

## **Relations with Non-Federal Entities: Official and Personal**

### **I. REFERENCES.**

#### A. Use of Government Resources (fiscal and ethical considerations):

1. 5 C.F.R. § 2635.704: Use of Government property
2. 5 C.F.R. § 2635.705: Use of official time
3. 5 C.F.R. § 2635.808: Fundraising
4. 41 C.F.R. Subpart D (§ 102-74.460 et seq.): Occasional Use of Public Buildings
5. DoD 5500.07-R, Joint Ethics Regulation (JER)
  - a. 2-301: Generally limits use of Government property to authorized purposes
  - b. 3-303: Prohibits use of Federal personnel for unofficial purposes.
6. 31 U.S.C. § 1345: Expenses of meetings
7. 31 U.S.C. § 1346: Expenses related to commissions, boards
8. Principles of Federal Appropriations Law (GAO Redbook)  
<http://www.gao.gov/special.pubs/redbook1.html>
9. Office of Legal Counsel (DOJ) opinions <http://www.justice.gov/olc/opinions.htm>
10. DoDI 1015.9, Scouting Organizations at Overseas Military Installations (10/31/90)
11. DoDD 1000.26E, Support for NFEs Authorized to Operate on DoD Installations (2/2/07)
12. DoDI 1000.15, Procedures and Support for NFEs Authorized to Operate on DoD Installations (10/24/08)
13. DoDD 1100.20, Support for Outside Eligible Organizations (4/12/04)
14. DoDD 5410.18, Public Affairs Community Relations Policy (11/20/01)
15. DoDI 5410.19, Public Affairs Community Relations Policy Implementation (11/13/01) [***Both combined in forthcoming updated omnibus DoDI 5410.19***]

16. 5 C.F.R. § 251.202: Agency Support to Private Organizations Representing or Serving Federal Employees

17. Opinions of the Comptroller General: <http://www.gao.gov/legal.htm>

B. Preferential Treatment:

1. 5 C.F.R. § 2635.702(b): Appearance of governmental sanction
2. 5 C.F.R. § 2635.702(c): Endorsements
3. 5 C.F.R. § 2635.808: Fundraising
4. DoD 5500.07-R, Joint Ethics Regulation (JER), *Change 7, 11/17/2011*
  - a. JER 3-209: Endorsement
  - b. JER 3-211: Logistical Support for NFE events

C. Conflicts of Interest:

1. JER 3-202: Management of private organizations
2. JER 3-304: Prior approval of outside employment and business activities

D. Conferences (may repeat authorities listed)

1. Federal Government-wide
  - a. Office of Legal Counsel Memorandum Opinion for the General Counsel, Environmental Protection Agency, *Use of Appropriated Funds to Provide Light Refreshments to non-Federal Participants at EPA Conferences*, April 5, 2007.
  - b. GSA Guidance for Conducting Conferences, Aug. 1, 2008.
  - c. Decisions of the Comptroller General.
    - (1) Letter from the GAO to the Honorable Barbara A. Mikulski, *Contractors Collecting Fees at Agency-Hosted Conferences*, B-306663, January 4, 2006
    - (2) Letter from the GAO to the National Institutes of Health – *Food at Government-Sponsored Conferences*, B-300826, March 3, 2005 ([www.gao.gov/decisions/appro/300826.htm](http://www.gao.gov/decisions/appro/300826.htm))

- d. U.S. Office of Government Ethics, *Conferences: A Guide for Ethics Officials* (version 1.0), dated May 2008.
  - e. 5 U.S.C. §§ 1103 and 4101: Training; and implementing regulations 5 CFR Part 410.
2. Department of Defense
- a. 10 U.S.C. § 2262, Department of Defense conferences: collection of fees to cover Department of Defense costs ([www.gpo.gov/fdsys/pkg/USCODE-2010-title10/pdf/USCODE-2010-title10-subtitleA-partIV-chap134-subchapII-sec2262.pdf](http://www.gpo.gov/fdsys/pkg/USCODE-2010-title10/pdf/USCODE-2010-title10-subtitleA-partIV-chap134-subchapII-sec2262.pdf))
  - b. DoD 7000.14-R, *Financial Management Regulation*
  - c. Conference Fee collection, Vol. 12, Chap. 32
3. Office of the Secretary of Defense memoranda
- a. Office of the Deputy Chief Management Officer, Department of Defense Conference Guidance, Version 4.0, dated June 26, 2016.
  - b. Deputy Secretary of Defense, Updated DoD Conference Guidance, Sep. 23, 2015.
  - c. Deputy Secretary of Defense, *Engaging with Industry*, March 2, 2018. ([https://dodsoco.ogc.osd.mil/Portals/102/engaging\\_with\\_industry\\_policy.pdf](https://dodsoco.ogc.osd.mil/Portals/102/engaging_with_industry_policy.pdf))
4. Department of the Air Force
- a. AFI 65-601v1, *Budget Guidance and Procedure*, paragraph 4.42
  - b. Memorandum, SAF/GCA, Subject: Government Accountability Office (GAO) and Department of Defense (DoD) General Counsel's Office Opinions on Conference Fees and Providing Food at Conferences, 5 October 2005.  
  
Policy Memorandum, Conferences, dated Oct. 28, 2011.
5. Department of the Army
- a. Directive 2011-20, Department of Army – Conferences, dated Oct. 14, 2011  
Directive 2011-05, Department of Army Conferences, Symposia, Seminars and Meetings, dated Apr. 20, 2011.
6. Department of the Navy
- a. OPNAVINST 5050.24F

b. U.S. Marine Corps

c. MARADMIN 525/08, Controlling Conference Costs, dated Sep. 19, 2008

7. National Guard Bureau, Memorandum, NGB-ARZ, Subject: ARNG Policy for the Conduct of Official Conferences and Meetings, 1 May 2005.

E. Army Guidance:

1. Private Organization Reference Guide (October 1998)
2. AR 210-22, Private Organizations on Department of the Army Installations (October 22, 2001)
3. AR 360-1, The Army Public Affairs Program (5/25/11)
4. AR 600-29, Fund-Raising within the Department of the Army (6/7/10)
5. AR 600-20, Army Command Policy (11/6/14)

F. Air Force Guidance:

1. AFI 34-223, Private Organization Program
2. AFI 35-101, Public Affairs Policy and Procedures
3. AFI 36-3101, Fundraising Within the AF
4. AFI 36-3105, Red Cross Activities Within the AF
5. AFI 36-3109, Air Force Aid Society
6. AFI 51-902, Political Activities by AF Members
7. AFI 61-205, Sponsoring or Co-Sponsoring Conferences
8. AFI 90-401, AF Relations with Congress

G. Navy/Marine Corps Guidance.

1. SECNAVINST 5340.7, Active Duty Fund Drive in Support of the Navy-Marine Corps Relief Society (NMCRS)
2. SECNAVINST 5720.44C, Public Affairs Policy and Regulations
3. SECNAVINST 1740.2E, Solicitation and Conduct of Personal Commercial Affairs
4. United States Navy Regulations, Chapter 11, Section 2

5. OPNAVINST 5760.5C, Navy Support and Assistance to Youth Groups

**II. ETHICAL PRINCIPLES.**

- A. Personnel shall not use Government property for other than authorized purposes. (5 C.F.R. 2635.101(b)(9))
- B. Personnel shall not use public office for private gain. (5 C.F.R. § 2635.101(b)(7))
- C. Personnel shall not give preferential treatment to any private organization or individual. (5 C.F.R. § 2635.101(b)(8))
- D. Personnel shall not participate in official matters that conflict with personal interests. (5 C.F.R. §§ 2635.402 and 2635.502)

See, the 14 Principles of Ethical Conduct issued by Executive Order 12647 (4/12/1989) and both the Standards of Ethical Conduct for Employees of the Executive Branch and the Joint Ethics Regulation.

In analyzing relations with non-Federal entities (NFEs) and applying the principles, determining whether participation by DoD personnel will be in their official or personal capacity is the first step. The following paragraphs roughly track increasing levels of relationship from mere meeting attendance to significant support, evaluating official and personal capacity participation for each activity.

**III. ATTENDING NFE MEETINGS OR OTHER EVENTS**

- A. **Official Capacity:** JER 3-200 permits agency designees to authorize DoD personnel in their official capacity to attend meetings and similar events sponsored by NFEs at Government expense and time if the meetings serve a legitimate official purpose, such as communications with industry or valid community outreach. (See 5 U.S.C. §§ 4109 and 4110; 31 U.S.C. 1345; and 37 U.S.C. § 412)
  - 1. Agency designees may also authorize such attendance at no additional cost to the Government when there is a legitimate purpose.
  - 2. Agency relationships with organizations representing Federal personnel and other organizations: The Office of Personnel Management (OPM) requires consultation with associations that represent Federal personnel by management officials and/or supervisors, and permits support to other organizations when such actions would benefit the agency's programs or be warranted as a service to employees who are members of the organization. Such support includes use of agency equipment to prepare papers, payment of travel to attend professional meetings (for employee development or when directly related to agency functions), liberal leave to attend

meetings, and use of Government information systems to inform employees of meetings. 5 C.F.R. § 251.202

3. Unless willing to provide the same access to similarly situated requestors, Agency Designees should generally decline such attendance when the event provides a narrow, non-diverse, audience like the officers and board members of one company or its clients or supply chain. Avoid any appearance of providing special access to senior DoD officials.

- B. **Personal Capacity**: Attendance is generally allowed so long as it is clear that personnel are attending in their personal capacities and acting exclusively outside the scope of their official positions. (JER 3-300.a.)

#### IV. REPRESENTING DOD TO, OR SERVING WITH, NFES

Often NFES will invite DoD personnel to serve in either an official or personal capacity on one of their boards, councils, or committees, including advisory boards.

- A. **Official Capacity**: In lieu of allowing DoD personnel to serve directly on those bodies in their official capacity, which would require them to owe a duty of loyalty to serve the NFE's interests, such personnel must serve as DoD liaisons. Under JER 3-201, Heads of DoD Component organizations may appoint DoD personnel as liaisons to represent DoD interests to NFES when they determine that there is a **significant and continuing DoD interest** in such representation. DoD personnel perform the representation as an official duty and may discuss matters of mutual interest. Liaisons must inform the NFE that their opinions do not bind DoD or any of its components.

1. When membership with an NFE is required, DoD may purchase an organization membership or accept free membership as a gift to DoD. DoD may not use appropriated funds to purchase **individual** memberships in NFES. See 5 U.S.C. § 5946.
2. Fiscal laws apply: Liaison activities must satisfy an authorized agency purpose.
3. Liaisons may not participate in management (internal, day-to-day management) or control of the NFE, but may serve on advisory committees.
4. Liaisons do not have a conflict of interest because they represent only DoD, with no fiduciary duty to the NFE.
5. Because they act in their official capacity, personnel may use Government time, resources, and personnel to perform that function. They may also use their title, position or organization name.
6. Since personnel act within their scope of office, their personal liability is limited.

B. **Personal Capacity:** Unless an outside activity is prohibited by statute or DoD regulation, or otherwise conflicts with their official duties, DoD personnel may voluntarily become members of, and actively participate in, NFEs, such as professional associations, civic, religious, or scouting groups, etc. When doing so, they must act exclusively outside the scope of their official position.

1. If they serve with or want to represent such entities to Federal agencies, the following limitations apply:
  - a. When such personnel are officers, directors, trustees, general partners, or employees with the NFE, they may not participate in their official capacity at DoD in any particular matters that may directly and predictably affect the NFE. They may request a waiver if their interests are not so substantial as to affect their integrity. (18 U.S.C. § 208)
  - b. When such personnel are active participants with the NFE (serving on committees, boards, etc), but not at the level in 1., above, they may not participate in their official capacity in any particular matters that may directly and predictably affect the NFE, or in which the NFE is, or represents, a party. They may request an authorization to participate from their Agency Designee based on a determination that the interests of the Government outweigh potential questions about the integrity of the agency's programs. (5 C.F.R. § 2635.502; JER 3-302)
  - c. Federal personnel may not act as an agent for, or represent, an NFE before Federal agencies or courts on particular matters in which the Government is a party or has a direct and substantial interest. (18 U.S.C. §§ 203 & 205)

Note: 18 U.S.C. § 205(d)(1)(B) permits Federal personnel to represent (without compensation) non-profit professional, recreational, or similar groups if the majority of the organization's members are Federal personnel or their dependents. (Limitations set out in 18 U.S.C. § 205(d)(2).)

- d. DoD personnel may not (in their official capacity) give their NFE preferential treatment, and they must ensure that they do not create an appearance that they are using their public office to assist the NFE in any way. (5 C.F.R. § 2635.702)
- e. DoD personnel may not (in their official capacity) endorse the NFE. Nor may they use, or permit the NFE to use, their official titles, positions, or organization names in connection with the NFE, which includes on the NFE's website, or any list, letterhead, or promotional materials. Active military members may use their rank and Service when identifying themselves in connection with the NFE. Retired members may do so only if they clearly identify the retired or inactive Reserve status. (5 C.F.R. § 2635.702(c) and JER 3-300 a (1))

- f. DoD personnel may not encourage, pressure, or coerce other personnel, especially subordinates, to join, support, or otherwise participate in outside organizations. (5 C.F.R. § 2635.702(a))
  - g. They may not personally solicit funds for the NFE from subordinates or prohibited sources. (5 C.F.R. § 2635.808(c))
  - h. They may not use appropriated funds, Government resources or official personnel to assist them in their work for the NFE. Note that Agency Designees may allow personnel the limited use of certain resources under specific, narrow exceptions, which they may use in connection with their NFE participation. See B., below; JER 2-301.b., and 3-300(b)
  - i. They may not disclose non-public Government information to the NFE. (5 C.F.R. § 2635.703))
  - j. If they file financial disclosure reports, DoD personnel must disclose the position with the NFE on their next annual report after appointment. (5 C.F.R. § 2634.307) If the NFE provides any travel expenses or other compensation, they must also disclose any reportable amounts. (5 C.F.R. § 2634.304)
  - k. Personnel have no official protection from liability stemming from their personal service to the NFE.
2. The following exceptions allow Agency Designees to permit their personnel the limited use of certain resources.
- a. Community Support Activities: When DoD personnel are voluntarily participating in community support activities that promote civic awareness or in uncompensated public service, such as blood donations and voter registration, Agency Designees may grant excused absence (administrative leave) under JER 3-300.c.
  - b. Professional Associations: Under JER 3-300.b, Agency Designees may grant personnel excused absences for reasonable periods for voluntary participation in non-profit professional associations, and may provide limited use of DoD equipment and support services (including personnel) for papers to be published in professional journals or presented at association events if the paper relates to official duties, gives a benefit to the agency, and does not interfere with performance of duties.

Receiving compensation for such papers is generally barred by 5 C.F.R. § 2635.807.

- c. Use of Government Resources by DoD personnel serving in a personal capacity.
  - (1) Agency Designees may allow limited personal use of Federal Government resources, other than personnel, if such use:
    - (a) Does not adversely affect performance of official duties,
    - (b) Is of reasonable duration and frequency and not on official time,
    - (c) Serves a legitimate public interest,
    - (d) Does not reflect adversely on DoD, and
    - (e) Creates no significant additional cost to DoD. (JER 2-301.b)
  - (2) Note that Agency Designees may allow their personnel to use resources, as restricted above, but they may not allow NFEs to directly use those resources under this authority.

## V. ADVISING NFES

- A. **Official Capacity:** DoD personnel, in their official capacities, generally should not serve as advisors or consultants, or serve on advisory boards of, NFEs that are DoD contractors or commercial entities that do business with DoD.
  - 1. Organizations and businesses that work with DoD often seek DoD personnel to advise them or sit on “customer panels,” user, or similar groups. While participation in such groups is not prohibited, because it may raise substantial conflicts of interest, appearances of preferential treatment, risk of disclosure of nonpublic information, endorsement, and abuse of office issues, such participation is strongly discouraged.
  - 2. Note that often this “advising contractors” concern may be eliminated by including such consultation as part of the contract for service, system, or software. (For example, contracts for particular software may include periodic feedback meetings between the supplier and customer.)
- B. **Personal Capacity:** DoD personnel, in their personal capacities, may participate as advisors, consultants, or on advisory boards of NFEs, provided they act exclusively outside the scope of their official position. See IV.B.1., above, for precautions to take. DoD policy, however, strongly discourages such participation with DoD prohibited sources when there is a high risk of inadvertent violations or the appearance of such violations.

1. Participation on advisory boards or curriculum advisory committees of academic institutions, or advisory committees of professional associations may not be inappropriate even when these organizations are prohibited sources.

## VI. PARTICIPATING IN PROFESSIONAL OR STANDARD SETTING NFES

- A. **Official Capacity:** When appropriate and authorized, the Head of DoD Component organizations may appoint and authorize DoD personnel to become active participants as members of councils of certain NFES, such as consensus standards organizations. The activity of the NFE must concern the mission of the DoD organization. Ethics Counselors must play an active role in making these determinations. See DoD 4120.24-M, “DoD Standardization Program” (9/24/14) for further guidance. When so appointed, DoD personnel may serve as chairpersons and vote on behalf of DoD, but may not manage or control the NFE. By contrast to serving on a council, DoD personnel are limited in the type of Board service they may engage in an official capacity. See 10 U.S.C. §§ 1033 and 1589.
- B. **Personal Capacity:** See IV.B.1., above, for precautions to take.

## VII. MANAGING NFES

- A. **Official Capacity:** Beyond the exceptions below, DoD personnel in their official capacity are prohibited from participating in the **management** of, or serving as directors, officers, or trustees (or other similar positions) for NFES. DoD personnel may so participate **only** pursuant to statute and with the approval of DoD General Counsel. See JER 3-202. Such participation raises several conflicts of interest issues and other problems.
  1. **Violation of 18 U.S.C. § 208:** Federal personnel may not take official actions in particular matters that have a direct and predictable effect on the financial interests of organizations in which they serve as director, officer, or employee.
    - a. See Office of Legal Counsel Memorandum to Howard M. Shapiro, General Counsel, FBI, from Beth Nolan, Deputy Assistant Attorney General, November 5, 1996.
    - b. "An employee appointed to a position with an organization such as the Society may have a fiduciary duty to act in the best interest of the Society in accordance with state law; to the extent he also has a duty to act in the Government's best interest, these conflicting obligations may present problems for the Government employee." OGE letter to Barbara S. Fredericks, Dept of Commerce, November 18, 1992.
    - c. **Confusing allegiance:** When Federal personnel manage an NFE as part of their official duties, it is easy for them, the public, and members of the NFE to assume the Federal employee is working for the NFE. Specific issues arise involving:

- (1) Release of non-public information;
  - (2) Appearance of official sanction;
  - (3) Fundraising;
  - (4) Lobbying;
  - (5) Dealings with DoD or other Federal agencies;
  - (6) Use of Government resources;
  - (7) Compensation; and
  - (8) Confusion by outsiders as to Federal employee's role.
2. Express statutory authority: Some statutes provide express authority for DoD personnel to serve in management positions of NFEs. The statute eliminates a conflict of interest. Ethics counselors should play an active role in determining whether the express authority exists. See, e.g., 22 U.S.C. § 4605. *and 10 U.S.C. §§ 1033 and 1589.*
  3. Implied statutory authority: The Department of Justice Office of Legal Counsel issued an opinion in 1998 stating that when there is an implication that a statute may provide the authority to serve in management positions of NFEs, or there is no fiduciary duty to the entity (for example, some private standards-setting organizations), an employee may serve on that Board of Directors in an official capacity. Unfortunately, at DoD, the only instances where either military or civilians may serve on Boards of Directors in an official capacity is found at 10 U.S.C. §§ 1033 and 1589, statutes passed by Congress immediately after the DoJ issued its 1998 opinion. .
    - a. See Office of Legal Counsel Memorandum to Marilyn Glynn, General Counsel, OGE, from Beth Nolan, Deputy Assistant Attorney General, August 24, 1998; also OGE memorandum, DO-98-025, September 2, 1998.
    - b. There must be fiscal authority to expend appropriated funds for the purpose of **managing** the particular non- Federal entity.
  4. Statutory Authorization for Designated Entities: 10 U.S.C. §§ 1033(b) and 1589(b) permit Service Secretaries (with the concurrence of DoD General Counsel) to authorize official participation in management of four military welfare societies, entities that regulate international athletic competition, entities that regulate and support athletic programs of the service academies, entities that accredit service academies and other schools of the armed forces, entities that regulate military health care, and entities in a foreign nation that promote

understanding between the military personnel serving in that nation and the citizens of that nation. See JER 3-202. **Note that the General Counsel cannot approve managing entities outside this narrow list and meeting these specific criteria.**

- a. Appropriated funds may be used only in the direct support of the DoD personnel. They may not be used for travel or transportation costs incurred by the personnel in a travel status.
- b. In addition to the relief societies, several DoD personnel have been approved for positions on the following entities: Southern Association of Colleges and Schools, Middle States Association of Colleges and Schools, Mountain West Conference, Conference USA, and the Patriot League.
- c. Note that the OGE regulatory exemption at 5 C.F.R. 2640.203(m) alleviates any concern about an 18 USC 208 criminal conflict of interest arising from performing such duties, but does *not* provide any independent authority to serve in outside positions in an official capacity. Only 10 U.S.C. §§ 1033(b) and 1589(b) do that.

**B. Personal Capacity:** DoD personnel may manage non-Federal entities in their personal capacity. See JER 3-301. Except for JER 3-210 organizations, however, DoD personnel may **not** so serve if the NFE position is offered because of the individual's assignment or position. The personnel must ensure that their participation is exclusively outside the scope of their official positions. See IV.B.1., above, for precautions to take.

1. For an extensive discussion of the application of 18 U.S.C. §§ 205 & 208 in these situations, see January 27, 1994, memo from Stuart Frish, Acting General Counsel, Justice Management Division of DOJ, "Application of Federal Conflict-of-Interest Statutes to Federal Employees Working With or For Non-Federal Entities That Do Business with the United States."
2. Flag and General Officers may not accept compensation for serving as officers or members of boards of NFEs in their personal capacities. Exceptions permitted, with approval of the Service Secretaries, for professional associations and family-held entities. (DepSecDef memo of July 23, 1996)
  - a. Three and Four star Generals and Admirals: Senate Armed Services Committee policy prohibits three and four star generals and admirals from serving in the management of, or on the boards of directors of, companies that do business with DoD or focus their business on military personnel. This applies to uncompensated as well as compensated service. The Committee's rationale is that the senior officers' selection to the boards is based upon their senior military status, and will be used by the company to

Relations with Non-Federal Entities  
Ethics Counselor's Deskbook  
June 2020

give the appearance of official endorsement or to attract the business of junior military personnel.

- b. DoD has expanded this Senate policy to a broader class of military personnel. (OUSD (P&R) memo, Change to Policy Regarding Officers Serving on Boards of Directors, of November 30, 2012.)
3. COMMON PROBLEM: DoD personnel who are active participants in an NFE may not take an official action involving that NFE. This prevents such personnel from approving requests from subordinates to attend meetings, to speak at an event, or to prepare papers for a meeting of the NFE. (See 5 CFR § 2635.502; JER 3-300.d).

## VIII. SUPPORTING NFE EVENTS

- A. **Official DoD Conferences and Meetings:** Although DoD conferences are official events not directly involving NFEs, because such conferences raise similar issues they are included here.
  1. The Secretary of Defense is authorized to collect fees from individuals and commercial participants at DoD conferences. 10 U.S.C. § 2262 (Section 1051 of the National Defense Authorization Act for FY 2007 (P.L. 109-364)).
    - a. The statute authorizes DoD conference planners and managers to implement the fee collection authority. The DoD Comptroller Memorandum, “Collection and Retention of Conference Fees from Non-Federal Sources,” 2/12/ 07, [http://www.dod.mil/dodgc/defense\\_ethics/resource\\_library/guidance.htm](http://www.dod.mil/dodgc/defense_ethics/resource_library/guidance.htm) requires that collected fees must be credited to the appropriation or account from which the conference costs are paid, must be used to pay or reimburse those costs, and any amount that exceeds those costs must be deposited into the Treasury as miscellaneous receipts. Components must have reimbursable authority. See Volume 12, Chapter 32, of DoD 7000.14-R, the Financial Management Regulation.
    - b. All other Federal laws and regulations, including DoD regulations regarding conferences and conference planning, the Federal Acquisition Regulation, the DoD FAR Supplement, and the Joint Ethics Regulation must be followed. This authority does not increase or affect any other currently existing conference authority, other than allowing fee collection.
  2. Fees:

Because receipts that exceed costs must be turned over to the Treasury as miscellaneous receipts, the totality of the fees (attendance, vendor, and other) should be structured so as not to exceed the anticipated costs of the conference.

- a. Attendance Fees: DoD may charge attendees, including individual Government personnel, attendance fees. DoD may charge different rates for DoD personnel, other Federal and state government personnel, and others. Be sure, however, to avoid any preferential treatment among NFEs.
  - b. Vendor/Exhibitor and Other Fees: DoD may invite vendors or exhibitors to submit applications to display products or services related to the subject matter of the conference and may charge fees for such a display.
    - (1) DoD personnel must select the vendors based on pre-established neutral criteria, subject to space availability. They may not select vendors that are not closely related to the subject matter or that otherwise appear to be purchasing exhibition space solely to obtain access to senior DoD officials.
    - (2) DoD personnel may select other Government agencies as vendors and exhibitors, but do not have statutory authority to charge a fee. They should balance the overall costs of the conference and the value of the Government agency's submission compared to those of commercial vendors.
3. Prohibited Fees and Arrangements:
- a. The ability of DoD entities to charge fees from vendors or sponsors in a commercial milieu presents is ripe for ethical misadventures. Specific problems include:
    - (1) Giving preferential treatment to particular NFEs;
    - (2) Creating or allowing the appearance that the conference is a joint venture of DoD and an NFE;
    - (3) Endorsing an NFE; or
    - (4) Permitting a vendor to sponsor receptions or other meetings that give the vendor special access to senior DoD personnel.
  - b. Accordingly, the following practices should be avoided:
    - (1) Allowing NFE logo to appear on presentation slides;
    - (2) Allowing and recognizing NFE sponsorship of a session in exchange for a fee;
    - (3) Granting an NFE naming rights to the conference;

- (4) Giving special access to DoD senior officials for a sponsorship fee (Usually this is in the form of a reception or meal in which only NFE employees and DoD personnel are invited);
  - c. Within the parameters established above, the following practices are usually appropriate. Be advised, however, that generally accepted commercial conference funding practices may not be appropriate for DoD official conferences:
    - (1) Providing free attendance with the payment of exhibitor or vendor fees for a display booth;
    - (2) Providing advertisement opportunities in a program, as long as the ad is clearly indicated as such and includes a disclaimer that the ad does not constitute an endorsement by DoD;
    - (3) Providing mention in the program and at the conference site of independent events (NFE sponsored) to which conference attendees are invited;
    - (4) Providing mention in the program/agenda, at the conference site, and/or on the conference website of sponsorships, such as providing door prizes.
4. Conference Costs
  - a. Conference costs may include the costs and fees (including reasonable profit) associated with a contract to administer, coordinate, or manage the conference, including the collection of fees. Such costs are subject to separate reporting to Congress, and must be reasonable and within common business practices. Any amount collected by the contractor that exceeds a reasonable conference expense must be deposited with the DoD conference account and deposited into the Treasury as miscellaneous receipts.
  - b. This authority does not supplement any other existing authority to pay conference costs and does not authorize the payment of any costs other than those currently authorized.
5. DoD conference managers should consult with legal counsel to ensure compliance with applicable laws and regulations.
6. The Secretary of Defense is required, no later than 45 days after the President submits a fiscal year budget, to submit to the congressional defense committees a budget justification document summarizing use of this authority. This requirement is reflected in the DoD FMR, Volume 12, Chapter 32, section 320402. DoD conference managers should ensure that they can provide the following statutorily required information:

- a. A list of all conferences conducted during the preceding two calendar years for which fees were collected;
  - b. For each conference on the list –
    - (1) The estimated DoD costs of the conference;
    - (2) The actual DoD costs of the conference, including a separate statement of the amount of any conference coordinator fees; and
    - (3) The amount of fees collected.
  - c. An estimate of the number of conferences for which fees will be collected during the calendar year in which the report is submitted.
7. Because they are official activities, DoD official seals and emblems may be used to promote and endorse the events which are DoD-managed conferences. DoD personnel may officially promote and endorse the event.

**B. Co-sponsored (Co-Managed) Events:**

- 1. JER 3-206 prohibits a DoD Component organization from co-sponsoring events with a non-Federal entity (defined as developing the substantive aspects *or* providing substantial logistical support—namely, “co-managing”) **except** for the following two types of events.
  - a. DoD may co-sponsor a civic or community activity (fostering good relations with the local community is in the best interests of DoD) when the activity is unrelated to the purpose or business of the co-sponsoring non-Federal entities. (DoDD 5410.20)
  - b. DoD may co-sponsor a conference, seminar, or similar event when **all** of the following requirements are met:
    - (1) The Head of a DoD Component organization determines that the
      - (a) Subject matter is scientific, technical, or professional issues relevant to its DoD mission, and
      - (b) Purpose is to transfer Federally developed technology or stimulate interest and inquiry into issues identified in (a) and the event is open to the public.
    - (2) The DoD Agency DAEO determines that the non-Federal entity is a recognized scientific, technical, educational, or professional organization approved for the purpose identified in (1)(b), with due consideration of the

prohibition against providing preferential treatment to the NFE (meaning that due consideration is given to similarly situated organizations);

- (a) If the DoD Component organization has co-sponsored an event with one particular NFE for a number of years, the Ethics Counselor must determine if there are other similar conferences that provide comparable benefits to DoD for co-sponsorship and that meet the criteria.
  - (i) If there are no such similar conferences, the DoD Component organization may continue to co-sponsor with the same NFE.
  - (ii) If there are such conferences, however, the Ethics Counselor must engage the DoD personnel working on the conference and determine if they considered co-sponsoring with another NFE, and if not, why not. There may be valid reasons, but it looks increasingly preferential as time goes on.
- (3) The co-sponsorship must be a bona fide co-sponsorship, not a veiled substitute for “hiring out” work on the DoD Component organization’s conference. That means that both the DoD Component organization and co-sponsor(s) participate, fairly equally in the substantive aspects (*e.g.*, development of the conference program, scope, theme, agenda, and speakers). DoD may provide substantial logistical support. See *National Conference Services, Inc., and Direct Marketing Productions Inc.*, Comp. Gen. B-311137 (April 25, 2008). In other words, DoD’s participation is sufficient to justify having its seal and name associated with the event and subjecting the event to the funding and fee requirements of 10 U.S.C. § 2262, but does not rise to the level in which DoD treats the conference as its own or fully controls the substantive aspects.
- (4) There must also be a written Memorandum of Understanding (MOU) that complies with sub-paragraph 3-206.b.(4). of the JER. Note also that the Federal Acquisition Regulation and other procurement criteria may apply if any funding matters are included. Use care to ensure the person executing any agreement has authority to commit the Government. Avoid use of multi-year agreements (*i.e.*, “Confused Command hereby agrees to partner with Conference Conductor Coalition through 2020”) to reduce risk of fiscal and procurement problems.
- (5) Because DoD is an official co-sponsor of the event, 10 U.S.C. § 2262 applies. The co-sponsor may collect fees on behalf of DoD. DoD may provide funds to the co-sponsor. However, the co-sponsor’s funds and DoD funds may not be commingled in any account. The MOU should explicitly provide for responsibilities in the funding and money handling areas. Should fees collected on DoD’s behalf exceed DoD’s agreed portion of the costs, they must be deposited into the Treasury as

miscellaneous receipts. 10 U.S.C. § 2262 supersedes any provision of subsection 3-206 of the JER to the extent that it appears to conflict with the statute.

- (6) The event must comply with sub-paragraph 3-206(b)(5) of the JER and 10 U.S.C. § 2262 so that the admission fees may not exceed the reasonable costs of sponsoring the event or portion of the event that is co-sponsored.

2. Practice tips:

- a. Because DoD may sponsor its own conferences and collect and use fees for that purpose, and because the same funding restrictions apply to co-sponsored conferences, we recommend that you encourage your clients to sponsor their own conferences when there is a legitimate interest in doing so.
- b. There must be a legitimate, mutual interest, and an equitable sharing of the substantial aspects of the event between DoD and the NFE to have a bona fide co-sponsorship event.
- c. Because DoD is a co-sponsor, the event is considered an official event and all applicable Federal laws and regulations, including 10 U.S.C. § 2262, apply.
- d. DoD official seals and emblems may be used to promote and endorse the event. DoD personnel may officially promote and endorse the event.
- e. The following are examples of ways in which DoD personnel may participate in a co-managed event:

(1) Speak;

(2) Participate in a committee with the co-manager to make substantive management decisions concerning the event, such as planning the topic, agenda, arranging for speakers, etc; or

(3) Use DoD resources, personnel, and time to perform official work on the event.

C. Training Conferences:

1. The **Government Employees Training Act (GETA)**, 5 U.S.C. §§ 4101-4118, allows an agency to collect and retain a fee to offset costs associated with training the employees of another agency. The term “**training**” as used in 5 U.S.C. § 4101 refers to “making available to an employee . . . . . fields which will improve individual and organizational

performance goals.” Some conferences will qualify as training for civilian personnel. See also 5 C.F.R. § 410.404.

There are many exceptions as to whom the GETA applies. For example, it does not apply to ... military personnel in certain circumstances. Before relying on the GETA, confirm that it applies to your client.

5 C.F.R. § 410.404 ***Determining if a conference is a training activity*** (emphasis added).

Agencies may sponsor an employee's attendance at a conference as a developmental assignment under section 4110 of title 5, United States Code, when—

- (a) The announced purpose of the conference is educational or instructional;
  - (b) More than half of the time is scheduled for a planned, organized exchange of information between presenters and audience which meets the definition of training in section 4101 of title 5, United States Code;
  - (c) The content of the conference is germane to improving individual and/or organizational performance, and
  - (d) Development benefits will be derived through the employee's attendance.
2. The head of a DoD Component command or organization may provide DoD personnel in their official capacities, as part of their management responsibility, as speakers, panelists or other similar speaking roles in events sponsored by non-Federal entities when a substantial portion of the audience, *i.e.*, greater than 20%, consists of DoD personnel, the primary purpose of the presentation involves the training or education of agency personnel, and all conditions of a training conference are met. (See DoDI 1430.02, Civilian Career Management.) Appropriated (O&M) funds may be used to pay expenses. 5 U.S.C. §§ 1103(c) and 4101 et seq.; 5 C.F.R. Part 410 (Training).
  3. Such participation must meet the fiscal requirements of agency interest.
  4. DoD personnel attending solely as speakers may not use training funds, but must use O&M funds. If such personnel also attend the event for training, they may use training funds.
  5. DoD personnel must weigh the value of the training offered in light of other training opportunities.

**D. Authorized Support to NFEs and Their Events:**

1. General Rule: DoD may not provide unauthorized support to or endorsement of NFEs. Fiscal limitations and prohibitions on preferential treatment and official endorsements generally prohibit providing support to non-Federal entities.
  - a. Government resources, time, and equipment may not be used for unauthorized purposes. (31 U.S.C. § 1301; 5 C.F.R. §§ 2635.704 & 705; JER 2-301)
  - b. Performance of services by Government personnel for private entities constitutes an improper use of appropriated funds, even if the Government is compensated or reimbursed in kind. (34 Comp. Gen. 599 (1955))
  - c. Employees shall act impartially and not give preferential treatment to any private organization or individual. (5 C.F.R. § 2635.101(b) (8))
  - d. Employees may not use or permit use of their Government position, title, or authority to endorse any product, service, or enterprise. (5 C.F.R. § 2635.702(c), JER 3-209)

2. Exceptions to the Rule:

- a. Groups with special statutory authorizations. Many non-Federal entities have **statutory authorization** for **particular** support. Some are referenced in JER 3-212, and all are listed in DoDI 1000.15, Procedures and Support for NFEs Authorized to Operation on DoD Installations (10/24/08).
  - (1) American Registry of Pathology (10 U.S.C. § 177)
  - (2) Henry M. Jackson Foundation for the Advancement of Military Medicine (10 U.S.C. § 178)
  - (3) American National Red Cross (10 U.S.C. §§ 2552, 2602; MOU to Reference I.A.12)
  - (4) Boy Scouts Jamborees (10 U.S.C. § 2554)
  - (5) Girl Scouts International Events (Transportation) (10 U.S.C. § 2555; DoDI 1015.9 (10/31/90))
  - (6) Shelter for Homeless (10 U.S.C. § 2556)
  - (7) National Military Associations (Assistance at National Conventions). (10 U.S.C. § 2558 allows national military associations, designated by the Secretary of Defense, to receive **limited** support for their **annual** national conferences and conventions. Statute does **not** authorize similar support for regional conferences, conventions, or symposia. (See 4.10 of DoDD 5410.18 and Enclosure 10 of DoDI 5410.19 for guidance on support.) Organizations currently designated by the Assistant Secretary of Defense for Public Affairs for support for their national conferences:

Relations with Non-Federal Entities  
Ethics Counselor's Deskbook  
June 2020

- (a) Adjutant General Association of the United States;
- (b) Air Force Association;
- (c) Association of the United States Army;
- (d) Enlisted Association of the National Guard;
- (e) Marine Corps League;
- (f) National Guard Association of the United States;
- (g) Navy League;
- (h) Non-Commissioned Officers Association of the United States of America;
- (i) Reserve Officers Association of the United States;
- (8) National Veterans' Organizations (Beds and Barracks) (10 U.S.C. § 2551)
- (9) United Seaman's Service Organization (10 U.S.C. § 2604)
- (10) Scouting: Cooperation and Assistance in Foreign Areas (10 U.S.C. § 2606; DoDI 1015.9)
- (11) Civil Air Patrol (10 U.S.C. §§ 9441& 9442; 36 U.S.C. § 40301 et.seq.)
- (12) Assistance for certain youth and charitable organizations (32 U.S.C. § 508; DoDD 1100.20);
- (13) Presidential Inaugural Ceremonies (10 U.S.C. § 2553)
- (14) Specified Sporting Events (Olympics, Special Olympics) (10 U.S.C. § 2564 and DoDD 2000.15 (11/21/94));
- (15) Federal Credit Unions (12 U.S.C. § 1770; DoDI 1000.11 (1/1`6/09))
- (16) Labor Organizations (5 U.S.C. Chapter 71, DoD 1400.25-M, subchapter 711)
- (17) Combined Federal Campaign (E.O. 12353; 5 C.F.R. Part 950; DoDI 5035.01 (3/1/08) (DoD fundraising); DoDI 5035.5 (2/21/08)(CFC overseas))
- (18) USO (36 U.S.C. § 220101; MOU to Reference I.A.12)
- (19) Fire Protection Agreements (42 U.S.C.§ 1856a)

- (20) ASYMCA (10 U.S.C. §§ 2012 & 2648; 32 U.S.C. § 508; MOU to Reference I.A.12)
- (21) Recognized Youth Organizations (Section 8126, “Support for Youth Organizations” in the FY 2006 National Defense Appropriation Act, which expands the list of recognized youth organizations.
- b. Annual DoD Authorization Acts and DoD Appropriations Acts frequently contain special authority. See, for example, the previously referenced C.2.a.21, expanding the list of recognized youth organizations. Most changes contained in special authority are incorporated in the U.S. Code, but some, which are one-time events, are not.
- c. Relief societies. Support for specified military relief societies in accordance with Military Department regulations is authorized:
  - (1) Army: AR 930-4, Army Emergency Relief;
  - (2) Navy and Marine Corps: SECNAVINST 5340.7, Active Duty Fund Drive in Support of the Navy-Marine Corps Relief Society (NMCRS);
  - (3) Air Force: AFI 36-3101: Fundraising Within the Air Force;
  - (4) 10 U.S.C. § 2566 authorizes the Military Departments to provide space and services (heating, lighting, phones) to these relief societies.
- d. Private Organizations Operating on DoD Installations.
  - (1) DoDI 1000.15 (10/24/08) applies to non-Federal entities operating on DoD installations and establishes additional requirements for on-base organizations.
  - (2) JER applies: no special privileges or rights.
  - (3) Organizations may not give the appearance of being official or sanctioned by DoD (including letterhead).
  - (4) Require approval by installation commander.
  - (5) Does not apply to: American National Red Cross, United Services Organization, United Seamen's Service, financial institutions. (These are governed by individual directives and/or have separate statutory authority for support.)
- e. Support via Training (Innovative Readiness Training (IRT). DoDD 1100.20 (4/12/04) implements 10 U.S.C. § 2012 by permitting the Secretary of Defense to authorize support to non-Federal entities if such support is incidental to military training and authorized by statute.

- (1) Training must fulfill a valid training requirement.
- (2) Support may not compete with commercial sources.
- (3) Support is limited to US, its territories and possessions.
- (4) Examples: Build or repair roads, repair buildings, transport materials and personnel, and provide medical and dental services in underserved areas.

**E. Other Support to NFEs:**

1. General Rule: Remember, the general rule is that DoD may not provide unauthorized support to, or endorsement of, NFEs. Fiscal limitations and prohibitions on preferential treatment and official endorsements generally prohibit providing support to non-Federal entities. Subsection D. addresses specific statutory and regulatory exceptions.
2. Official purpose analysis. Ask, "Is this "logistical support" at all? Is the principal purpose for the official attending to further the agency or organization's primary mission? Meaning, is the speech, presentation, or attendance primarily for the benefit of the Government -- serving the Department's interests, or is it merely "support" -- by providing speakers -- that meet the less-essential, non-core mission community relations function?
  - a. JER 3-211 is primarily a fiscally-based ("Purpose Doctrine") guidance underlying the ethics rule ("No misuse of resources"). It tries to define that area where resources may properly be provided to support NFEs based upon general community relations grounds. This is only relevant when there is no specific interest or justification inherent to the providing organization's mission for providing the resource -- that interest could be "training" (for stadium flyovers or helicopter large animal rescues, "security" (for providing interoperable equipment or training to civilian agencies), or "official communications" (for speeches by officials who identify a need to disseminate DoD information and positions). These official activities do not need to be tested against the 3-211(a) criteria because they are justified from fiscal and use-of-resources perspectives without using the "last resort" of "furthering community relations."
  - b. Compare the phrase in JER 3-211(a), "provide DoD employees in their official capacities to express DoD policies as speakers" [subject to the logistical support test], and the phrase in 3-211(c), "Speeches by DoD employees at events sponsored by non Federal entities ... when the speech expresses an official DoD position in a public forum" [not precluded]. They refer to two different activities: 3-211(a) means performing a community relations function by providing speakers -- only because the DoD organization was asked by an NFE, while 3-211(c) means supporting the DoD mission by

speaking because our officials found that there is a bona fide need to reach the anticipated audience.

- c. This subsection addresses circumstances when support to NFEs may be authorized because it supports DoD interests in public affairs and community relations under JER 3-211(a). Before support may be provided, it must comply with DoDD 5410.18, DoDI 5410.19, Military Department public affairs and community relations regulations.

3. General Restrictions and Limitations to the Provision of Other DoD Support:

- a. Endorsement: DoD personnel are prohibited from endorsing or providing preferential treatment in their official capacities, or using their official titles, positions, or organization names in their personal capacities to imply that the Department endorses or provides preferential treatment, to an NFE, an NFE-sponsored event, any other events, products, services, or enterprises sponsored by the NFE. Active military members may use their rank and Service when identifying themselves in connection with the NFE. (“Captain John Smith, U.S. Navy”) Retired members may do so only if they clearly identify the retired or inactive Reserve status. (5 C.F.R. § 2635.702(c); JER 3-209 & 300. a (1))

- (1) Official endorsements are permitted when authorized by statute to promote products, etc, or when resulting from documenting compliance with agency requirements or recognizing, under agency recognition program, achievement in support of agency’s mission. (5 C.F.R. § 2635.702(c))

- (2) DoD personnel may officially endorse fundraising or membership drives of JER section 3-210 organizations. See 3-210 of the JER and Deskbook Chapter on Fundraising.

- (3) DoD personnel may officially acknowledge past contributions, services, or assistance to DoD or its personnel if factual and limited to the purpose of recognizing the contribution. (*e.g.*, “We appreciate your gift to the men and women of the Armed Forces.”) However, don’t expand the acknowledgment into an endorsement or solicitation on behalf of the organization, and guard against hyperbole and expressions of future success.

- (a) Examples of improper, official, stated endorsement: Letter or statement from a DoD official recommending that the reader contribute funds to the organization, join the organization, support the organization, or a statement that the organization is worthy.

- (b) Examples of improper implied endorsement: Appearing at the organization's meetings or events in uniform in violation of Military Service's uniform regulations, being listed with title or position on letterhead, joining an honorary committee, presenting an award, or sitting at a head table.
- (4) Non-Federal entities may provide information, including official titles, positions, organization names, and official pictures, about confirmed DoD speakers at its event, but may not use such information to infer DoD endorsement of the non-Federal entity or the event. When DoD personnel are supporting a non-Federal entity event in their personal capacity, they may use their official titles, positions, or organization names only as part of their biographical details, provided they have the same prominence as other important details. (5 C.F.R. § 2635.807(b))
- (5) Disclaimer: Personnel in either an official or personal capacity who use or permit the use of their military grade or official titles, positions, or organization names in association with their speaking or other participation must make a disclaimer at the beginning of the speech if the subject of their speech deals with agency policies, operations, or programs and they have not been authorized by appropriate DoD authority to present the speech as DoD's position. (JER 2-207)
  - (a) The disclaimer must expressly state that the views presented are those of the speaker and do not necessarily represent the views of DoD or its components.
  - (b) Official policy speeches that present an official DoD position and are so authorized do not require the disclaimer. See 2-207 and 3-211.c. of the JER.
- b. Use of DoD seals/emblems/logos: An event sponsored by an NFE is not an official event, so the NFE may not use official seals or emblems in connection with the event, even if DoD personnel are speaking.
- c. Restricted Access, especially to senior DoD officials:
  - (1) DoD personnel may attend non-training NFE-sponsored events or separate meetings at such events if they are widely attended, but they may not attend special events with a restricted audience, especially if the NFE promotes attendance of the overall event by featuring special access to senior DoD officials or if they charge higher rates for such special access. This includes meals or events in which only major contributors are invited to meet DoD officials. DoD officials may not participate in private, one-on-one meetings at such events.

- (2) DoD personnel generally should not support meetings or events when they are limited to persons from only one entity (such as the annual meeting of the leadership of a large corporation). Because the audience is limited, there are concerns regarding preferential treatment, disclosure of nonpublic information, the appearance that the business has special access to senior DoD officials, and potential overburdening of senior officials with speaking engagements. Since some of these meetings take place at posh resorts, there may be the appearance that the DoD officials are accepting extravagant accommodations and travel. While it is generally in DoD's interests to consult with suppliers, the preferred venue is meetings or conferences open to all members of the industry.
- (3) DoD personnel generally should not support events when they are private meetings of selected groups, such as clients of law firms, investment companies, and lobbying firms. These entities often seek briefings from senior DoD officials for selected groups of their clients and customers. The subtle message is that by hiring these firms, companies may receive private briefings from senior officials, learn non-public information, and enjoy special (one-on-one) access to senior officials. DoD personnel may not participate in meetings where it appears that a particular individual or company can provide such special access. Such support is antithetical to the Department's speaking policy.
- d. Security Review: Speech text and subject matter may require review and clearance for security and policy by proper authority. (4.b of DoDD 5230.9, Clearance of DoD Information for Public Release (8/22/08)), DoDI 5230.29, Security and Policy Review of DoD Information for Public Release (8/13/14), requires all official DoD information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to the Department, to receive a security and policy review. This applies to both official and personal capacity and includes information that is presented by a DoD employee, who, by virtue of rank, position, or expertise, would be considered an authorized DoD spokesperson.
- e. Non-public Information: DoD personnel may not disclose non-public or privileged information. (5 C.F.R. § 2635.703)
- f. Official Communications: DoD may use official channels to notify DoD personnel of events of common interest sponsored by NFEs. Such notices may not include endorsements, solicitation, or hype. JER 3-208.
- g. Sponsorships: The Heads of DoD Component organizations, in their business judgment, may procure sponsorships, exhibitor booths, or similar items at an NFE event. Such items are not considered support to, or endorsement of, the NFE or the event when:

- (1) It is clear that DoD is procuring a sponsorship or booth in same manner as others.
  - (2) Such items are offered to other interested parties; and
  - (3) DoD receives equitable and reasonable value.
- h. Gifts: See Deskbook Chapter on Gifts. In a personal capacity, personnel may not accept gifts from prohibited sources or offered because of their official positions. **Note that political and non-career appointees incur additional restrictions on gifts for entities or individuals registered as lobbyists (most defense contractors) as signatories to the Administration's Ethics Pledge.** The most common bases for acceptance of gifts by officials not subject to the Ethics Pledge in connection with speaking at NFE events are:
- (1) Speaker Memento: If DoD personnel in their official capacity are offered a gift thanking them for speaking at a non-Federal entity (whether or not a prohibited source) event, they may accept in their personal capacity if the item has little intrinsic value, such as a plaque or certificate, and is intended solely for presentation. (5 C.F.R. § 2635.203(b)(2))
  - (2) Modest items of food and refreshment: not a meal. (5 C.F.R. § 2635.203(b)(1))
  - (3) Anything that is paid for by the Government or secured through a Government contract (*e.g.*: payment of conference fee). (5 C.F.R. § 2635.203(b)(7))
  - (4) Gifts of \$20 or less value. (C.F.R. §2635.204(a))
  - (5) Benefits offered to members of a group or class in which membership is unrelated to Government employment. (*e.g.*: all attendees of the conference if the conference is not limited to Government.) (5 C.F.R. § 2635.204(c)(2)(i))
  - (6) Attendance at separate Widely Attended Gatherings (5 C.F.R. § 2635.204(g): When there is a separate function (usually a dinner or reception) at a non-Federal entity event that is not open to all participants or is not sponsored by the event sponsor, you must determine if that particular event qualifies as a widely attended gathering.
    - (a) An event is widely attended if it is expected that a large number of persons will attend, and that persons with a diversity of views or interests will be present.

- (b) The agency designee must authorize attendance in writing upon determination that the individual's attendance is in the interest of the agency because it will further agency programs or operations.
  - (c) When these two conditions are met, Federal personnel may accept free attendance from the sponsor of a widely attended gathering, or from donors other than the sponsor if more than 100 people are expected to attend, and the value of the gift is of “minimal value” (currently \$390 or less).
  - (d) Note that hospitality rooms, where people may come and go throughout the day normally will not qualify as a widely attended gathering since it is impossible to determine if a gathering of many people with a diversity of views will occur during the visit of the DoD personnel.
- (7) Meals and refreshments, not provided by foreign government, (up to per diem rate) in foreign areas when participating in meetings with non-US citizens as part of employee’s official duties. (5 C.F.R. § 2635.204(i))
- i. Door Prizes and Random Drawings: (5 C.F.R. § 2635.203(b)(5))
- (1) Occasionally, conferences include door prizes and random drawings. DoD personnel may keep such winnings if:
    - (a) The conference is open to the public (anyone may enter, no fee is charged to qualify for the prize, and there are no limiting factors such as number of attendees), and
    - (b) Employee’s entry is not required by official duties (personnel voluntarily enter in their personal capacity).
  - (2) If DoD has paid a conference fee, or if all attendees are automatically entered in the contest, the winner is DoD!
  - (3) For a thorough discussion, see OGE DAEOGRAM DO-99-017, 4/26/99.
- j. Uniform: Uniform regulations of the applicable Military Service apply. (DoDI 1334.1, Wearing of the Uniform)
- (1) Army: AR 670-1
  - (2) Navy: NAVPERS 15665I
  - (3) Marine Corps: MCO P1020.34G W/CH 1-4
  - (4) Air Force: AFI 36-2903, Dress and Personal Appearances of Air Force Personnel.

k. Costs:

- (1) DoD organizations may use appropriated funds to pay the costs of attendance and travel, as personnel are performing official business.
- (2) DoD organizations may accept, in advance, travel payments for official travel to attend meetings or similar events from non-Federal sources. (31 U.S.C. § 1353; 41 C.F.R. Part 304)
  - (a) See Deskbook Chapter on Gifts to determine which offers of payment may be accepted and the role of the Ethics Counselor.
  - (b) This authority only applies to personnel on funded travel orders. This authority may not be used for personnel using no-cost TDY orders or on authorized absence.
- (3) DoD civilian employees (military personnel are not included in this authorization) may accept travel and other expenses **incident to training** from not-for-profit organizations. (5 U.S.C. Chapter 41, 5 C.F.R. § 410.501-503))
- (4) Appropriated funds may also be used for preparation of speeches, materials, and other items involved in participation in the event.
- (5) Alternatively, in the exercise of their business judgment, DoD Component organizations may negotiate with the sponsor for reduced or free registration fees for personnel to attend in exchange for speaker support.

4. Community Relations -- Non-Fundraising, Non-Training Conferences and Other Similar Events:

a. Logistical Support (not including personnel).

- (1) JER 3-211(a) provides that heads of DoD Component organizations may provide, on a limited basis, logistical support (use of DoD facilities and equipment) to non-Federal entity events, but only if they determine seven factors to ensure that the support may be authorized as supporting legitimate DoD interests. The seven factors are:
  - (a) The support does not interfere with performance of official duties (of the entire organization, not just those directly providing support) and does not detract from readiness;
  - (b) The support serves legitimate DoD public affairs interests, military training interests (as identified at 10 U.S.C. § 2012), or community relations interests;

- (i) See DoDD 5410.18, DoDI 5410.19, and relevant Military Department regulations (See References above).
  - (ii) Except for programmed public affairs activities in the O&M funds, community relations activities shall not involve any additional cost to the Government. (DoDD 5410.18, 4.2.1 and 4.9)
  - (c) The event is appropriate for association with DoD;
  - (d) The event is of interest and benefit to the community or DoD;
  - (e) DoD Component organization is willing and able to provide the same support to comparable events sponsored by similar non-Federal entities (No preferential treatment);
  - (f) The support is not barred by statute or regulation (*e.g.*, DoD aircraft and vehicles may not be leased to non-Federal entities if commercial assets are available, see 10 U.S.C. § 2560); and
  - (g) Admission to the event is
    - (i) Free,
    - (ii) DoD support, if provided, may range from incidental to less than substantial when admission is an amount that covers only the reasonable costs of sponsoring the event or that portion of the event that receives DoD support, or
    - (iii) DoD support, if provided, may not be more than incidental, in accordance with public affairs guidance, when admission is an amount that exceeds the “reasonable costs” of sponsoring the event or that portion of the event that receives DoD support.
- (a) *Informal rule of thumb.* Currently, an admission fee of \$759 a day or less for all attendees (considering the highest rate charged to any attendee, including late fees) is considered **reasonable** as a “rule of thumb.” This reasonable fee may be adjusted upward, but only by the percentage amount by which the per diem rate for the conference location exceeds that for Washington, D.C. No downward adjustment is required. The reasonable fee will be adjusted every three years by the percentage increase or decrease in the minimal value established by GSA under the Foreign Gifts and Decorations Act. See SOCO Advisory, March 23, 2009.
- (b) "**Incidental support**" is defined as support that has a negligible or minimal impact on the planning, scheduling, functioning, or audience draw of a public event.

- (2) “Logistical support” includes providing meeting rooms on a DoD installation; Naval vessels on which to hold events or receptions; installation recreational facilities; wooded areas for camping; medical supplies; portable water tanks for large demonstrations; aircraft, tanks, and weapons for static displays at conventions.
- (3) Some equipment, such as motor vehicles and aircraft, may have additional restrictions. Use of MWR facilities, such as golf courses or clubs, are also governed by appropriate MWR regulations.

b. Personnel Support.

- (1) Official Speaking. JER 3-211.a. provides that heads of DoD Component organizations may provide DoD personnel in their official capacities to express DoD policies as speakers, panel members or other participants as logistical support to non-Federal entity events, but only if they determine seven factors to ensure that the support may be authorized as supporting legitimate DoD interests. The seven factors are enumerated above and supplemented below.

**"Incidental support"** is defined as support that has a negligible or minimal impact on the planning, scheduling, functioning, or audience draw of a public event. Examples are providing a military color guard as a ceremonial opening of a conference, or three DoD speakers at a 3-day conference featuring dozens of non-DoD speakers. *As a rule-of-thumb, DoD deems incidental support to be a percentage of DoD speakers and similar participants of 20% or less of the total speaker participation at the NFE event.* Use caution. DoD incidental support adds minimal, if any, programmatic value or impact to the perceived quality, audience draw or other aspect of the event. (See E2.1.14 of DoDD 5410.18)

- (a) **Practitioner's note:** Review the entire event program and proposed list of speakers. Often only one speaker is sought from a particular DoD organization, so participation appears to be incidental. When combined with speakers from other DoD Components, however, DoD support may add up to become a significant portion of the program. Also beware that sponsors often claim that certain DoD speakers have been confirmed when they are not. They do this to persuade other DoD officials to speak and also to portray that the event has already been vetted and approved officially.

(2) Official Personnel Support Other Than Speaking.

- (i) Liaison and Other Similar Support: Note that the support that may be provided to events produced by non-Federal entities is more limited than the support that may be provided to co-managed events (see VIII.B. above). Where warranted, DoD personnel may

be appointed as liaisons to the conference (see IV.A. above). DoD personnel are prohibited from participating in the over-all management of the event, but may provide limited support, such as making recommendations as to agenda topics or speakers.

- (ii) Some services, such as civil works and transportation, may be accomplished as part of military training: see Innovative Readiness Training, above.
- (iii) Use of DoD personnel for menial purposes such as ushers, guards, escorts, messengers, parking lot attendants is **prohibited** by DoDD 5410.18, section 4.2.16. No "human bunting" allowed.

Bands, Choral Groups, Color Guards: See paragraph 4.8 of DoDD 5410.18 and Enclosure 8 to DoDI 5410.19.

c. **Speaking in a Personal Capacity.** Subject to certain restrictions and limitations, discussed below, DoD personnel may speak in their personal capacity at NFE events.

(1) **Compensation:** Generally, personnel may accept compensation for a speech in their personal capacities unless it relates to their official duties. (5 C.F.R. § 2635.807). See Chapter on Outside Activities for detailed discussion of speaking, teaching, and writing restrictions.

(a) Speeches relate to an employee's official duties if:

- (i) The speech is delivered as part of the employee's official duties,
- (ii) The opportunity to speak was extended primarily because of the employee's official position,
- (iii) The invitation to speak was extended by a person whose interests may be affected substantially by the employee's performance of official duties,
- (iv) The information draws substantially from nonpublic information, or
- (v) The subject deals in significant part with the employee's official duties (or those assigned in the last one-year period) or any on-going policy, program, or operation of the agency.

(b) Except for Senate-confirmed Appointees and non-career SES personnel, subjects that are related to the employee's official duties do not include subjects within the employee's discipline or expertise based on education and experience. (For example, a policy analyst dealing with Iraq, who has a Ph.D. in International Relations, may

Relations with Non-Federal Entities

Ethics Counselor's Deskbook

June 2020

accept compensation for speaking to the Foreign Affairs Council on the Future of the Middle East.)

- (c) This prohibition does not include compensation for teaching a course requiring multiple presentations that is part of the established curriculum of certain educational institutions, or is sponsored and funded by the Federal, State, or local government, even if related to the employee's official duties because the employee was asked primarily because of his or her official position, or the subject deals significantly with any matter to which the employee has been assigned within the previous year, with any ongoing or announced policy, program, or operation of DoD, or with the general subject matter primarily affected by DoD.
- (d) For Senate-Confirmed Appointees: These employees may not receive any outside earned income during their appointment. (E.O. 12674, section 102, as modified by E.O. 12731.)
- (e) For Non-Career SES Appointees:
  - (i) These employees may not earn more than \$27,765 in outside earned income (in CY 2017). Such income includes compensation, salary, honoraria, payment of travel expenses, and professional fees.
  - (ii) If the speaking involves teaching (instruction or imparting knowledge or skill), these employees must receive advance authorization from their Designated Agency Ethics Official.

## (2) Costs

- (a) Since such speaking is not part of official duties, the Government is not responsible for expenses.
- (b) DoD personnel may accept travel expenses (transportation, lodging and meals), in kind or reimbursement. They are not considered a gift, but payment of the employee's expenses. Non-career employees must include payment of such travel expenses as compensation.
- (c) DoD personnel may also accept waivers of attendance fees and course materials and other material provided to all attendees if the event is a widely attended gathering.

## (3) Other Limitations and Restrictions

- (a) For endorsement, see paragraph E.2.a., above.
- (b) For disclaimer, see E.2.a.5.

(c) For security review, see E.2.e.

(d) For Gifts, see E.2.i.

5. Co-Located Events: An official DoD event and an NFE event may be held at the same time and be contiguous (co-located at the same facility), but unless co-sponsored (co-managed), may not occur in the same physical space at an event location. Each event must be separate and distinct and governed by the appropriate section above.

6. Fundraising Events: See Deskbook Chapter on Fundraising.

a. Logistical Support (not including personnel).

(1) JER 3-211.b. provides that heads of DoD Component organizations may provide, on a limited basis, logistical support (use of DoD facilities and equipment) to charitable fundraising non-Federal entity events, but only if they determine factors 1-6 in paragraph 3-211.a., enumerated above, to ensure that the support may be authorized as supporting legitimate DoD interests.

(a) Although the 7<sup>th</sup> factor regarding “reasonable costs” is inapplicable because, by definition, the admission fees for a fundraising event are more than the costs of sponsoring the event, the requirement that DoD support be incidental still applies. See 4.1.4. of DoDD 5410.18. The explanation of incidental support above, applies.

(b) The DoD Component organization must also ensure that no unofficial fundraising event occurs in the Federal Government workplace.

b. Personnel Support:

(1) Authority for official personnel support of NFE fundraising events may be found at 5 C.F.R. § 2635.808. Note that JER 3-211.b. does not address personnel support.

Note that DoDD 5410.18 specifically finds that bands are not appropriate NFE logistical support and may not perform at NFE 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.

F. Partisan Political Activities: See Deskbook Chapter on Political Activities.

## **IX. NFE USE OF DOD PERSONNEL AND RESOURCES FOR PROMOTION**

- A. NFEs are prohibited from using DoD personnel in their official capacities, DoD resources that may be identified as a DoD resource, or any images of such personnel and resources, in commercial, advertising, marketing, or promotional activities. See 15 U.S.C. §§ 45(a) and 1125, 10 U.S.C. § 771, and DoDI 1334.1.
1. DoD resources include any DoD images of DoD personnel in their military uniform or any distinctive part of a military uniform, and DoD materiel, insignia, seals, medals, logos, or any similar items. Such images do not include productions approved pursuant to DoDI 5410.16 (DoD Assistance to Entertainment Industry).
  2. The Military Departments and other DoD Components may approve the use of their unofficial emblems, logos, names, and similar items in compliance with their regulations, as long as such use does not imply an endorsement of the NFE. Note that DoD has authority to collect fees pursuant to valid licenses for its trademarks, whether registered or not. DoD is in the process of determining how to work out problems between the licensing process and endorsement issues. This is an evolving area, stay tuned.
- B. NFEs should not use images of identifiable persons, including DoD personnel, without obtaining permission from those persons for use of their image in commercial, advertising, marketing, or promotional activities. Such images include DoD imagery that is publicly available, such as on any DoD website.
- C. When NFEs use any images that may appear to be identified with the Department of Defense or any of its Components in commercial, advertising, marketing, or promotional activities, they should include, in a reasonably prominent position and easily readable type size, a disclaimer that neither the Department of Defense nor any of its components endorse the NFE or the product, service, or event.

## **PRACTICAL APPLICATION EXAMPLES:**

Hints: Get as many facts as possible, both for the immediate questions and for any possible future questions that may arise. Keep your analysis narrowly focused on the separate parts of the overall questions, as it is very easy in this area to start mixing up the law and the facts. Whether DoD may provide support in the form of speakers is different from whether DoD personnel may attend an event, which is different from whether they may accept a gift of attendance, and if so, in their official or personal capacity. Also, just because a non-Federal entity asks for a widely attended gathering determination does not mean that such a determination is relevant to what the non-Federal entity really wants or what our personnel need.

**Training Conference:** The Armed Forces Communications Association (AFCA or Association) is sponsoring a 3-day conference on Bandwidth in San Diego, California. It invited your Commander (from a base in Virginia) to speak on the morning of the 2<sup>nd</sup> day. He really wants to go, as the Command is vitally interested in bandwidth. He asks for an ethics opinion as to whether he may accept. The Association also invited him to attend a general reception sponsored by a DoD contractor on the first night of the conference.

Do you have enough information? No.

What information do you need? You need information to determine whether the event could be a training conference or whether you could provide support under JER 3-211. Also, it wouldn't hurt to gather data for a determination about a widely attended gathering just in case gifts of attendance are involved.

First, go to the AFCA website and find the conference. If you don't find everything you need there, call the conference point of contact. You learn that the agenda is a full three days of substantive topics, both individual speakers and panels. There is also a luncheon speaker on the second day. There is a dinner the second night which is strictly a social event for members of the Association. The website mentions the reception the night before and has a link to the DoD contractor's website for additional information. There you find that everyone attending the conference is invited, and it will be held immediately at the end of the last lecture, 5:00 PM, and will be only 2 hours. The attendance fee for the conference is \$599 per day for DoD personnel and members of the Association, and \$699 per day for all others. You also calculate that 80% of the speakers seem to be from various DoD organizations.

Oh, the Commander just called – the Association is waiving the attendance fee for him for the entire 3 days and throwing in an extra free attendance. He is also a member of the Association and would like to attend the dinner the second night. It costs \$35 extra, and the Association did not include that in the waiver.

Are you still missing any information? Yes. What? Are DoD personnel going to attend, and if so, how many? How can you find out? First, did the website have a section on who should

attend? Does it mention DoD personnel? Call the Association and ask them if they held a similar conference previously, and do they have statistical breakdown of attendees? Most do, especially when they have several ticket prices. If not, do they have an expectation? Again, most conference sponsors do this type of analysis before making the decision to spend the money to have a conference. You find out that last year 45% of the attendees were DoD personnel. As a last resort, ask your program people if the conference appears to be one to which they would send their personnel for training or professional development.

Now, ready to analyze?

First, may the Commander speak? The conference is educational with a substantial agenda all 3 days. The content is related to the organization's mission, and your program people confirmed that attendance should contribute to improved conduct of the program. Is the expected 45% DoD attendance substantial? Yes. Substantial does not require a majority, but participation over 20% is substantial. So, the activity meets the criteria of a training conference, and the Commander may attend and speak. Do you care that the conference charges DoD personnel less to attend? No. Do you care that the maximum charge is \$699 a day? No. (Note that for JER 3-211.a purposes, the \$699 would not exceed the \$759 "rule of thumb" for reasonable fee.) What about the 80% DoD speakers? No. As long as the event meets the criteria for a training conference, you don't need to examine fees or amount of support, which is only relevant if the event does not meet the criteria for a training conference. The only other concern now is whether the Command has sufficient funds.

Second, may the Commander attend the first and third days and accept the offer of free attendance? Yes. The training and travel people do need to make the determination that the training qualifies for the expenditure of training funds and that there is sufficient funding. Under 31 U.S.C. § 1353, the event qualifies as a meeting or other similar event, and since the Commander is attending in his official capacity, DoD may accept an offer of travel expenses, which includes waiver of attendance fees. The lunch on the second day is not even considered a gift to either the Government or to the Commander personally under 5 C.F.R. § 2635.203(b)(8)(i). If he attends, however, he may not claim the lunch on his per diem request for reimbursement.

Third, may he attend the DoD contractor reception, which is not part of the conference? Since he will legitimately be in the area, he may attend and accept the gift of free attendance in his personal capacity if it qualifies as a widely attended gathering, there is an "agency interest" and he is "authorized in writing by the agency designee." Since everyone who will be attending the conference is invited, and since the audience will have several different DoD contractors, as well as DoD attendees, and since it is expected that almost everyone will attend (since it is right after the last class and not very long), the reception qualifies as a widely attended gathering under 5 C.F.R. § 2635.204(g). There is also sufficient agency interest in attending the event.

What if the Commander hadn't decided to attend the first day of the conference? Since he is the second speaker on the second day, it is likely that he would have to travel the day before to be able to make the speech, so he would be in the area legitimately. BE VERY AWARE of personnel who want to use official funds to travel somewhere so that they may attend a

social event in their personal capacities. Congress frequently expresses interest in DoD use of travel and training funds to go to conferences, so be sure that the travel is legitimate and cost justifiable. If so, once there, if the event is a widely attended gathering, personnel may accept the gift. Since it is a reception with finger food, not a meal, he may later go to dinner and claim the cost on his per diem request.

Fourth, what about the dinner? This is also a social event, but there is no gift. The Government would not pay the separate fee as it is not part of the conference. As a member, the Commander may attend in his personal capacity and pay the \$35. This is a meal that he can claim on his per diem.

Fifth, what about the free attendance for the other DoD personnel? For the day the commander is speaking, they receive the same exclusion from the definition of a gift for the free attendance under 5 C.F.R. § 2635.203(b)(8)(ii) because they accompany the presenter. Alternatively, because they are in a travel status, DoD may accept under 31 U.S.C. § 1353.

AFCA is happy to know that you are involved and called to request that you make a widely attended gathering determination for the entire conference. This is happening with increasing frequency. Somehow non-Federal entities think that if a conference has a widely attended gathering determination, it sounds like encouragement to attend the conference. Your response? Unless there are side events that our personnel may attend in their personal capacity, and they are being offered a gift of free attendance at that event, don't make the determination. It is not necessary and has nothing to do with attendance at a training conference in an official capacity.

**Conference for the Public Affairs Purpose.** Hollywood Salutes the Military (HSM) occurs annually in Los Angeles and consists of two separate events. First, in the morning there is a Symposium, usually on a general theme concerning military families. There may be two lectures and an opportunity to discuss various viewpoints. There is no attendance fee to anyone and almost all of the attendees are expected to be DoD personnel or their families. Second, the major event is a televised Dinner and awards presentation that evening. It is not a fundraiser and there is no attendance fee to anyone. HSM has invited your Commander, General B. A. Starr, to speak at the Symposium and attend the Dinner.

Do you have enough information? No.

What information do you need? You need information to determine whether the morning event could be a training conference or whether you could provide support under JER 3-211. Also, since the dinner is obviously a social event, our personnel would attend in their personal capacities, so you also need data to determine if it qualifies as a widely attended gathering.

Neither DoD Public Affairs Office nor DoD SOCO will make a single widely attended gathering determinations for an event. If you have questions, contact your respective HQ office. In the past, the Public Affairs Office annually determined that this Dinner is a social event and that DoD personnel may attend in their personal capacities. If any DoD personnel are making an official speech or accepting an award, they, and only they, may attend in their

official capacity. The Public Affairs Office also determined that the event is widely attended. That is half of the widely attended gathering determination, so half of your work may not be too difficult. Each attendee's supervisor must determine that there is sufficient agency interest for invited personnel to attend in their personal capacities. If there is sufficient agency interest, your personnel may attend in their personal capacities. (Please remember that travel funds may not be used if personnel are attending in their personal capacities.)

Appropriate command authorities must determine whether there is a sufficient DoD purpose to justify attendance in an official capacity and the use of funds to travel to Los Angeles to attend the Symposium.

Check out the Symposium on the HSM website. If you don't find everything you need there, you will need to call the event point of contact. In this example, you find that the Symposium does not offer a substantive educational agenda and that your command does not have a strong relationship to the topic. It probably will not meet the criteria for a training conference.

Is the nature of the audience and the topic of the proposed presentation such that it meets a mission requirement, such as dissemination of important information via an official policy speech or an important community relations benefit? Does it meet the JER 3-211.c standard?

Next make a JER 3-211.a analysis of all seven factors. One of the most important factors is the 5<sup>th</sup> one: is your commander willing and able to travel to other comparable events and make a similar speech? Since there is no attendance cost, obviously the cost is "reasonable". Therefore, DoD may provide more than an incidental amount of support. From an ethics viewpoint, the Commander may attend and make a speech under 3-211.a of the JER. As HSM is not willing to provide travel expenses, however, General Starr should also consider whether such travel will involve additional costs over and above public affairs programmed O&M costs and, regardless, whether the Symposium provides sufficient justification for the travel.

If there is sufficient justification, the next question is whether General Starr may attend the Dinner. Is it possible for him to travel back the same day? If not, and he is in LA anyway, he may attend the Dinner in his personal capacity if his Agency Designee (for a military officer O-7 or above in command, the Ethics Counselor) determines that it is in his agency's interest that he attend. If he could travel back, he may need to pay the cost of the hotel stay. General Starr's military service's uniform regulations will govern whether he may wear his uniform or his grape lamé tuxedo.