

ETHICS COUNSELOR FUNDAMENTALS

I. AUTHORITIES

- A. 18 U.S.C. §§ 201-209, 216.
- B. Ethics in Government Act of 1978 (5 U.S.C. app. § 101 et. seq.).
- C. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R., Part 2635 (Office of Government Ethics Rules).
- D. Supplemental Standards of Ethical Conduct for Employees of the Department of Defense, 5 C.F.R., Part 3601.
- E. Joint Ethics Regulation (JER)
- F. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," April 12, 1989, as amended.
- G. Executive Branch Ethics Program 5 C.F.R. part 2638

HELPFUL LINKS.

- DoD Standards of Conduct Office (<https://dodsoco.ogc.osd.mil/>)
- Office of Government Ethics (<https://www.oge.gov/web/oge.nsf/home>)

II. CRIMINAL ETHICS STATUTES

- A. 18 U.S.C. § 201-209 are the main criminal ethics statutes providing enforcement mechanisms for these laws. 18 U.S.C. § 216 provides the penalty for a violation of the criminal conflict of interest statutes.
- B. Section 201 makes bribery a crime. Section 202 defines Special Government Employees. Sections 203 and 205 restrict Federal employees from representing others before the Government with or without compensation. Section 207 places post-government employment restrictions on former federal employees. Section 208 is the conflicts of interest law covering current Executive Branch federal employees. Section 209 prohibits federal employees from being paid by two non-federal sources to perform their federal duties.

III. OFFICE OF GOVERNMENT ETHICS (OGE)

- A. The U.S. Office of Government Ethics was created by the Ethics in Government Act, 5 U.S.C. app. §401, as a separate Executive Branch agency to oversee Executive Branch ethics programs. The underlying basis for the Ethics in Government Act is the Basic Obligations of Public Service issued under Executive Order 12674 at Appendix A (commonly known as the 14 principles).
- B. OGE's authority, functions, and oversight of Executive Branch agencies is designated by 5 U.S.C. app. § 402.
- C. The Ethics in Government Act requires that the head of each Executive Branch agency designate a designated agency ethics official (DAEO) to administer the agency ethics program.
- D. In response to Executive Order 12674, OGE issued the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635. The Standards apply to all executive branch employees and address a myriad of ethics topics, including: both the criminal conflict of interest and appearance of a conflict of interest rules, misuse of Government personnel and equipment, receipt of gifts, regulations on seeking employment and on post-government employment and participation in fundraising events.

IV. IMPLEMENTATION OF THE ETHICS IN GOVERNMENT ACT AT DOD

- A. DoD has issued a supplemental regulation which applies only to DoD personnel (military and civilian) and addresses a number of issues of importance to the DoD community.
- B. The Supplemental Regulation is found at 5 C.F.R., Part 3601. (NOTE: The JER incorporates the supplemental regulation by reference but is not itself the DoD supplementation.) This regulation supplements the Standards of Ethical Conduct for Employees of the Executive Branch.
- C. Part 3601 provides additional exceptions for gifts from outside sources, provides for additional limitations on gifts between DoD employees, sets forth when employees must complete a written disqualification, places limits on solicited sales by supervisors to subordinates, provides criteria for prior approval for outside employment and business activities, and requires a disclaimer for speeches and writings devoted to agency matters.

V. WHO RUNS THE DOD ETHICS PROGRAM

- A. The general counsel of each DoD designated separate agency component (DoD DAEO organization), pursuant to 5 C.F.R. § 3601.102, serves as the DoD agency DAEO unless the head of the agency appoints another person.

VI. THE JOINT ETHICS REGULATION

- 1. Applies to all DoD Components and personnel.
 - 2. Punitive. Noncompliance with the regulation is administratively punitive for civilian personnel. Regulations printed in ***bold italics*** in the JER are general orders—they apply to all military members without further implementation and violations may be punishable as violations of a lawful general order, Article 92, Uniform Code of Military Justice (UCMJ).
 - 3. Rules apply to all “DoD personnel” except the following do **not** apply to enlisted personnel: 18 U.S.C. §§ 203, 205, 207, 208, and 209; but provisions *similar* to 18 U.S.C. §§ 208 and 209 do apply. *See* JER, Chapter 5, Sections 1 and 2.
- B. Only the Secretary can waive application of a JER provision, unless the JER provides otherwise (e.g., certain provisions may be waived by the DoD General Counsel).
 - C. The JER provides DoD-specific interpretative and procedural guidance for implementation of the regulations. For example, the JER also includes key responsibilities for certain officials in implementing the DoD ethics program in Chapter 1.

VII. DESIGNATED AGENCY ETHICS OFFICIAL DUTIES AND RESPONSIBILITIES

(All short references are to 5 C.F.R.)

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| § 2638.104 | DAEO and various designees are also agency ethics officials. |
| § 2638.104 | Responsible for managing agency ethics program. |
| § 2635.805(c) | May authorize, in coordination with the DOJ, service as an expert witness which might otherwise violate 18 U.S.C. §§ 205 or 207. |

- § 2634.201(g) Reviewing official (DAEO or alternate) may grant 45-day extension for filing OGE 278.
- § 2634.204(a) May determine that filer will serve less than 60 days in a given year and not have to file OGE 278.
- § 2634.602 OGE 278s are filed with DAEO.
- § 2634.605(a) OGE 278s must be reviewed within 60 days after filing.
- § 2634.605(b)(2) OGE 278s are to be reviewed for each part of the report being completed; no interest or position disclosed on the report violates or appears to violate: any applicable provision of Chapter 11 of title 18 The Act, as amended, and the implementing regulation, Executive Order 12674 as modified by Executive Order 12731, and the implementing regulations; any other applicable Executive Order in force at the time of the review, or any other agency-specific statute or regulation which governs the filer conflicts.
- § 2634.605(b)(5) When OGE 278s are incomplete:
- (1) Reviewer must notify filer
 - (2) Must give the filer an opportunity to respond
 - (3) Must pursue remedies to resolve conflicts
 - (4) Must notify the head of the agency if the filer is in non-compliance JER 6-203
- § 2634.803(b) DAEO may enter into ethics agreements to resolve conflicts of interest.
- § 2638.104(c) DAEO duties in managing agency ethics program are:
- (1) Liaison with OGE
 - (2) Maintain financial disclosure system
 - (3) Promptly and timely furnishing OGE with all documents and information (disclosure reports)
 - (4) Carrying out an effective government ethics education program
 - (5) Taking appropriate measures to resolve conflicts of interest whether it involves recusals, directed divestitures, waiver, authorizations, or reassignments
 - (6) Consult with OGE on 18 U.S.C. § 208 waivers

- (7) Carrying out an effective financial disclosure program
 - Procedures (JER)
 - File timely
 - Collect late fees for late filing or no filing of public reports
 - Referrals to OIG and DOJ
 - Review for conflicts
 - Consult with Supervisors and filers about conflicts
 - Timely certify reports
 - Use information in financial disclosure reports to prevent conflicts
- (8) Assist the agency in enforcement of ethics laws and regulations
 - Referrals to OIG and DoJ
 - Take Disciplinary or corrective action
- (9) Assist OIG in interpretation and application of government ethics laws
- (10) Ensure that agency has process to notify OGE when a referral to DoJ is made per 28 U.S.C. § 535.
- (11) Providing advice to special Government employees
- (12) Requiring timely compliance with ethics agreements
- (13) Conducting ethics briefings for certain agency leaders
- (14) Prepare agency's ethics program for a potential Presidential transition
- (15) Evaluate the Agency's ethics program, and make recommendation to the agency regarding the resources available to the ethics program.

§ 2638.104

- (d) and (e) May delegate powers to deputy ethics officials (as used by OGE "deputy ethics officials" includes alternate DAEOs, agency ethics officials, and ethics counselors).

§ 2638.303 and .306 In managing the agency ethics training program, the DAEO must:

- (1) Notice of ethics requirements sent to new supervisors (including language in 2638.306(c))
- (2) Notice of ethics requirements included in job offers (2638.303)

VIII. DEPUTY DESIGNATED AGENCY ETHICS OFFICIAL RESPONSIBILITIES INCLUDING THOSE UNDER THE DOD SUPPLEMENTAL REGULATION (5 C.F.R., PART 3601)

- A. Implements, administers, and oversees all aspects of the organization's ethics program and all matters relating to ethics covered by the DoD supplemental ethics regulation at 5 C.F.R., Part 3601. *See* 5 C.F.R. § 2638.201
- B. Specific responsibilities set out in the ethics rules:

1. DoD Supplemental Regulation 5 C.F.R., Part 3601:
 - a. .103 advising on additional exceptions for gifts from outside sources
 - b. .104 advising on acceptance of group gifts
 - c. .105 advising on disclaimer for teaching, speaking and writing
 - d. .106 advising on prior approval for outside activities
 - e. .107 advising on Waiver
2. Section 2635 of 5 C.F.R.:
 - a. 5 C.F.R. § 2635.107(b) - Advice and counsel.
 - b. 5 C.F.R. § 2635.204(d)(ii) - Written determination required before certain awards or honorary degrees may be accepted.
 - c. 5 C.F.R. § 2635.206 - Advise on proper disposition of improper gifts. *See also* group gifts at 5 C.F.R. § 3601.104
 - d. 5 C.F.R. § 2635.502(a)(1) - Consult with agency ethics official and agency designee when appearance of a conflict may exist over personal or business relations.
 - e. 5 C.F.R. § 2635.602(a)(2) - Post-government employment advice including advising on written disqualification at 5 C.F.R. § 3601.105
 - f. 5 C.F.R. § 2635.805(c) - Authorize appearance of government employee as an expert witness in a case in which the U.S. Government is a party.
 - (1) Delegated by Army DAEO to Chief, Litigation Division for Army. For the rules, *see* Army Regulation 27-40, paragraph 7-10b
 - (2) Current and former Air Force employees rules are found in Air Force Instruction 51-301 (20 June 2002), Chapter 9.)
 - (3) Current Navy and Marine guidance is at 32 C.F.R. part 725.

- g. 5 C.F.R. 3601.103 (b)- Determination regarding gifts of scholarship and grants.

C. Guidance to “Agency Designees” when dealing with:

1. Acceptance of Gifts from Outside Sources - Widely Attended Gathering (5 C.F.R. § 2635.204).
 - a. 5 C.F.R. § 2635.204(g)(4) - Determination of agency interest.
 - b. 5 C.F.R. § 2635.204(g)(3)(i) –(iv) Written determination of agency interest--that employee's participation outweighs favoritism appearances.
 - c. 5 C.F.R. § 2635.204(g)(6) - Authorize accompanying spouse or other guest.
2. Waiver of Conflicting Financial Interest. The appropriate component DAEO consults with the U.S. Office of Government Ethics.
 - a. 5 C.F.R. § 2635.402(d)(2)(i) - Official responsible for appointment waives 18 U.S.C. § 208 conflict of interest.
 - b. 5 C.F.R. § 2635.402(d)(3)(ii) - Official responsible for appointment of SGE to a Federal Advisory Committee waives 18 U.S.C. § 208 conflict.
3. Conflict of Interests - Impartiality.
 - a. 5 C.F.R. § 2635.502(a) - Consult when appearance of a conflict.
 - b. 5 C.F.R. § 2635.502(c) - Determines if appearance of a conflict.
 - c. 5 C.F.R. § 2635.502(d) - Authorize participation notwithstanding appearance of a conflict of interest.
4. Seeking Employment 5 C.F.R. § 2635.605(b) -Authorize participation in a particular matter notwithstanding appearance of a conflict of interest while seeking employment.
5. Events sponsored by State and Local Government 5 C.F.R. § 3601.103(a) - Determination of community relations interest.
6. Outside Employment 5 C.F.R. § 3601.106 - Authorize employment.

D. 31 U.S.C. § 1353 (Gifts of Travel and Travel-Related Expenses to the Agency). Travel approval authority may not authorize acceptance without advice and concurrence of EC: 5 C.F.R., Part 304

1. Army Directive 2007-01, paragraph 15

2. SECNAVINST 4001.2J (12 Aug 09)

3. No Specific instruction in Air Force.

E. Public (OGE Form 278) and Confidential (OGE 450) Financial Disclosure Reports (5 C.F.R. Part 2634).

F. Provide Written Ethics Opinions to Individuals.

1. 5 C.F.R. § 2635.107 (In general).

2. 5 C.F.R. § 2635.602 (Post-Government Restrictions).

3. 5 C.F.R. § 2636.103 (Compensation for Teaching).

4. 41 U.S.C. § 2101-2107 (Procurement Integrity).

G. Other Agency Ethics Official Responsibilities.

Often, an Agency Ethics Official is appointed in writing by the DAEO, or by the head of a command or organization, who has been delegated the authority to assist in managing the ethics program and provide ethics advice (a.k.a. "Ethics Official"). He has the following responsibilities. (All short references are to 5 C.F.R., Part 2635.)

.102(c) and

JER 1-101 Definition: Has been delegated authority to carry out agency ethics program.

.107(b) May give authoritative advice on the standards of conduct.

.204(d)(ii) Must make written determination that awards in excess of \$200 in value are bona fide part of a program of established recognition.

.204(d)(3) Must make written determination that acceptance of an honorary

degree would not create an appearance of impropriety.

- .204(e)(4) When former employees may attend former employer reception or similar event.
- .204(m) May accept gifts of informational materials under certain terms.
- .206 May decide how to dispose of improper perishable gift (note: all supervisors have this power).
- .402(c)(2) May require written disqualification in resolving conflicting financial interest under 18 U.S.C. § 208 (note: all supervisors have this power).
- .502(a)(1) May provide advice to employees on whether an outside interest or relationship creates an appearance of impropriety.
- .502(e)(2) May require written disqualification in resolving appearance of impropriety (note: all supervisors have this power).
- .602(a)(1)(2) and (b)(2) May provide advice to employees on post-employment restrictions (including 18 U.S.C. § 207; 5 C.F.R. §§ 2637 & 2641; and 41 U.S.C. § 2101).
- .604(c) May require written disqualification while "seeking employment" (note: all supervisors have this power).

FAR 3.104-6(c) Shall, within 30 days of written request, provide written opinion on whether this statute precludes engaging in a specific activity.

IX. WHAT ONLY THE DAEO MAY DO

Certain duties of the DAEO are not delegable. They are:

- A. Determining whether an employee may testify against the Government pursuant to 5 C.F.R. § 2635.805.
- B. Approving teaching as an outside activity by a non-career political appointee pursuant to 5 C.F.R. § 2636.307.
- C. Certifying a public financial disclosure report of a presidential appointee confirmed by the Senate. 5 C.F.R. 605(c)(2)

- D. Possibly being the final reviewer of the commander depending upon the EC delegation.

X. REQUIRED REPORTS

A major part of an ethics program is a series of reports. The Ethics Counselor will be responsible for completing the following reports either as a reviewer for financial disclosure or as the designee responsible for gathering the information in the office to be included in the report.

- A. OGE Form 450 - Confidential Financial Disclosure Reports (Annual reports due 15 February). 5 C.F.R. § 2634.903.
- B. OGE Form 278 - Public Financial Disclosure Reports (Annual reports due 15 May). 5 C.F.R. § 2634.201.
- C. Gifts of Travel - (31 U.S.C. §1353) to report up to DAEO office as instructed. (Prior approval required prior to acceptance, and final report due within 30 days of travel) (Agency submits semi-annual reports to OGE no later than 31 May & 30 Nov).
- D. Annual Ethics Program Survey to report up to DAEO office as instructed. (5 C.F.R. § 2638.604(b). (Due Feb each year).
- E. Enforcement of the Joint Ethics Regulation - (Chapter 8, JER). (As needed for serious criminal misconduct. Matters referred to DOJ or U.S. Attorney are reported on OGE Form 202, "Notification of Conflict of Interest Referral," June 2023.
- F. By January 15, a report about issuing job offer notices and notices to supervisors about ethics and confirmation that the procedures have been implemented. 5 C.F.R. § 2638.310.

XI. RESOURCES (IN ADDITION TO LAW AND REGULATION) THAT MAY HELP THE ETHICS COUNSELOR

- A. GAO Principle of Federal Appropriations Law (Redbook) for Fiscal Law Related Issues. (<http://www.gao.gov/>)
- B. OGE material. (<https://www.oge.gov/web/oge.nsf/home>)

- C. DoD SOCO website: <https://dodsoco.ogc.osd.mil/>
- D. Your MACOM/MAJCOM/higher command EC.
- E. Navy JAG (Code 13); Navy Assistant General Counsel (Ethics); AF/JAG General Law Division; Army SOCO.

XII. HEAD OF AGENCY AND SGES

A. Head of Agency

(All short references are to 5 C.F.R., Part 2635.)

.102 Determinations relating to the conduct of the agency head, or actions which must be taken by agency head, must be done in consultation with the DAEO

.102(i) Definition: "Head of Agency" means head of agency

.503(c) Waiver of conflict created by extraordinary payments from former employers shall be in writing and given only by the head of agency. However, this waiver authority may be delegated.

2638.107 Is personally responsible for agency ethics program, and shall make sufficient resources available for the program, and select the DAEO.
NOTE! The headnote summaries of these sections have been condensed and simplified. However, to the greatest extent possible, the operative verbs and objects in the regulations have been retained.

B. Special Government Employees and How They Are Impacted Under OGE Rules

2635.102(h) Definition of "employee" includes special government employees (SGE)

.102(1) Definition of "SGE" incorporated from 18 U.S.C. § 202(a), i.e., on temporary duty not to exceed 130 days per year. They generally are consultants or members of an advisory committee. An SGE is an ethics term, and not a personnel term.

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- .204(e)(2) Gifts: Example 1: For gifts based on outside relationships, SGEs may accept gifts (even from DoD contractors) so long as it is not given for work done as an SGE
- .805(a) Restriction on service as an expert witness only applies to SGEs on the same particular matter in which they served as a federal official
- .805(b) SGE must get agency permission to act as expert witness in a matter involving agency where SGE was employed if the SGE is a presidential appointee, serves on a statutory commission, or has served more than 60 days in a given year
- .807(a) SGE prohibited from receiving compensation for speaking, teaching, or writing about official duties
- .807(a)(2)(i)(E)(4) Teaching, speaking, and writing do not relate to SGE official duties when the SGE comments on matters of official agency policy, agency operations, agency programs, general subject matter concerning an industry or economic sector, or matters to which to employee was assigned during the previous year (unless the employee has served more than 60 days during the previous year and 60 days during the subsequent year). In other words, the restriction on SGEs' compensation for teaching, speaking, or writing is limited to the same particular matter in which they were involved personally and substantially. See examples 7, 8, and 9.
- .808(c) SGE may engage in fund-raising in a personal capacity and may solicit a prohibited source, if the prohibited source is not directly affected by the SGE's duties

APPENDIX A

BASIC OBLIGATIONS OF PUBLIC SERVICE UNDER EXECUTIVE ORDER 12674

1. **Public Service is a public trust**, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty**.

3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.

4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees **shall put forth honest effort in the performance of their duties**.

6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.

7. Employees **shall not use public office for private gain**.

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.

9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.

10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.

11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.

12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.