



U.S. Department of Defense Standards of Conduct Office

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

At the Department of Defense (DoD or Department), we are fortunate to have many professionals and industry leaders provide advice to the Secretary as consultants and experts. Because many of these individuals retain ties to defense industries or other organizations related to national security, it is important to identify potential conflicts of interest that may arise while serving as a DoD consultant. This handout briefly summarizes the ethics rules. We encourage employees to consult an ethics official whenever they have questions or need more detailed information.

Good faith reliance on the advice of an ethics official will, in most cases, protect you from adverse administrative action and deter criminal prosecution. SOCO attorneys are available at (703) 695-3422 or by email at OSD.SOCO@MAIL.MIL. We have also posted considerable guidance, including information on financial disclosure reporting, on our website at: <https://dodsoco.ogc.osd.mil/>.

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

In the Department, most employees appointed as consultants and experts, including members of advisory committees, serve as “Special Government Employees” (SGEs). Upon appointment, these consultants and experts assume many of the responsibilities, obligations, and, restrictions that are part of public service.

SGEs *are* Government employees, for purposes of the conflict of interest laws. Specifically, an SGE is “an officer or employee . . . who is retained, designated, appointed, or employed” by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days. Your status as an SGE is determined prospectively at the time of your appointment based upon a good faith estimate that you will not be expected to serve more than 130 days during the ensuing 365-day period. This 130-day period is an aggregate of all your Federal service, and not just your appointment to one office or advisory committee at DoD. For example, it includes days you serve as a consultant or expert in another Federal agency or department, and days you serve as a military reservist. If you have served in any capacity for a Federal agency or department within the last year or will serve in the coming 365-day period, please

share this information with the appropriate DoD official to ensure that you do not exceed the 130-day limit.

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

Attached to this document is an Excel spreadsheet that you may use as a tool in tracking days. Your organization may require that you submit the DD Form 2525 to certify the number of days that you have worked in a given year, which can be found at:

<https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2525.pdf>

2. Financial Disclosure

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

3. Criminal Conflict of Interest Statutes

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

Financial Conflicts of Interest

The primary financial conflict of interest statute, **18 U.S.C. § 208(a)**, prohibits all employees, including SGEs, from participating personally and substantially in any particular matter that has a direct and predictable effect on their own financial interests or on the financial interests of any person whose interests are imputed to them. The interests of the following persons are imputed to you: your spouse; minor child; general partner; organizations which you serve as an officer, director, trustee, general partner or employee; and a person or organization with whom you are negotiating or have an arrangement concerning prospective employment. Because SGEs are typically engaged in outside employment which is related to the subject area

for which the Government requests their services, it is extremely important to take this conflict rule into consideration.

A conflict may arise in various ways. An SGE would be prohibited from participating in a discussion that involves whether a certain weapons program should be continued if the SGE works for the company that manufactures the weapon, or from reviewing a contract proposal from an association for which the SGE serves as a member of the board of directors. In these instances the SGE would be required to recuse from participating in the matter.

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

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

Representational Activities

Two statutes, 18 U.S.C. §§ 203 and 205, prohibit Federal employees, including those in an SGE status, from representing another person or entity before any agency or court of the Executive or Judicial Branches. Specifically, as an SGE, section 203 prohibits the receipt of compensation for representational services only in particular matters involving a specific party: (1) in which an SGE has participated personally and substantially as a Government employee; or (2) which is pending in DoD if the SGE has served for more than 60 days in DoD (aggregating all days served at any DoD component or organization) during the immediately preceding 365 days. For example, this would include service within DoD as a regular employee, military member on active duty, and/or as an SGE. Representational services include written or oral communications and appearances made on behalf of someone else with the intent to influence the Government. Section 205 parallels section 203, except that even uncompensated representations made by an SGE are prohibited.

Limits on Representations After You Leave the Government

Finally, 18 U.S.C. § 207, prohibits former employees, including SGEs from representing another person or entity to DoD or another Federal agency or court on any particular matter involving a specific party in which the SGE participated personally and substantially while employed at DoD. This bar lasts for the lifetime of the particular matter.

4. Standards of Ethical Conduct

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

Teaching, Speaking, and Writing in a Personal Capacity

During your appointment, you may continue to receive fees, honoraria, and other compensation for teaching, speaking, and writing undertaken in your personal capacity on topics that are not directly related to your SGE position.

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

Speaking on behalf of DoD

DoD advisory committee members provide Executive-level advice to the Secretary and the Deputy Secretary. These duties generally do *not* include representing DoD or its views to external entities. This means that advisory committee members may not represent the views of DoD, or give an official speech on behalf of DoD, as this is considered an inherently governmental function and as such can only be undertaken by a full-time or permanent part-time DoD employee or member of the military on active duty.

If you are asked to speak on behalf of DoD, for example, by Congress, the media, or an outside organization, please contact your supervisor or ethics official for further guidance.

Acceptance of Gifts from Outside Sources

Acceptance of gifts given to you because of your DoD position is generally prohibited. Because there are a number of exclusions or exceptions that permit the acceptance of a gift, you should consult an ethics official if you receive a gift in your SGE capacity.

Impartiality

While SGEs are prohibited from participating in matters in which they have a financial interest, there may be other circumstances in which an SGE's participation in a particular matter involving specific parties would raise a question regarding the SGE's impartiality. For example, if an SGE is asked to review a grant application submitted by their mentor or someone with whom the SGE has a close personal or professional relationship, this may raise concerns about the SGE's impartiality. In such circumstances, the SGE should seek the guidance of their supervisor or advisory committee staff to determine whether disqualification from the matter is appropriate.

Misuse of Position

SGEs are subject to a number of prohibitions intended to address the use, or appearance of "public office for private gain." These prohibitions include:

- Using your DoD title or referring to your Government position for your own private gain, the private gain of friends, relatives, or anyone with whom you are affiliated in a non-Governmental capacity (including nonprofit organizations at which you serve as an officer, member, employee, or in any other business relationship), or for the endorsement of any product, service, or enterprise.
- Using your DoD title or Government position to coerce or induce another person to provide a benefit to you or another person.
- Using non-public Government information in a financial transaction to further your private interests or those of another, or disclosing confidential or non-public information without authorization.

Fundraising

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

Foreign Agents

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

The Emoluments Clause

This provision of the United States Constitution prohibits anyone who holds an "Office of Profit or Trust" in the Government from accepting a position with a foreign state, whether compensated or uncompensated, or from accepting any compensation or other items of value, including salary, honoraria, and travel expenses, from a foreign state, except as authorized by Congress. Employment by educational or commercial institutions owned, operated, or controlled by a foreign government are included within the scope of this restriction.

According to the Department of Justice, to be considered an "Office of Profit or Trust" within the meaning of the Emoluments Clause, a position must involve some exercise of governmental authority. Since some SGE positions are purely advisory in nature, they are not covered by the Emoluments Clause; however, to the extent that your position as a SGE is not purely advisory and you hold some authority to bind DoD or to otherwise implement your recommendations, views, or to execute any other governmental authority, you will be subject to the restrictions under the Emoluments Clause.

Since the nature of your duties as a SGE will ultimately determine whether or not the restrictions under the Emoluments Clause applies to you, we recommend checking with your ethics officials before accepting a position or payment from a foreign government.

Hatch Act

The Hatch Act limits the political activities of Federal civilian employees. SGEs are covered by the Hatch Act only when actually performing work for the Federal government. This means that an SGE may not engage in any political activities (activities associated with a partisan campaign) during the hours that he or she is "on-duty" for DoD.

Disclosure of Information

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

Frequently Asked Questions

Q. 1. While serving as an SGE you are asked to evaluate a contract between DoD and XYZ Company. You own \$16,000 worth of stock in XYZ Company. Can you evaluate the contract?

No, you may not evaluate the contract. SGEs are subject to the criminal conflict of interest statute and are prohibited from participating in any particular matter that has a direct and predictable effect on their own financial interests. The awarding of the contract will have a direct and predictable effect on XYZ Company and consequently, your own financial interests. There is a limited exemption for financial interests in stock that does not exceed \$15,000 in value; however, even if the stock's value did not exceed \$15,000, there would be a concern about the appearance of a conflict of interest.

Q. 2. As part of your DoD duties, you participate in a study that identifies four defense contractors suitable for future work on a prospective personnel system contract. One of the four contractors subsequently asks you to represent them before DoD on the personnel system contract. Can you represent the contractor before DoD?

No, you may not represent the contractor before DoD on the personnel system contract. Because you participated in the study in your SGE capacity, you are prohibited from representing an outside entity back to DoD on the same exact matter.

Q. 3. You would like to use your DoD title on marketing materials for your consulting firm. Can you use your DoD title to market your outside business?

No, you may not use your DoD title or position to promote your outside business. The ethics rules prohibit employees from using their DoD titles, or referencing their DoD position for their own private gain or the private gain of others.

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