



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 and other DoD officials as consultants and experts. As 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 they serve as DoD consultants and experts. This handout briefly summarizes the conflict of interest laws and other ethics rules that may be of importance while serving at DoD. We encourage consultants/experts to contact an ethics official when they have questions or need more detailed information regarding the ethics rules.

Good faith reliance on the advice of an ethics official will, in most cases, protect an individual from adverse administrative action and deter criminal prosecution. *OSD Personnel Only:* Contact the DoD Standards of Conduct Office (SOCO) at (703) 695-3422 or by e-mail at OSD.SOCO@MAIL.MIL for advice applicable to specific situations or with any questions about the subject covered in this Guide. *All Other DoD Personnel:* Contact the ethics official(s) via your organization's legal office. For other DoD personnel, ethics contact information can be found here: <https://dodsoco.ogc.osd.mil/Contact/>. You may also consult with a private attorney.

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

In the Department, most people appointed as consultants/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. The status of an SGE is determined prospectively at the time of appointment based upon a good faith estimate that the individual 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 Federal service, and not just the appointment to one office or advisory committee at DoD. For example, it includes days served as a consultant or expert in another Federal agency or department, and days served as a military reservist. Individuals who served in any capacity for a Federal agency or department within the last year

or will serve in the coming 365-day period, should share this information with the appropriate DoD official to ensure that they do not exceed the 130-day limit.

When counting days worked as an SGE, each day in which the consultant/expert performs services counts as a full day, even if services were not performed 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 an individual receives pay from the Government (not including travel reimbursement) must be counted as a day.

Your organization may require that you submit the DD Form 2525 to certify the number of days that you worked during the year. The form 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 could hinder or preclude your service for the Department.

3. Criminal Conflict of Interest Statutes

During their appointments, SGEs 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**, prohibits all employees, including SGEs, from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he, or any person whose interests are imputed to him under this statute has a financial interest. The interests of the following persons are imputed to employees: spouse; minor children; general partners; organizations which the employee serves as an officer, director, trustee, general partner or employee; and a person or organization with whom the employee is negotiating or has an arrangement for 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 be aware of this criminal conflict of interest law.

A conflict may arise in various ways. An SGE is prohibited from participating in a discussion that involves the question of 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.

SGEs must disqualify themselves from acting in any particular matter in which they have a financial interest and should notify their supervisor of the conflicting interest. SGEs should also contact their ethics official for further guidance on addressing the potential conflict. There are a number of regulatory exemptions that may permit the SGE to participate in the matter.

The statute and implementing regulations provide for the issuance of a waiver that could allow an SGE to work on matters in which they have a financial conflict of interest. Waivers are rarely granted.

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, section 203 prohibits the receipt of compensation for representational services only in particular matters involving a specific party:

(1) in which the 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 Leaving Government Service

Finally, another criminal statute, **18 U.S.C. § 207(a)(1)**, 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 (5 C.F.R., Part 2635) that pertain to SGEs.

Teaching, Speaking, and Writing in a Personal Capacity

During their appointments, SGEs may continue to receive fees, honoraria, and other compensation for teaching, speaking, and writing undertaken in their personal capacities on topics that are not directly related to their SGE positions.

An SGE's DoD title or position may be referenced as one of several biographical details given as an introduction in connection with personal teaching, speaking, or writing. When the subject of the teaching, speaking, or writing deals in significant part with any ongoing or announced policy, program, or operation of DoD, SGEs must use a disclaimer (at the beginning of their speech or prominently displayed on written material), expressly stating that the views presented are the SGEs 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 as an SGE, you are asked to speak on behalf of DoD, for example, by Congress, the media, or an outside organization, please contact an ethics official for further guidance.

Acceptance of Gifts from Outside Sources

Acceptance of gifts given because of an SGE's position are generally prohibited. Because there are a number of exclusions or exceptions that permit the acceptance of a gift, SGEs should consult an ethics official for information related to gift acceptance.

Gifts between Employees

Unless an exclusion or exception applies, SGEs are prohibited from giving, donating to, or soliciting contributions for a gift to an official superior and from accepting a gift from a Government employee receiving less pay.

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 ethics official 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 are listed below.

- SGEs may not use their DoD titles or refer to their Government positions for their own private gain, the private gain of friends, relatives, or anyone with whom the SGE is affiliated in a non-Governmental capacity (including nonprofit organizations at which the SGE serves as an officer, member, employee, or in any other business relationship), or for the endorsement of any product, service, or enterprise.
- SGEs may not use their DoD titles or Government positions to coerce or induce another person to provide a benefit to themselves or another person.
- SGEs may not use non-public Government information in a financial transaction to further their own private interests, those of another, or disclose confidential or non-public information without authorization.

Fundraising

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

5. Other Restrictions

Foreign Agents

SGEs 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 the SGE's employment as an agent or lobbyist is in the national interest. 18 U.S.C. § 219.

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. Most SGE positions which are purely advisory in nature 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 one’s duties as an SGE will ultimately determine whether or not the restrictions of the Emoluments Clause apply, we recommend checking with your ethics official 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

SGEs may not disclose classified or proprietary information that they receive in the course of their 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. Additionally, SGEs 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.

DoD-Specific Recusal Requirements (Section 1117 of the 2022 NDAA)

DoD personnel are subject to two additional statutory recusal requirements applicable to former employers and prospective employers.

- **Former Employer Recusal**: Section 1117 prohibits DoD personnel, for a period of two years from the date they last served in a covered position (officer /employee) with an organization, from participating personally and substantially in a particular matter involving specific parties in which the former organization is a party.
- **Seeking Employment Recusal**: Section 1117 prohibits DoD personnel from participating in a “*particular matter involving specific parties*” where a prospective employer is or represents a party to the matter.

CERTIFICATION: SGE ETHICS TRAINING

TEST YOUR KNOWLEDGE

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?

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?

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 personal business?

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ANSWER KEY

A.1. 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.

A.2. 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.

A.3. 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.