissued in February 2000, and is again being updated and reissued today. While it has been coordinated with the Department of Justice, employees are cautioned that it reflects only a preliminary interpretation of the amendments to 18 U.S.C. § 207 enacted by the Ethics Reform Act of 1989 and thereafter.

**II. SUMMARY OF RESTRICTIONS**

Section 207 of title 18 sets forth seven substantive prohibitions restricting the activities of individuals who leave Government service or who leave certain high-level positions in the executive branch. Each of these restrictions is discussed separately below, followed by a discussion of several statutory exceptions.

None of the provisions bar any individual, regardless of rank or position, from accepting employment with any private or public

employer after Government service. Section 207 only prohibits individuals from engaging in certain activities on behalf of persons or entities other than the United States, whether or not done for compensation. None of the restrictions bar self-representation.

**A. APPLICABILITY**

The first three restrictions [§§ 207(a)(1), (a)(2), and (b)] are applicable to former officers or employees of the executive branch. They also apply to former senior or very senior employees as those terms are described below, and to former special Government employees. According to 18 U.S.C. § 202, a "special Government employee" includes an individual who is "retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis...." [Enlisted personnel of the uniformed services are not "officers" or "employees" for purposes of section 207.]

The fourth restriction [§ 207(c)] is applicable only to former "senior personnel" (hereinafter referred to as "senior employees"). A senior employee is any employee (other than an individual covered by the fifth restriction) who was employed in a position for which the rate of pay is specified in or fixed according to the Executive Schedule, in a position for which the rate of basic pay is equal to or greater than 86.5 percent of the rate of basic pay payable for level II of the Executive Schedule (or, for a period of two years following November 24, 2003, any person who was employed on November 23, 2003 in a position for which the rate of basic pay was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service), or in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade is O-7 or above. The term includes those individuals appointed by the President to a position under 3 U.S.C. § 105(a)(2)(B) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(B). The term also includes any person who was assigned from a private sector organization to an agency under the Information Technology Exchange Program, 5 U.S.C., chapter 37. An individual is subject to section 207(c) as a result of service as a special Government employee only if the individual served 60 or more days as a special Government employee during the one-year period before terminating service as a senior employee.

The fifth restriction [§ 207(d)] applies only to former "very senior personnel" (hereinafter referred to as "very senior employees"). A very senior employee is any employee who was employed in a position at a rate of pay payable for level I of the Executive Schedule, or in a position in the Executive Office of the

President at a rate of pay payable for level II of the Executive Schedule. The term includes the Vice President and those appointed by the President to a position under 3 U.S.C. § 105(a)(2)(A) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(A).

The sixth restriction [§ 207(f)] applies to individuals who formerly served in either a senior or very senior position.

The seventh restriction [§ 207(l)] applies to any person who was assigned from a private sector organization to an agency under the Information Technology Exchange Program, 5 U.S.C., chapter 37.

**B. SUBSTANTIVE RESTRICTIONS**

1. **Basic Prohibition of 18 U.S.C. § 207(a)(1)**. No former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.

Discussion. This is a lifetime restriction that commences upon an employee's termination from Government service. The target of this provision is the former employee who participates in a matter while employed by the Government and who later "switches sides" by representing another person on the same matter before the United States. The restriction is measured by the duration of the matter in which the former employee participated.

The restriction does not apply unless a former employee communicates to or makes an appearance before the United States on behalf of some other person. For these purposes, the "United States" refers to any employee of any department, agency, court, or court-martial of the United States (but not of the District of Columbia). The term does not include the Congress, and therefore communications to or appearances before Members of Congress and legislative staff are not prohibited by this provision.

A former employee is not prohibited by this restriction from providing "behind-the-scenes" assistance in connection with the representation of another person. Moreover, the restriction prohibits only those communications and appearances that are made "with the intent to influence." A "communication" can be made orally, in writing, or through electronic transmission. An "appearance" extends to a former employee's mere physical presence at a proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An "intent to influence" the United States may be found if the communication or appearance is made for the purpose of seeking a discretionary

Government ruling, benefit, approval, or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular Government action to be taken. Accordingly, the prohibition does not apply to an appearance or communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.

A communication to or appearance before the United States is not prohibited unless it concerns the same particular matter involving a specific party or parties in which the former employee participated personally and substantially while employed by the Government. An employee can participate "personally" in a matter even though he merely directs a subordinate's participation. He participates "substantially" if his involvement is of significance to the matter. Thus, while a series of peripheral involvements may be insubstantial, participation in a single critical step may be substantial. The term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. In determining whether two situations are part of the same particular matter, one should consider all relevant factors, including the amount of time elapsed and the extent to which the matters involve the same basic facts or issues and the same or related parties. Even if a post-employment communication or appearance would concern the same particular matter, however, the representational bar will not apply unless the United States is a party or has a direct and substantial interest in that matter at the time of the post-employment representation.

The provision requires that an employee's official participation in a particular matter have taken place at a time when the matter involved a specific party (or parties). It also requires that the matter involve some specific party or parties at the time of the post-employment communication or appearance (although these can be different parties than were involved with the matter at the time of the employee's participation). General rulemakings do not usually involve specific parties. Consequently, it is quite possible that an employee who participated in a rulemaking while employed by the Government will, after leaving Government service, be able to appear before his former agency concerning the application of that rule to his new private sector employer without violating the lifetime restriction. Contracts, on the other hand, are always particular matters involving specific parties. A Government procurement has specific parties identified to it when a bid or proposal is received in response to a solicitation, if not before.

The provision does not prohibit a former employee from representing himself before the United States (as distinguished

from a corporation or consulting firm). Moreover, a former employee is not prohibited from acting on behalf of the United States (or the Congress). Thus, even though an individual may once have worked on a matter while employed by the Government, he will not, while subsequently reemployed by the Government, be barred from communicating with any employee of the United States concerning that matter if he does so as part of his official duties. A former employee does not act on behalf of the United States, however, merely because the United States may share the same objective as the person whom the former employee is representing.

2. Basic Prohibition of 18 U.S.C. § 207(a)(2). For two years after his Government service terminates, no former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of his employment with the United States.

Discussion. This is a two-year restriction that commences upon an employee's termination from Government service.

This provision is identical to the lifetime restriction discussed above except that it is of shorter duration and requires only that an individual have had official responsibility for a matter while employed by the Government, not that he have participated personally and substantially in that matter. Like the lifetime restriction, it prohibits certain communications and appearances made on behalf of any other person or entity except the United States (or the Congress). The communications and appearances prohibited are those made, with the intent to influence, to or before any employee of a department, agency, court, or court-martial of the United States. The representational bar applies with respect to any particular matter involving a specific party or parties that was actually pending under the former employee's official responsibility at some time during his last year of Government service.

"Official responsibility" is defined in 18 U.S.C. § 202 as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." The scope of an employee's official responsibility is usually determined by those areas assigned by statute, regulation, executive order, or job description. All particular matters under consideration in an

agency are under the official responsibility of the agency head, and each is under that of any intermediate supervisor having responsibility for the activities of a subordinate employee who actually participates in the matter. An employee's recusal from or other non-participation in a matter does not remove it from his official responsibility.

A matter was "actually pending" under a former employee's official responsibility if the matter was in fact referred to or under consideration by persons within the employee's area of responsibility. A former employee is not subject to the restriction, however, unless at the time of the proposed representation of another he knows or reasonably should know that the matter had been under his official responsibility during his last year of Government service.

**3. Basic Prohibition of 18 U.S.C. § 207(b).** For one year after his Government service terminates, no former employee may knowingly represent, aid, or advise on the basis of covered information, any other person (except the United States) concerning any ongoing trade or treaty negotiation in which, during his last year of Government service, he participated personally and substantially as an employee.

Discussion. This is a one-year restriction that commences upon an employee's termination from Government service. Extending to certain "behind-the-scenes" assistance, this provision can serve to augment the representational bar provided for in the lifetime restriction discussed above.

The restriction set forth in section 207(b) does not apply unless, during the one-year period before he left Government, an employee participated personally and substantially in an "ongoing" trade or treaty negotiation that is covered by the statute. It is not necessary that a former employee have had actual contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation.

Trade negotiations covered by the statute are those that the President determines to undertake pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 2902). [Note: The specific statutory trade agreement authority referenced in section 207(b) has expired.] Unless there is an earlier public announcement of a determination by the President, a trade negotiation commences to be "ongoing" when, at least 90 days before entering into a trade agreement, the President notifies both the House of Representatives and the Senate of his intention to enter into an agreement (19 U.S.C. § 2903(a)(1)(A)). Whether an employee participated personally and substantially in an "ongoing" trade negotiation is determined by reviewing an employee's participation after trade negotiations commenced. A treaty is an international

agreement made by the President that requires the advice and consent of the Senate. A negotiation on a treaty commences to be "ongoing" at the point when both (1) the determination has been made by a competent authority that the outcome of a negotiation will be a treaty, and (2) discussions with a foreign government have begun on a text. Trade and treaty negotiations both cease to be ongoing when an agreement or treaty enters into force or when all parties to the negotiation cease discussion based on a mutual understanding that the agreement or treaty will not be consummated.

Once he has participated in an ongoing negotiation, section 207(b) prohibits a former employee from representing, aiding, or advising any other person concerning a trade or treaty negotiation (that is still ongoing) on the basis of certain "covered" information. "Covered" information refers to agency records which were accessible to the employee, which he knew or should have known were designated as exempt from disclosure under the Freedom of Information Act (e.g., documents that were marked as subject to a national security classification or those otherwise designated in a manner that made it clear they were exempt from release under FOIA), and which concern a negotiation in which the employee participated personally and substantially during his last year of Government service. A former employee is not prohibited from utilizing information from an agency record which, at the time of his post-employment activity, is no longer exempt from disclosure under the Freedom of Information Act.

Only activities that are undertaken on behalf of "any other person" are prohibited by this restriction. Action taken on behalf of the United States (or the Congress) or on behalf of the former employee himself are not prohibited. A former employee "represents" another person when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that person to or before any third party. For this purpose, a third party includes any employee of the executive, legislative, or judicial branch of the Federal Government, including a Member of Congress. A former employee "aids and advises" another person when he assists that person other than by communicating to or appearing before a third party. A former employee represents, aids, or advises another person "on the basis of" covered information if the former employee's representation, aid, or advice either involves a disclosure of covered information to any person, or could not have been made or rendered had the former employee not had actual knowledge of covered information.

It is important to note that although a post-employment activity may not be prohibited by section 207(b), a former employee must still be careful to comply with other statutory restrictions. For example, even though a trade or treaty negotiation may not yet have become "ongoing" at the time of an employee's official participation, the negotiation may nevertheless have had specific

parties identified to it, thus triggering the lifetime restriction set forth in section 207(a)(1).

**4. Basic Prohibition of 18 U.S.C. § 207(c).** For one year after service in a "senior" position terminates, no former "senior" employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of a department or agency in which he served in any capacity during the one-year period prior to termination from "senior" service, if that communication or appearance is made on behalf of any other person (except the United States), in connection with any matter concerning which he seeks official action by that employee.

Discussion. This is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously. The purpose of this one-year "cooling off" period is to allow for a period of adjustment to new roles for the former senior employee and the agency he served, and to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former senior position. As already noted, this provision is applicable to "senior" employees, but not to "very senior" employees.

Like the lifetime restriction discussed above, this provision prohibits communications to and appearances before the Government and does not prohibit "behind-the-scenes" assistance. Unlike the lifetime restriction, however, this one-year restriction applies only to a "senior" employee, does not require that the former employee have ever been in any way involved in the matter that is the subject of the communication or appearance, and only prohibits communications to or appearances before employees of any department or agency in which he formerly served in any capacity during the one-year period prior to his termination from senior service. The representational bar applies with respect to any matter, whether or not involving a specific party, concerning which the former senior employee is seeking official action by a current employee of such department or agency on behalf of any other person except the United States (or the Congress).

As described below, section 207 provides for two methods by which the restrictions of section 207(c) can be narrowed or eliminated. The first is through the designation of separate departmental or agency components and the second is through the exemption of a position or category of positions from coverage. Not all senior employees are eligible to benefit from either or both of these procedures. A former senior employee is ineligible to benefit from these procedures if he is subject to section 207(c) by virtue of having served in a position for which the rate of pay is specified in or fixed according to the Executive Schedule or by virtue of having been appointed by the President to a position

under 3 U.S.C. § 105(a)(2)(B) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(B). A former senior employee who is subject to section 207(c) by virtue of having been assigned by a private sector organization to an agency under the Information Technology Exchange Program, 5 U.S.C., chapter 37, is eligible to benefit from the component designation procedure but not from the position exemption procedure.

As has been noted, the representational bar usually extends to any department or agency in which the former senior employee served in any capacity during the year prior to his termination from senior service. However, certain senior employees may be permitted to communicate to or appear before components of their former department or agency if those components have been designated as separate agencies or bureaus by OGE. For example, although it may not by statute be a separate component, OGE has designated the Defense Logistics Agency as an agency that exercises functions which are separate and distinct from its "parent" department, the Department of Defense. For a list of other designations of separate agencies, see appendix B to 5 C.F.R. part 2641. An individual formerly serving in a parent department or agency would be barred by section 207(c) from making communications to or appearances before any employee of that parent, but would not be barred as to employees of any designated component of that parent. An individual formerly serving in a designated component of a parent department or agency would be barred from communicating to or appearing before any employee of that component, but would not be barred as to any employee of the parent or of any other component. The statute now provides that no agency within the Executive Office of the President may be designated as a separate component.

The restrictions of section 207(c) can be waived altogether as to certain senior employee positions or categories of positions. As a consequence of such exemption, the one-year restriction of section 207(c) will not begin to run upon an employee's termination from such a position. In order to grant an exemption, OGE must receive a request to do so from a department or agency. After review of the request, OGE can grant an exemption or exemptions based upon its determination that as to a particular position or category of positions, the imposition of section 207(c) would create an undue hardship on the department or agency in obtaining qualified personnel and that the granting of the exemption would not create the potential for use of undue influence or advantage.

5. Basic Prohibition of 18 U.S.C. § 207(d). For one year after service in a "very senior" position terminates, no former "very senior" employee may knowingly make, with the intent to influence, any communication to or appearance before any individual appointed to an Executive Schedule position or before any employee of a department or agency in which he served as a "very senior"

employee during the one-year period prior to termination from Government service, if that communication or appearance is made on behalf of any other person (except the United States), in connection with any matter concerning which he seeks official action by that individual or employee.

Discussion. This is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a very senior employee, not from the termination of Government service, unless the two occur simultaneously.

This provision, applicable only to "very" senior employees, is very similar to the one-year restriction of section 207(c) discussed above. It too prohibits communications to or appearances before employees of certain governmental departments and agencies, unless on behalf of the United States (or the Congress). A former very senior employee is prohibited by section 207(d) from representing another before any current employee of any department or agency in which he served as a very senior employee during the one-year period prior to his termination from Government service. (Compare section 207(c) which prohibits communications and appearances to current employees of any department or agency in which a former "senior" employee served in any capacity during the one-year period prior to termination from senior service.) A former very senior employee is also prohibited by section 207(d), however, from representing another person before any individual currently appointed to an Executive Schedule position listed in 5 U.S.C. §§ 5312-5316, whether or not that individual is serving in the very senior employee's former department or agency. The representational bar applies to any matter, whether or not involving a specific party, concerning which the former very senior employee is seeking official action by any current officer or employee of the executive branch.

Section 207 does not authorize OGE to designate separate and distinct components within a department or agency as a means of narrowing the scope of section 207(d). Moreover, no very senior employee's position is eligible for exemption from the application of section 207(d).

**6. Basic Prohibition of 18 U.S.C. § 207(f).** For one year after his service in a "senior" or "very senior" position terminates, no former "senior" employee or former "very senior" employee may knowingly, with the intent to influence a decision of an employee of a department or agency of the United States in carrying out his official duties, represent a foreign entity before any department or agency of the United States or aid or advise a foreign entity.

Discussion. This is a one-year restriction, except that it is permanent as applied to any individual who serves as the United

States Trade Representative or Deputy United States Trade Representative. The restriction is measured from the date when an employee ceases to be a senior employee or a very senior employee, not from the termination of Government service, unless the two occur simultaneously.

This restriction prohibits a former senior or very senior employee from representing, aiding, or advising a foreign entity with the intent to influence certain governmental officials. A "foreign entity" means the "government of a foreign country" as defined in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611), as amended, or a "foreign political party" as defined in section 1(f) of that Act. The government of a foreign country includes--

any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.

A foreign political party includes--

any organization or any other combination of individuals in a country other than the United States, or any unit or branch thereof, having for an aim or purpose, or which is engaged in any activity devoted in whole or in part to, the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country or a subdivision thereof, or the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country or a subdivision thereof.

A foreign commercial corporation will not generally be considered a "foreign entity" for purposes of section 207(f) unless it exercises the functions of a sovereign.

A former senior or very senior employee "represents" a foreign entity when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that entity to or before any employee of a department or agency. He "aids or advises" a foreign entity when he assists the entity other than by making such a communication or appearance. Such "behind the scenes" assistance to a foreign entity could, for example, include

drafting a proposed communication to an agency, advising on an appearance before a department, or consulting on other strategies designed to persuade departmental or agency decisionmakers to take certain action. A former senior or very senior employee's representation, aid, or advice is only prohibited if made or rendered with the intent to influence an official discretionary decision of a current departmental or agency employee.

7. **Basic Prohibition of 18 U.S.C. § 207(l)**. For one year after the termination of his assignment from a private sector organization to an agency, under the Information Technology Exchange Program, 5 U.S.C., chapter 37, no former assignee may knowingly represent, or aid, counsel, or assist in representing any other person (except the United States) in connection with any contract with that agency.

**Discussion**. This prohibition, which was added as part of the E-Government Act of 2002, Pub. L. 107-347, § 209(d)(3), applies only to former private sector assignees under the Information Technology Exchange Program created by that Act. The one-year restriction is measured from the date when the former employee's assignment under the Program terminates.

This provision prohibits a former assignee from representing another person in connection with a contract with the agency to which the former assignee was assigned. A former assignee represents someone when he acts as agent or attorney or otherwise communicates or appears on behalf of another person in connection with a contract with the former agency. In addition to representational conduct, the prohibition also covers certain "behind-the-scenes" activity, i.e., aiding, counseling, or assisting in representing another person in connection with a contract with the former agency.

#### C. **EXCEPTIONS**

Sections 207(j) and (k) set forth several exceptions to the statute's substantive prohibitions. As noted below, some exceptions do not avoid application of all of the seven substantive restrictions of 18 U.S.C. § 207.

**Performing Official Government Duties**. A former employee is not restricted by any of the substantive provisions of section 207 from engaging in post-employment activities performed in carrying out official duties on behalf of the United States. This exception also extends to activities undertaken in carrying out official duties as an elected official of a state or local Government.

**Representing Certain Entities** A former senior or very senior employee will not violate section 207(c) or (d) if his communication or appearance is made in carrying out official duties

as an employee of and is made on behalf of (1) an agency or instrumentality of a State or local Government, (2) an accredited degree-granting institution of higher education as defined in section 101 of the Higher Education Act of 1965, as amended (20 U.S.C. § 1001), or (3) a hospital or medical research organization exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. § 501(c)(3)).

**Representing or Assisting International Organizations.** A former employee is not restricted by any of the substantive provisions of section 207 from representing, aiding, or advising an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interest of the United States.

**Imparting Special Knowledge.** A former senior or very senior employee will not violate section 207(c) or (d) if he makes a statement that is based on his own special knowledge in the particular area that is the subject of the statement, provided that he receives no compensation for making the statement.

**Scientific or Technological Information or Expertise.** A former employee will not violate section 207(a)(1), (a)(2), (c), or (d), if he makes a communication solely for the purpose of furnishing scientific or technological information in accordance with procedures acceptable to the agency involved. Alternatively, a former employee may make a communication if the head of the agency concerned publishes a certification in the Federal Register stating that the former employee has outstanding qualifications in a scientific, technological, or other technical discipline, that he is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the former employee's participation.

**Testimony.** A former employee is not restricted by any of the substantive restrictions of section 207 from giving testimony under oath or from making statements required to be made under penalty of perjury, subject to a special rule with respect to expert opinion testimony. Unless expert opinion testimony is given pursuant to court order, a former employee may not provide such testimony on a matter on behalf of any other person except the United States (or the Congress) if he is subject to the lifetime prohibition contained in section 207(a)(1) relating to that matter.

**Representing Candidates or Certain Political Organizations.** A former senior or very senior employee will not violate section 207(c) or (d) if his communication or appearance is on behalf of a candidate for Federal or State office or an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party.

**Employment with Certain Prior Employers.** A former employee is not restricted by any of the substantive restrictions of section 207 if granted one of 25 Presidential waivers in connection with his reemployment at a Government-owned, contractor operated entity.

DCN: 12154

Instructions and Format for Preparing a Request for an 18 U.S.C. 207 Opinion  
February 2005

Summary of Materials:

- I. Privacy Act Statement (pg 1)
- II. Explanation of 18 USC 207 (pg 1)
- III. Format for a request for an 18 USC 207 opinion (pg 4)
- IV. Worksheet for each particular matter (pg 9)

PRIVACY ACT STATEMENT

AUTHORITY: PRIVACY ACT OF 1974 (5 U.S.C. 552(A)(7)), 18 U.S.C. 207, 5 C.F.R. 2637.101 and 5 C.F.R. 2641.101, AFI 33-332.

PRINCIPAL PURPOSE: To enable ethics counselors to render advice to military and civilian employees leaving government service.

ROUTINE USE: Information provided is not confidential. The ethics counselor is the government's representative. There is no attorney-client relationship established between the ethics counselor and the individual, and the ethics counselor may not act as an attorney on behalf of anyone submitting this information. The information will be used for providing written ethics advice. It will be retained for six years and will be available to ethics counselors, finance personnel, and other appropriate personnel responsible for compliance with post-government employment restrictions.

DISCLOSURE: Voluntary. No criminal, civil or other penalties will follow from refusal to provide requested information. However, failure to fully disclose information requested would likely result in receipt of inaccurate advice or the inability to provide written ethics advice pursuant to 18 U.S.C. 207.

Explanation of 18 USC 207

1. 18 U.S.C. 207 is a federal statute that contains seven different post-government employment restrictions. Three restrictions apply only to senior employees (officers O-7 or above and SES employees), one restriction applies only to Members of Congress, and one restriction applies only to trade or treaty negotiators. However, the other two restrictions apply to all military officers and civilian employees in the Executive Branch. These two restrictions are commonly referred to as the "lifetime representation law" (18 U.S.C. 207(a)(1)), and the "2-year representation law" (18 U.S.C. 207(a)(2)).

2. The "lifetime representation law" can be *summarized* as follows. You will violate this law if all of the following eight conditions occur:

- (1) You are a military officer or a civilian employee in the Executive Branch;
- (2) While you are working for the federal government, you **participate personally and substantially** in a government contract or other particular matter in which the United States has a direct and substantial interest;
- (3) At the time you participate in the contract or other matter there is another party (such as a government contractor) involved in the matter;
- (4) You leave the federal government;

- (5) You then, at any time in your life, communicate with or appear before a government officer or employee in connection with the same contract or other matter that you participated in while you were with the federal government;
- (6) Your communication or appearance is on behalf of someone other than the United States (such as the contractor) (NOTE: the party on whose behalf you are making the appearance or communication does not have to be the same party who was involved in the matter at the time you were working on the matter for the government);
- (7) Your intent in making the communication or appearance is to **influence** the government official (*i.e.* you're not just providing information; you're trying to persuade the government official about something); and
- (8) You **know**, when you are communicating with or appearing before the government official, that the matter in question is a matter that you participated in when you were with the government (*i.e.* it's not something so minor that you forgot you ever worked on it when you were with the government).

3. The "2-year representation law" can be *summarized* as follows. You will violate this law if all of the following eight conditions occur:

- (1) You are a military officer or a civilian employee in the Executive Branch;
- (2) While you're working for the government there is a government contract, or other particular matter in which the United States has a direct and substantial interest, that is pending **under your official responsibility during your last year in the government**;
- (3) At the time the matter is pending under your official responsibility during your last year in the government, there is another party (such as a government contractor) involved in the matter;
- (4) You leave the federal government;
- (5) During the first 2 years after you leave the government, you communicate with or appear before a government officer or employee in connection with that same contract or other matter;
- (6) Your communication or appearance is on behalf of someone other than the United States (such as the contractor) (and the party on whose behalf you are making the appearance or communication does not have to be the same party who was involved in the matter at the time the matter was pending under your official responsibility during your last year in the government);
- (7) Your intent in making the communication or appearance is to **influence** the government official (*i.e.* you're not just providing information; you're trying to persuade the government official about something); and

- (8) You **know**, when you are communicating with or appearing before the government official, that the matter in question is a matter that was pending under your official responsibility during your last year in the government (*i.e.* it's not something so minor that you forgot it was ever under your official responsibility during your last year in the government).

#### 4. Definitions.

a. Participate. What does it mean to "participate" in a government contract or other particular matter? The term "participate" means to take an action through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action. [18 USC 207(i)(2)]

b. Particular matter. "Particular matter" means any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. [18 USC 207(i)(3)]

c. Official responsibility. The term "official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action. [18 USC 202(b)]

d. Communication. A "communication" can be made orally, in writing, or through electronic transmission.

e. Appearance. An "appearance" would include a former employee's mere physical presence at a meeting or proceeding when the circumstances make it clear that his attendance is intended to influence the United States.

f. Intent to influence. An "intent to influence" may be found if the communication or appearance is made for the purpose of seeking a discretionary Government ruling, benefit, approval, or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular Government action to be taken. Accordingly, the prohibition does not apply to an appearance or communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.

5. To obtain an opinion on whether the "lifetime representation law" or the "2-year representation law" apply to you with respect to a particular contractor, you must prepare a written request for such an opinion. Use the format which is attached to this handout. Your request will be an attachment to the legal opinion you receive.

6. The legal opinion will be valid only if you provide complete and accurate facts. Therefore, take care when setting forth the facts in your request. How much detail to put into a request for a legal opinion is always a judgment call. If you're not sure, please call your ethics attorney for guidance. Also, if you can, please prepare your request on a word processor, as you may be asked to provide additional facts after your request is

reviewed. This is because your ethics attorney can only issue you a legal opinion if your request contains all the facts necessary to support the legal conclusion.

7. When drafting your request, you should (1) state what acronyms stand for, and (2) assume that the reviewing attorneys have no technical background, and little or no knowledge of what your office (or former office) does.

8. The legal opinion you receive on the "lifetime representation law" and the "2-year representation law" will contain a disclaimer. The disclaimer will say that the opinion is that of the Department of the Air Force, and that the opinion is not binding on the Department of Justice. Federal government attorneys who do not work for the Department of Justice are required to include this disclaimer in all 18 U.S.C. 207 opinions. This is because the law is a federal criminal statute, and the interpretation of federal criminal statutes falls under the jurisdiction of the Department of Justice.

9. What contracts to list. Please note that if the "representation ban" in 18 USC 207 applies to you with regard to a contract, then it applies to you regardless of who your employer is. Therefore, you need to list all contracts (or other particular matters) you have been involved in regarding your potential employer. In addition, if your potential employer may ask you to communicate with a Government officer or employee regarding a contract with another contractor (*i.e.*, a contract under which your potential employer may have a subcontract, or if you are considering working for a support contractor, and your potential support contractor works on a larger contract on which you worked while you were with the Government) we urge you to list all on-going contracts that could involve your potential employer, and describe fully your involvement with regard to each such contract.

**Format for a Request for an 18 U.S.C. 207 Opinion**

[Date]

MEMORANDUM FOR AFMCLO/JAF (ATTN: MR. JOHN CASE)

FROM: Name, Current rank or grade  
Street address  
City, State, Zip

SUBJECT: Request for 18 U.S.C. 207 Opinion

1. I request a legal opinion on the application of 18 U.S.C. 207 to my employment with [name of company]. I [expect / would like] to begin working for this company [on (date or approximate date)] [as soon as possible].

2. **Background.** [In this paragraph, provide general information about your last 5 years in the Air Force. Include:

a. The installation(s) where you were assigned.

- b. The office(s) you were assigned to, and the office symbol of that office (or those offices).
- c. Your job title(s) (and the dates you held each position, if you held more than one position).
- d. A brief description of your job duties (in each position, if you held more than one position). [You may describe what the responsibilities of your office were, but please also describe what your responsibilities were.]
- e. What contractor(s) you worked with (if any).
- f. Your date of retirement, separation or resignation from the Air Force (or the expected date), and the date you will begin (or the date you began) terminal leave (if you will take, are taking, or took terminal leave).]
- g. If military, attached is a copy of my Officer Performance Report for my last two years. (Attached)

3. Expected duties. If employed by this contractor, I expect to work on the following particular matters or contracts during my post-Government employment:

- a. Contract 1: \_\_\_\_\_
- b. Contract 2: \_\_\_\_\_
- c. Contract 3: \_\_\_\_\_

4. Involvement in Particular Matters while Employed by the Government. (Use either paragraph (A) "NO INVOLVEMENT" (if you and no one who works for you has had any involvement in any particular matter relating to your potential employer), or Paragraph (B) "SOME INVOLVEMENT" (if you or someone who works for you has had some involvement in any particular matter on which you seek advice).

**A. NO INVOLVEMENT IN ANY CONTRACT OR OTHER PARTICULAR MATTER:  
(Attach Worksheet, [located at end of this document], for examples of involvement.)**

[If you're sure all the following five statements are true for you, then use them as your paragraph 4. The statements are separated here to make them easier to read, but you may put them together in one paragraph in your request.]

While employed by the Government, I did not have any involvement in, or work on in any way, any contract or other particular matter that was awarded to [company for which you're requesting the opinion],

While employed by the Government, I did not have any involvement in, or work on in any way, any source selection for which the contract has not been awarded yet, and for which [company for which you're requesting the opinion] is a competitor.

While employed by the Government, I did not have any involvement in, or work on in any way, any contract or other particular matter, whether awarded or not, on

which the company for which I am seeking employment will assign me to work, (such as a prime contract with another company with which my potential employer has a subcontract, or such as a prime contract with another contractor on which my potential employer provides support services to the Air Force). (NOTE: Just list those contracts or particular matters that you believe that your potential employer wants you to work. If you become aware of other particular matters later, you may request a supplemental opinion.)

While employed by the Government, I did not participate in, or work on in any way, any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, judicial or other proceeding, or any other matter involving [the company for which you're requesting the opinion]. (Note to person preparing this letter: For examples or "participation," see the attached worksheet.)

During the last year of my Government service, neither I, nor anyone who worked for me in my direct chain of supervision, had, or will have, the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action on any contract or other particular matter (whether or not the authority was actually exercised), involving [the company for which you're requesting an opinion]. (Note to person preparing this letter: For examples of what is "pending under your official responsibility, see the attached worksheet.)

[If you're still employed by the Air Force, and if the following statement is true for you, then include it in your paragraph 4.]

I do not expect to participate in or work on any such matters before I leave the Air Force.

OR

**B. SOME INVOLVEMENT IN AT LEAST ONE CONTRACT OR OTHER PARTICULAR MATTER: (Attach one Worksheet for each particular matter, [at end of this document], and to see examples of involvement.)**

[If, at any time while you were working for the Government, you, or someone who worked for you in your direct chain of supervision (*i.e.*, in your evaluation chain of command at any level), had some involvement with a contract or any source selection, or other particular matter; or had the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action on any contract (whether or not the authority was actually exercised), involving the company for which you're requesting the legal opinion, (or involving a contract or other particular matter of which you are aware, with another company on which your potential employer will assign you to work), provide the details about that contract, source selection, or other matter. You can do so in the following manner.]

"While employed by the Government, I never, at any time, had any involvement in, or worked on in any way, any contract, source selection, or contract formation process, or other particular matter involving [company for which you're requesting the opinion], except for the contract number(s) or particular matter(s) listed below.

While employed by the Government, no one who worked for me under my supervision during the last year of my Government employment, had, or currently has, any involvement in, or worked on in any way, any contract, source selection, contract formation process, or other particular matter involving [company for which you're requesting this opinion], except for the contract number(s) or particular matter(s) listed below.

--During the last year of my Government employment, I did not have the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action on any contract or other particular matter involving [company for which you are requesting this opinion], except for the contract number or particular matter listed below.

--During the last year of my Government employment, no one who has worked for me under my supervision during the last year of my Government employment, has had, or currently has, any involvement in, or worked on in any way, any contract, source selection, contract formation process, or other particular matter, involving a prime contract with another company, that my potential employer may assign me to work (such as a prime contract on which my potential employer has a subcontract, or such as a prime contract on which my potential employer may have a support contract or A&AS contract, that may involve a contract on which I participated as a Government employee) except for the contract number or particular matter listed below:

--While employed by the Government, I was never involved in any contract, source selection, contract formation process, or other particular matter involving a company other than my expected employer, on which my potential employer may assign me to work (such as a prime contract on which my potential employer has a subcontract, or such as a prime contract on which my potential employer may have a support contract or A&AS contract, that may involve a contract on which I participated as a Government employee] except for the contract number or particular matter listed below:

- First Contract No. (or other particular matter) \_\_\_\_\_ ;
- Second Contract No. (or other particular matter) \_\_\_\_\_ ;
- Third Contract No. (or other particular matter) \_\_\_\_\_ ;
- Fourth Contract No. (or other particular matter) \_\_\_\_\_ ;
- Fifth Contract No. (or other particular matter) \_\_\_\_\_ . "
- Etc.

**Please see the attached Worksheet.** I have attached one worksheet for each particular matter I have identified and on which I request advice. (Attach a copy of the Worksheet for each contract or other particular matter. The Worksheet is located at the end of this document.)

5. Trade or treaty negotiations. [If you're sure the following statement is true for you, then use it as your paragraph 5. There are two versions of the statement. The first is for

people who have left the Air Force. The second is for people who are in their last year in the Air Force.]

During my last year in the Air Force, I did not participate in, or work on in any way, any ongoing trade or treaty negotiations on behalf of the United States which involved [company for which you're requesting the opinion].

During my last year in the Air Force, I have not participated in, or worked on in any way, any ongoing trade or treaty negotiations on behalf of the United States which involve [company for which you're requesting the opinion]. I do not expect to participate in or work on any such negotiations before I leave the Air Force.

[If this statement is **not** true for you, or if you're not sure if it's true for you, provide the details about the trade or treaty negotiations you are or were involved with.]

6. [Please mail the opinion to the following address: ...]  
[Please fax the opinion to (xxx) xxx-xxxx, and mail it to the following address: ...]  
[Please call me when the opinion is ready, as I would like to pick it up.]  
If you have any questions, please call me at (xxx) xxx-xxxx (business) or (xxx) xxx-xxxx (home).

[Your name]  
[Your rank or grade]  
[Current or former Office Symbol]

**Worksheet relating to 18 USC 207**

1) Identify the contract, contract number, task order number, contractor, or other particular matter, including contracting officer (or, if not a contract, the most knowledgeable person) and phone number or program manager and phone number for the Contract, or other particular matter on which you seek advice.

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Please list your home address for the address element in our letter to you (even if you are requesting a fax copy).

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**LIFETIME BAN**

2) Regarding the contract or other particular matter identified above, did you take any action through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, relating to contract formation? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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**EXAMPLES: (Not an all-inclusive list of examples)**

A. Did you have any role in identifying, describing or drafting the requirements? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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B. Did you draft any part of the proposal, contract, modification, or task order, including, but not limited to, recommending the inclusion of any Contract Data Requirements List (CDRL), Data Item Description (DID), Statement of Work (SOW) provision, contract clauses, standards of performance, or by reviewing Government or Contractor proposed test plans? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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C. Did you have any role formulating Acquisition Strategy, to include identifying interested contractors, performing a market survey, performing a pre-award audit, advertising the proposal, participating in the Acquisition Strategy Panel, investigating or identifying sources, or discussing the proposal/contract with potential offerors? If so, describe your actions with regard to your role. (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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D. Did you have any role in certifying funds, approving funds or determining priority of funds for this contract? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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E. Did you have any role in the cost or technical evaluation of offers or selection of contractor? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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F. Did you have any other role in contract formation? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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3) Regarding the contract, or other particular matter identified above, did you take any action through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, relating to contract performance or administration? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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EXAMPLES: (Not an all-inclusive list of examples)

A. Did you have any role in making decisions, giving advice, or making recommendations to the contracting officer, program manager, quality assurance evaluator, or anyone else, regarding evaluating any aspect of performance, including, but not limited to, award fee determination, acceptability of performance, evaluation of work, review of contract deliverables or reports, approval of invoices for payment, evaluation of contractor work, or CPAR inputs? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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B. Did you have any role in evaluating contractor performance, including whether the contractor met contract requirements or satisfied test plans? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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C. Did you have any role in approving or disapproving, advising, recommending action, evaluating or resolving any Requests for Equitable Adjustments, cost proposals, disputes, or claims? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

D. Did you ever have any role in recommending, assigning, or generating taskings or work requirements for contractor personnel to perform? (If “yes” or “not sure,” describe fully your role and each such task, and the date you performed such a role.)

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E. Were you involved in closing out the contract? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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**TWO-YEAR BAN**

4) During your last year of Government service, did you have any contract (or other particular matter) actually pending under your official responsibility? (yes/no/not sure) (If “yes,” or “not sure,” describe fully your role, and the date you performed such role.)

(NOTE: The term “actually pending under your official responsibility” means “direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.”)

(ADDITIONAL NOTE: Last year of Government service, ends on your official date of retirement, separation, or resignation.)

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EXAMPLES: (Not an all-inclusive list of examples)

A. In January 2003, a working-level engineer at WPAFB reviewed a contractor’s proposed test plan for how to measure the performance of a new navigational aid being made under Contract No 0001. The working-level engineer wrote a report to the Contracting Officer that recommended approval of the test plan. The working-level engineer worked for the base civil engineer, who worked for the base commander. All three plan to retire in June 2003. The working-level engineer will likely have a lifetime ban from making certain communications to the Air Force about the Contract, since he participated personally and substantially on the contract. The base civil engineer and the base commander, who never saw the test plan, both have two-year bans, measured from their actual date of retirement, from making certain communications to the Air Force about the Contract, since the contract was pending under their official responsibility. The base civil engineer and the base commander had the direct administrative or operating authority to direct Government action, even though they did not exercise their authority.

B. Capt Dan recommended approval of an award fee for Contract No. 0001 with Big B Corp. Capt Dan worked directly for Lt Col Worth, a division chief, who approved the fee determination on a staff summary sheet. Lt Col Worth reported directly to Col Commodore, the base commander, who never saw the staff summary sheet. Capt Dan and Lt Col Worth will likely have a lifetime representation ban, since they participated personally and substantially, while Col Commodore will have a two-year representation ban since the matter was pending under the Commodore’s official responsibility

5) During your last year of Government service, did anyone who worked for you in your direct chain of supervision take any action through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, relating to contract

formation, of the Contract or other particular matter? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

EXAMPLES: (Not an all-inclusive list of examples)

A. During your last year of Government service, did anyone in your direct chain of supervision at any level, draft any part of the proposal, contract, modification, or task order, including, but not limited to, recommending the inclusion of any Contract Data Requirements List (CDRL), Data Item Description (DID), Statement of Work (SOW) provision, contract clauses, standards of performance, or review Government or Contractor proposed test plans? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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B. During your last year of Government service, did anyone in your direct chain of supervision have any role formulating Acquisition Strategy, to include identifying interested contractors, recommending a sole source contract, performing a market survey, performing a pre-award audit, advertising the proposal, participating in the Acquisition Strategy Panel, investigating or identifying sources, or discussing the proposal/contract with potential offerors? If so, describe your actions with regard to your role. (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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C. During your last year of Government service, did anyone in your direct chain of supervision have any role in the cost or technical evaluation of offers or selection of contractor? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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6) During your last year of Government service, did anyone who worked for you in your direct chain of supervision take any action through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, relating to contract performance or administration, of the Contract or other particular matter? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

EXAMPLES: (Not an all-inclusive list of examples)

A. During your last year of Government service, did anyone under your supervision, have any role in making decisions, giving advice, or making recommendations to the contracting officer, program manager, quality assurance evaluator, or anyone else, regarding evaluating any aspect of contractor performance, including, but not limited to, award fee determination, acceptability of performance, comments following a review of contract deliverables or reports, evaluation of work, approval of invoices for payment, CPAR ratings, or other evaluation of contractor work? (yes/no/not sure) (If “yes” or “not sure,” describe fully your role, and the date you performed such a role.)

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B. During the last year of Government service, did anyone in under your supervision have any role in recommending, advising, or determining what taskings should be assigned to the contractor? (yes/no/not sure) (If "yes" or "not sure," describe fully your role, and the date you performed such a role.)

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C. During your last year of Government service, did anyone in your direct chain of supervision have any role in evaluating contractor performance, including whether the contractor met contract requirements or satisfied test plans? (yes/no/not sure) (If "yes" or "not sure," describe fully your role, and the date you performed such a role.)

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D. During your last year of Government service, did anyone in your direct chain of supervision have any role in approving or disapproving, advising, recommending action, evaluating or resolving any Requests for Equitable Adjustments, cost proposals, disputes, or claims? (yes/no/not sure) (If "yes" or "not sure," describe fully your role, and the date you performed such a role.)

E. During your last year of Government service, did anyone in your direct chain of supervision have any role in closing out the contract? (yes/no/not sure) (If "yes" or "not sure," describe fully your role, and the date you performed such a role.)

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Atch 1:  
(If military, OPRs during relevant time periods)