

Keeping Committees Clear of Ethical Problems:

An Ethics Guide for Designated Federal Officials Of DoD Advisory Committees

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Introduction:

As a director or manager of a Department of Defense (DoD) advisory committee, you are a Designated Federal Official (DFO) and are largely responsible for the successful operation of the committee and the completion of the committee's mission. While you have substantial administrative and regulatory duties, ensuring that the committee's deliberations and recommendations are free from conflicts of interest and other ethical problems cannot be overemphasized. Many hours of hard work may be nullified if the findings of the committee are challenged because of allegations that even one of the members had a conflict of interest, was not impartial, or was otherwise improperly influenced.

To help you to protect the integrity of the advisory committee's work, the Standards of Conduct Office (SOCO) of the Office of the DoD General Counsel offers this guide. Our goal is to bring to your attention issues, such as conflicts of interest, that have caused problems for past committees, and to assist you in preventing or resolving these problems. Since dealing with such issues is a major task of our office, please don't hesitate to contact us at the number on the front page. **While it is our job to help you to resolve these issues, we depend upon you to alert us when such issues, conflicts of interest, or appearances of conflicts arise in your committee.**

Appointment as a Special Government Employee

DoD appoints all consultants and committee members as Special Government Employees (SGEs). By doing so, these personnel become Government employees, who must follow many Federal ethics rules and are required to file financial disclosure reports.

Financial Disclosure Report

A Government-wide regulation, 5 C.F.R. 2634, and chapter 7 of the DoD 5500.7-R (Joint Ethics Regulation) require that all SGEs file either a public or confidential financial disclosure report (SF 278 or OGE Form 450) prior to their appointment (and yearly thereafter if reappointed), and in any event no later than assuming duties, giving advice, or attending their first advisory committee meeting.

The timing is essential so that the DFO and this office may review the reports prior to any possibility of an inadvertent violation to determine if there are any conflicts that the SGEs may have between their financial interests and their duties and responsibilities on the advisory committee. **This review by the DFO is crucial.** We depend on you to compare each SGEs financial interests with the agenda and topics of discussion of the committee, and note potential conflicts of interest. If you identify a potential conflict of interest, please contact an ethics official in SOCO immediately so that we may help resolve the issue. You should also perform this review before each meeting.

If there are no conflicts, you should sign the financial disclosure report as the "supervisor" of the SGE, and forward the report to this office, where we will review it for completeness, regulatory compliance, and conflicts of interest. Please remember, however, that we are not aware of the content of advisory committee discussions, so our ability to detect

potential conflicts of interest is very limited. For that, we rely on the DFO. A copy of the OGE Form 450, the report most likely filed, is included as Attachment A. We recommend using the form in Excel format that is posted on the SOCO web site, at http://www.defenselink.mil/dodgc/defense_ethics/, under the Ethics Resource Library, Forms, OGE Form 450. By using this form and saving the information, the SGE will be able to file the report in subsequent years merely by updating the current form rather than completing an entirely new form. The computer-generated form is also easier to read.

What's a Conflict of Interest?

A conflict of interest or the appearance of loss of impartiality occurs when a Federal employee, who has an interest in a particular matter, takes some official action that has a direct and predictable affect on that interest. Official actions by the employee that affect the interests of persons with a relationship to the employee, such as spouses, children, business associates, and employers, may also trigger a conflict of interest.

For example, an employee may have a conflict of interest or the appearance of a loss of impartiality if she participates in an advisory committee meeting that reviews whether a certain weapons program should be continued and:

- the employee owns stock in the prime or subcontractor that supplies the weapon;
- the spouse of the employee owns stock in, or works for, the contractor(s);
- the employee is a consultant, employee, or former employee of the contractor(s);
or
- the employee is a member of the board of directors of the contractor(s).

Official participation in particular matters that are part of the conflict is generally barred by either a criminal statute or regulation. The above examples illustrate a very important point: employees may participate in official matters in which they have a conflict of interest without realizing they have such a conflict. They either may be unaware that the particular matter conflicts with their personal financial interests, or that the interests of persons with whom they have a relationship may also cause a conflict. A lack of intent to defraud the Government or improperly profit from their official duties does not absolve them from prosecution.

Conflict of Interest Rules

The conflict of interest statute most commonly involved is 18 U.S.C. 208(a), which prohibits Government employees, including SGEs,

- from officially participating personally and substantially (including making a recommendation, giving advice, or performing an investigation)
- in any particular matter (such as a dispute, contract, license, or agreement)
- that could affect, to their knowledge, their financial interests
 - as well as the financial interests of their spouse, minor child, general partner, an organization in which they serve as an officer, director, trustee, general partner, or employee, or an organization with which they are

negotiating or with which they have an arrangement for prospective employment.

The regulation dealing with the appearance of a loss of impartiality is 5 C.F.R. 2635.502, which prohibits Government employees, including SGEs,

- from officially participating personally and substantially (including making a recommendation, giving advice, or performing an investigation)
- in any particular matter involving specific parties (such as a dispute, contract, license, or agreement)
- that, to their knowledge,
 - is likely to have a direct and predictable effect on the financial interests of a member of their household, or
 - has a party, or representative of a party, with whom he has a covered relationship
 - “Covered relationships” include: relative with close personal relationship; person with whom the employee has a business, contractual, or financial relationship; organization in which employee is an active participant; any person for whom either the employee has served in the last year, or the employee’s spouse, parent, or dependent child is serving or seeking to serve, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.
- where a reasonable person with knowledge of the relevant facts would question the employee’s impartiality.

Preventing Conflicts of Interest

To prevent conflicts of interest, we take several precautions:

1. Consultants and committee members are appointed as Special Government Employees (SGEs), whether or not they are compensated.
2. All SGEs file a financial disclosure report that discloses their financial interests.
3. All SGEs sign a written statement disqualifying them from participation in particular matters that may affect any financial interest disclosed on their report.
4. DFOs and a DoD ethics official review financial disclosure reports to screen SGEs from matters in which they may have conflicts of interest.
5. All SGEs complete a foreign activities questionnaire to prevent violation of the U.S. Constitution.
6. Written ethics training material is provided to SGEs prior to appointment to inform them about conflicts of interest and other Government standards of conduct.
7. We orally brief committee members at meetings to remind them of these requirements.
8. DoD Ethics officials are readily available to SGEs and DFOs to answer questions or otherwise assist.

Resolving Conflicts of Interest

Generally, DoD advisory committees address broad policy matters, not particular matters. This greatly reduces the potential for conflicts of interest. In certain instances, however, the committees may address matters that focus on the interests of specific persons or a discrete and identifiable class of persons. For example, an advisory committee may recommend that the Department purchase more unmanned aerial vehicles (UAVs). Since only two or three companies manufacture UAVs, such a recommendation would constitute a particular matter. Under the law, if an SGE has any of the interests discussed above in relation to one or more of those manufacturers, the SGE may have a conflict of interest.

If a conflict of interest is determined to exist, please consult with your ethics official to determine if a regulatory exemption exists. Such exemptions, for example, cover interests held in diversified mutual funds, or securities with aggregate values of less than \$15,000. There are other exemptions, as well.

If no exemption exists, the conflict is usually resolved by **disqualification**, meaning that the SGE does not participate in the particular matters. Commonly, the SGE simply leaves the room during such discussions. **DFOs should ensure that advisory committee minutes reflect that the SGE was not present during the relevant discussions.** SGEs are aware of the requirement to disqualify themselves because, when they submitted their financial disclosure reports, they also submitted written disqualifications from participating in particular matters affecting their financial interests. A copy of this form is included as Attachment B.

If it is not possible to disqualify an SGE, another (but less favored) option is to obtain a waiver from the Government official responsible for appointing the SGE. Such waivers are possible when the interest is not so substantial as to be deemed likely to affect the integrity of expected services. SOCO drafts waivers, which are ultimately reviewed by another Federal agency, the U.S. Office of Government Ethics. Employment interests generally cannot be waived. Stock interests may be waived if the stock is worth less than 5% of the SGE's total financial portfolio.

Foreign Activities Questionnaire

SGEs must also complete the Foreign Activities Questionnaire. This document is required to determine if the SGE has accepted a position, title, or pay from a foreign government, all of which are prohibited by the Emoluments Clause of the U.S. Constitution. If an SGE declines to give up such a position or pay, he or she cannot serve on the advisory committee or as a Federal employee. The Questionnaire, DD Form 2859, is available on the DoD web site, at http://www.defenselink.mil/dodgc/defense_ethics/, under Ethics Resource Library, Forms. A copy is attached, along with the DoD General Counsel's cover letter, and a set of examples to assist you when advising SGEs. See Attachment C.

Training

SGEs are required to receive initial ethics training pursuant to 5 C.F.R. 2638. Initial ethics training may be accomplished by providing instructional materials. (A copy, Attachment D, is attached.) In addition, ethics officials from SOCO seek to address each advisory committee at least annually. We use these briefings to highlight recent changes to regulations, remind the SGEs of how regulations apply to their personal and official activities, and answer questions from the SGEs. These in-person briefings are very useful for drawing out questions and assisting the SGEs in applying the regulations to their individual circumstances.

Bottom Line

You, as the DFO, play a key role in preventing conflicts of interest. We, in SOCO, will assist, but we need your eyes and ears to alert us to potential problems. If you help us, we'll help you. Give us a call.

Attachments:

- OGE Form 450
- Sample Disqualification Statement

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