

OUTSIDE ACTIVITIES

I. REFERENCES

- A. 5 U.S.C. § 5515 (jury duty), § 5534a (military member dual employment and pay during terminal leave), § 5536 (extra pay), Appx § 501 (outside earned income)

- B. 10 U.S.C. § 974 (Military musical units and musicians: performance policies; restriction on performance in competition with local civilian musicians) § 1060 (service with newly democratic nations)

- C. 18 U.S.C. § 201-209 (compensation for representational services), § 205 (3rd party agent in front of Government), § 219 (foreign principals), § 798 (disclosure of classified info), § 1905 (disclosure of confidential info)

- D. Executive Order 12674, as modified by Executive Order 12731 (outside earned income)

- E. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, Subparts G (Misuse of Position) & H (Outside Activities)

- F. Limitations on Outside Earned Income, Employment and Affiliations for Certain Noncareer Employees, 5 C.F.R. Part 2636, Subpart C

- G. 48 C.F.R. § 3.601 (no contracts to Government employees)

- H. DoD Instruction 5525.08 (military jury duty on state and local juries)

- I. DoD Instruction 5410.20 (commercial use of DoD material)

- J. DoD Financial Management Regulation, Volume 8, Chapter 5, § 0517 (civilian jury duty)

- K. DoD 5500.07-R, Joint Ethics Regulation (JER), *Change 7, 11/17/2011*

L. Secretary of the Navy Instruction 5720.44B (public affairs)

M. Air Force Instruction 35-101 (public affairs)

N. Senate Armed Services Committee Guidance Regarding Military Officers in Grades O-9 and O-10

II. INTRODUCTION

A. This chapter overviews the rules affecting outside activities, such as working, teaching, writing, and speaking by active duty and civilian DoD personnel. The first section discusses outside employment. The second section discusses some “special case” paid and unpaid outside activities. The third section cites and briefly discusses several miscellaneous provisions concerning other outside activities.

B. This chapter does not discuss certain outside activities that are covered elsewhere in this publication. In particular, it does not discuss elected positions with federal, state, and local government, positions and roles with more traditional non-federal entities, procurement integrity, or post-government employment. When reviewing outside activities, please cross-reference these chapters as applicable.

C. The general rule for outside activities is permissive: Executive branch employees, subject to some limitations, are allowed to participate in outside activities. An employee may not have outside employment or be involved in an outside activity that conflicts with the official duties of the employee's position. An activity conflicts with official duties --

- if it is prohibited by statute or by the regulations of the employee's agency, or
- if the activity would require the employee to be disqualified from matters so central to the performance of the employee's official duties as to materially impair the employee's ability to carry out those duties.

Employees of some agencies may be required by their agency's own supplemental conduct regulations to obtain prior approval before engaging in certain outside employment or activities. These details follow.

III. OUTSIDE EMPLOYMENT

A. **Overview:** This section discusses the rules affecting full and part-time employment for DoD personnel.

NOTE: PAS Officials are generally barred by SASC and White House policy from participating in outside employment.

B. **Federal Government Positions:**

1. Active Duty Military Members may not accept compensation for holding another Federal position because their military duties make them “on call” 24 hours a day. JER 5-404. Military personnel on terminal leave pending separation under honorable conditions may accept a Federal position. 5 U.S.C. § 5534a.

2. Civilian Employees may hold separate and distinct federal positions. 5 U.S.C. § 5536. JER § 5-405.

3. DoD personnel may receive retirement and/or similar payment from a former employer, even if the former employer is the Federal Government. JER 5-404.

4. **No compensation for official acts or duties.** Federal employees may not receive compensation for performing official acts or completing their official duties from any source other than their Federal Government employer. JER 5-404 (*But see* Gifts) Further, 18 USC 209, a criminal provision, prohibits employees from receiving any salary or contribution to or supplementation of salary from any source other than the United States as compensation for services as a government employee.

5. For senior officials serving in 10 USC 601 positions (O-9 and O-10 level) special rules apply. See the SASC guidance contained at the end of this outline.

C. **Outside Positions / Self-Employed:** DoD personnel may engage in outside employment or be self-employed outside the work place. 5 CFR 2635.801-804. There are, however, **several limitations** that should be kept in mind.

1. **No interference with official duties.** Generally, you can not be on both sides of the equation.

(a) **Interference Generally.** A DoD employee may not engage in outside activities that interfere with his performance of military duties, are prohibited by statute or regulation, or would require the employee's disqualification from matters critical to the office. 5 C.F.R. § 2635.802; JER § 5-406. (Cross reference with the Procurement Integrity Act.)

(b) **Security and Agency Specific Requirements.** Agencies may require employees to seek approval for outside employment and may prohibit such activities if they will detract from readiness or pose a security risk. This authority is derived from the authority of the Secretary of Defense, under title 10, United States Code, to maintain military readiness and must be tied to a legitimate military mission requirement. JER § 2-303.

(c) **Financial Disclosure Filers.** Within DoD, financial disclosure filers must obtain prior written approval from their "Agency Designee" before working for a prohibited source. Permission shall be granted unless the outside activity involves conduct prohibited by statute or regulation. 5 C.F.R. § 2635.803; JER §§ 2-206, 3-306, Senate Armed Forces Committee guidance on specific restrictions for 09/010 Officers (see memo at conclusion of outline).

2. **No representing to the Federal Government. Note – these are criminal provisions.** Employees may not act as agent or attorney for anyone before any agency of the Government on any matter in which the United States is a party or has a direct and substantial interest. 18 U.S.C. § 205. Other than in the performance of official duties, employees may not receive compensation for representational services rendered either personally or by another. 18 U.S.C. § 203. Further, 18 USC 208 bars any employee from participating personally and substantially in an official capacity in any particular Government matter that would have a direct and predictable effect on his own (or imputed) financial interests. (Cross-reference with discussion on Conflicts of Interest in chapter and note references in 18 U.S.C. § 201 - 209 and 5 C.F.R. 2637.)

3. **Appearance of Impropriety.** In addition to the limitations described above, Federal Employees are prohibited from taking positions when to do so would create an appearance of a conflict of interest with his or her federal employment. 5 C.F.R. 2635.802

III. SPECIAL CASE PAID / UNPAID OUTSIDE ACTIVITIES

A. **Teaching, Speaking, or Writing Related to Official Duties.** A Government employee may not use his public office for private gain. There are several common pitfalls and things to Reflecting this restriction is 5 C.F.R. § 2635.807, which precludes the acceptance of compensation from a non-Federal source for teaching, speaking, or writing when:

1. The activity is undertaken as part of the employee's official duties; or
2. The invitation was extended because of the employee's official position rather than his expertise; or
3. The invitation is from a person whose interest may be affected by the employee's official duties; or
4. The presentation is based on nonpublic information; or
5. The topic deals with the employee's current duties or those during the previous year, or the topic deals with a policy, program, or operation of the employee's agency.
6. "Compensation" is defined at 5 CFR 2635.807(a)(2)(iii). It does not include gifts that could be accepted from prohibited sources under 5 C.F.R. § 2635.204, free attendance at the event in which the speaking or teaching takes place, or publications that provide a record of the activity. When an employee who is required to file a financial disclosure report is authorized to and does accept travel expenses from a source other than the United States Government, travel and travel reimbursements must be reported on the financial disclosure report if the travel or travel reimbursements exceed \$335. 5 C.F.R. § 2635.807(a)(2)(iii).
7. Political Appointees have special rules limiting their outside earned income. These restrictions are contained in 5 C.F.R. 2636.304, which places a 15 percent limitation on outside earned income of PAS officials (\$26,550 for CY10).
8. Service as an expert witness. 5 C.F.R. 2635.805 provides the general rule that prohibits federal employees from serving as an expert witnesses, with or without compensation, in any court proceeding in which the United States is a party, or has a direct interest. This section places additional restrictions on certain types of special government employees. This section also contains some exceptions which usually require significant coordination between the individual, the designated agency ethics official, and the party representing the United States (typically DOJ).

9. Exceptions:

(a) The prohibition on accepting compensation does not apply to matters within the employee's discipline or expertise based on education or experience. 5 C.F.R. § 2635.807(a)(2)(i)(E) note. It applies differently to non-career employees and special government employees than it does to other Executive Branch employees.

(b) As an exception, an employee may accept compensation for teaching a course of the regularly established curriculum of an elementary school, high school, or institution of higher education. 5 C.F.R. § 2635.807(a)(3).

(c) Policy & Security Reviews. A lecture, speech, or writing that pertains to military matters, national security issues, or subjects of significant DoD concern shall be reviewed for clearance by appropriate security and public affairs offices. JER § 3-305; Secretary of the Navy Instruction 5720.44B, Department of the Navy Public Affairs Policy and Regulations, 1 Nov 05, Chapter 2; Air Force Instruction 35-101, Public Affairs Policies and Procedures, 29 Nov 05, Chapter 15.

10. Disclaimers. DoD employees who permit the use of their military grade, title, or position while teaching, speaking, or writing regarding DoD policies, programs, or operations shall indicate that the views are those of the speaker and not DoD or its components. Where a disclaimer is required for a writing, the disclaimer must be prominently printed in the presentation. Where a disclaimer is required for a speech, the disclaimer may be given orally at the beginning of the presentation. JER § 2-207.

B. **Honoraria**. An honorarium is payment to an individual in recognition of a special service for which custom or propriety forbids any fixed price to be set. Honoraria services may include, but are not limited to, speeches, panel participation, reviewing manuscripts, and leading group discussions. The ban on accepting honoraria set out in 5 C.F.R. Part 2636, subpart B (*now deleted*), was struck down by the Supreme Court in *National Treasury Employees Union v. United States*, 115 S. Ct. 1003 (1995). The Office of Legal Counsel, Department of Justice, issued an opinion on February 26, 1996, that the honoraria prohibition cannot be enforced against any Government employee. Honoraria may only be accepted, however, if it is not for speaking, teaching, or writing related to official duties.

- (1) C. **Military Band Members**. 10 U.S.C. § 974 places restrictions on all military bands and other musical units from performing in their official capacity when the performance competes with employment of local civilian musicians. However, it does allow military band members and other musical units from performing in their personal capacity regardless

of competition with local civilian musicians. 10 U.S.C. § 974, as amended. See paragraph 4.8 of DoDD 5410.18 and Enclosure 8 to DoDI 5410.19. Note that DoDD 5410.18 specifically finds that bands are not appropriate logistical support and may not perform at fundraising events. Waiver of this restriction by DoD Public Affairs has been limited to a single annual national fundraising event by each of the military aid organizations.

D. Participation in media productions. The (exceptionally welcome) rise of reality television in the past several years combined with the increased appreciation of our military members' efforts and sacrifices has resulted in many efforts by various media productions to make one or several of our military members the focus of a reality television life-improvement program (e.g., Extreme Home Make-Over, Pimp My Ride, Underage and Engaged, etc.) These are primarily Public Affairs events; PA will take the lead (with legal support) on production assistance agreements, use of the base, etc. Note that in most cases DoD has determined that the items received by the military member of focus (e.g., the wedding for the engaged minor, etc.) are payment for appearance and participation in the event, in their personal capacity, and not a gift from the source.

E. Letters of Recommendation. There are two main issues with respect to Letters of Recommendation: (1) Can the government employee sign the letter of recommendation using his or her official title? And (2) can the government employee put the letter of recommendation on the official stationery of his or her Federal agency?

1. 5 CFR 2635.702(b). [Note: This provision, including the example, applies to all Executive Branch employees.]

(b) Appearance of governmental sanction. Except as otherwise provided in this part, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another. When teaching, speaking, or writing in a personal capacity, he may refer to his official title or position only as permitted by Sec. 2635.807(b). He may sign a letter of recommendation using his official title only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment or whom he is recommending for Federal employment.

2. It is important to remember that while DoD employees may write a letter of recommendation supporting an employment application, they cannot use their official title and position or DoD letterhead to endorse either their own personal activities, services, or products, or those of another. Furthermore, DoD employees cannot state or imply that DoD or the Government endorses or sanctions their personal activities or those of another.

IV. MISCELLANEOUS PROVISIONS

A. **Use of Nonpublic Information.** Employees may not use nonpublic information to further their own private interests or those of another. 5 C.F.R. § 2635.703. Nonpublic information is information that is not available to the general public. It includes information not releasable under FOIA, protected by Privacy Act, classified (18 U.S.C. § 798, 50 U.S.C. § 783(b)), protected by the procurement integrity law (41 U.S.C. § 423), or protected by the Trade Secrets Act (18 U.S.C. § 1905).

B. **Solicited Sales.** DoD employees shall not make solicited sales to DoD personnel who are junior in rank, grade, or position, or to the family members of such personnel. JER §§ 2-205, 5-409.

1. Includes solicited sales of insurance, stock, mutual funds, real estate, cosmetics, vitamins, or house wares.

2. Does not prohibit sale or lease of employee's non-commercial property.

3. Does not prohibit commercial sales solicited and made in a retail establishment during off-duty time.

4. Absent coercion or intimidation, sales made because the junior approaches the senior are not prohibited.

5. Note: JER 2-205 and 5-409 have regularly been interpreted to permit "one-time" sales of cars and similar property as well as rental of real estate, etc. Ethics Counselors should take care, however, to avoid advising senior officers to take actions that may create the appearance of fraternization, favoritism, etc. (e.g., the direct rental of property to subordinates, etc.). Best practice of using a rental agent, for example, may avoid situations where one DoD member is attempting to collect a disputed payment from another.

6. **Solicitations by Spouses.** Personal commercial solicitations by the spouse or other household member of a DoD employee to those who are junior in rank, grade, or position to the DoD employee, may give rise to the appearance that the DoD employee himself is using his public office for private gain. In such circumstances, the DoD employee's supervisor must consult with an ethics counselor and counsel the employee that such activity must be avoided where it may cause actual or perceived partiality or unfairness, involve the actual or apparent use of rank or position for personal gain, or otherwise undermine discipline, morale or authority. JER § 5-409(c).

C. Use of the Uniform and Title:

1. Military personnel may not wear the uniform in connection with furthering political activities, private employment, or commercial interests or when participating in activities such as unofficial public speeches, when Service sponsorship or sanction may be implied. DoD Instruction 1334.01. JER 3-209. Other commercial use of DoD material, including uniforms and insignia, must be approved by OASD (PA). Permission to use or reproduce military emblems or insignia for unofficial purposes other than commercial advertising or promotion may only be given by the Military Department responsible for the insignia. DoD Instruction 5410.20.

2. Employees may not use or permit the use of their Government positions, titles, or authority in a manner that could be reasonably construed to imply official endorsement or sanction of personal activities or non-Federal entities. 5 C.F.R. § 2635.702; JER § 3-209.

(a) Specific authority exists to endorse some types of organizations like the military relief societies. JER § 3-210a.

(b) Rank and branch of service are considered terms of address and do not imply official endorsement. (“Pvt. J. Jones, U.S. Army”). JER 3-300a(1).

Expert Witness. Employees may not appear as expert witnesses, other than on behalf of the United States, in any proceeding before a Federal agency or court in which the United States is a party or has a direct and substantial interest. 5 C.F.R. § 2635.805.

An employee may testify without compensation with DAEO approval.

The prohibition does not apply to fact witnesses when subpoenaed by appropriate authority.

D. **Outside earned income limitation for covered non-career employees.** 5 U.S.C. Appx. §§ 501, 502; 5 C.F.R. 2636, subpart C. “Covered non-career employees” include non-career employees whose basic pay equals lowest level of SES. Does not include career SES, admirals, or generals. 5 C.F.R. § 2636.303.

1. Limits annual outside earned income to 15% of Executive Level II (\$25,830 in 2008). 5 C.F.R. § 2636.304.

2. No outside earned income for Presidential appointees. Executive Order 12674 as modified by Executive Order 12731.

3. No compensation from activities involving a fiduciary relationship (e.g., outside law practice). 5 C.F.R. § 2636.305.

4. No compensation for serving as officer or member of the board of directors of any entity. 5 C.F.R. § 2636.306.

5. DAEO authorization required for compensation for teaching. 5 C.F.R. § 2636.307.

E. **Use of Government property.** See Use of Government Resources.

F. **Contract Awards to Government Employees.** The Government may not award appropriated fund contracts to Federal employees or businesses substantially owned or controlled by them, unless the needs of the Federal Government cannot reasonably be otherwise met. 48 C.F.R. § 3.601; JER § 5-402. For guidance on the award of non-appropriated fund contracts to Air Force personnel, see Air Force Manual 64-302, Nonappropriated Fund (NAF) Contracting Procedures, 3 Nov 00, para. 11.11.

G. **Assignment of Reservists.** See Ethics for Reserve Personnel.

H. **Job Search Expenses.** Employees negotiating for employment may receive some forms of compensation to defray the expenses of job hunting. An employee may accept travel benefits, including meals, lodging and transportation, if customarily provided by a prospective employer in connection with bona fide employment discussions even if tendered by a DoD contractor. 5 C.F.R. § 2635.204(e)(3). However, if the prospective employer has an interest that could be affected by the performance or nonperformance of the employee's duties, payment for expenses may only be accepted after complying with the disqualification requirements. 5 CFR 2635.604; JER 2-204c. See Post Government Employment and The Procurement Integrity Act.

I. **Employment by a Foreign Government / Employment by a Foreign Principal.** See Post-Government Employment and Procurement Integrity.

J. **Limitations on contracting officials and related personnel.** See Post-Government Employment and Procurement Integrity.

K. **Jury Duty.** Civilian Federal employees are authorized court leave with pay when serving as a juror in a judicial proceeding to which the United States, District of Columbia, or State or local government is a party. Civilian Federal employees may accept jury duty fees when serving on a jury in State or local court. Civilian Federal employees may not accept fees for jury duty or

witness fees in Federal or District of Columbia courts. If such fees are paid, they must be turned in to the customer service representative at the employing activity. An employee may keep reimbursements for expenses. 5 U.S.C. § 5515; DoD Financial Management Regulations, Volume 8, Chapter 5, § 0517. Military members are exempt from State or local jury duty when it would interfere unreasonably with performance of duties or adversely affect command readiness. Military members who do serve on State or local juries shall not be charged leave, and all fees accrued to active duty members are payable to the U. S. Treasury. Members are entitled to keep reimbursement for travel or other actual expenses. DoDD 5525.08; Secretary of the Navy Instruction 5822.2; Air Force Instruction 51-301.

L. **Fundraising**. For information on the Girl Scout Cookie Police and other fundraising restrictions, please see the fundraising outline.