

The Judge Advocate General's Legal Center & School Ethics Counselor's Deskbook

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CHAPTER A: ETHICS COUNSELOR FUNDAMENTALS

I. AUTHORITIES

- A. 18 U.S.C. §§ 201-209, 216.
- B. Ethics in Government Act of 1978 (5 U.S.C. app. § 101 et. seq.).
- C. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R., Part 2635 (Office of Government Ethics Rules).
- D. Supplemental Standards of Ethical Conduct for Employees of the Department of Defense, 5 C.F.R., Part 3601.
- E. DoD Directive (DoDD) 5500.07, Standards of Conduct (November 29, 2007)
- F. DoD 5500.07-R, Joint Ethics Regulation (JER), 30 August 30, 1993 (including Change 7 last revised November 17, 2011).
- G. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," April 12, 1989, as amended.

HELPFUL LINKS.

- DoD Standards of Conduct Office (http://www.dod.mil/dodgc/defense_ethics/)
- Office of Government Ethics (<https://www2.oge.gov/web/oge.nsf/About+OGE/>)

II. CRIMINAL ETHICS STATUTES

- A. 18 U.S.C. § 201-209 are the main criminal ethics statutes providing enforcement mechanisms for these laws. 18 U.S.C. § 216 provides the penalty for a violation of the criminal conflict of interest statutes.
- B. Section 201 makes bribery a crime. Section 202 defines Special Government Employees. Sections 203 and 205 restrict Federal employees from representing others before the Government with or without compensation. Section 207 places post-government employment restrictions on former federal employees. Section 208 is the conflicts of interest law covering current Executive Branch federal employees. Section 209 prohibits federal employees from being paid by two non-federal sources to perform their federal duties.

III. OFFICE OF GOVERNMENT ETHICS (OGE)

- A. The U.S. Office of Government Ethics was created by the Ethics in Government Act, 5 U.S.C. app. §401, as a separate Executive Branch agency to oversee Executive Branch ethics programs. The underlying basis for the Ethics in Government Act is the Basic Obligations of Public Service issued under Executive Order 12674 at Appendix A (commonly known as the 14 principles).
- B. OGE's authority, functions, and oversight of Executive Branch agencies is designated by 5 U.S.C. app. § 402.
- C. The Ethics in Government Act requires that the head of each Executive Branch agency designate a designated agency ethics official (DAEO) to administer the agency ethics program.
- D. In response to Executive Order 12674, OGE issued the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635. The Standards apply to all executive branch employees and address a myriad of ethics topics, including: both the criminal conflict of interest and appearance of a conflict of interest rules, misuse of Government personnel and equipment, receipt of gifts, regulations on seeking employment and on post-government employment and participation in fundraising events.

IV. IMPLEMENTATION OF THE ETHICS IN GOVERNMENT ACT AT DOD

- A. DoD has issued a supplemental regulation which applies only to DoD personnel (military and civilian) and addresses a number of issues of importance to the DoD community.
- B. The Supplemental Regulation is found at 5 C.F.R., Part 3601. (NOTE: The JER incorporates the supplemental regulation by reference but is not itself the DoD supplementation.) This regulation supplements the Standards of Ethical Conduct for Employees of the Executive Branch.
- C. Part 3601 provides additional exceptions for gifts from outside sources, provides for additional limitations on gifts between DoD employees, sets forth when employees must complete a written disqualification, places limits on solicited sales by supervisors to subordinates, provides criteria for prior approval for outside employment and business activities, and requires a disclaimer for speeches and writings devoted to agency matters.

V. WHO RUNS THE DOD ETHICS PROGRAM

- A. The general counsel of each DoD designated separate agency component (DoD DAEO organization), pursuant to 5 C.F.R. § 3601.102, serves as the DoD agency DAEO unless the head of the agency appoints another person. *See also* DoDD 5500.07, section 5.4.
1. DAEO (JER § 1-207): A DoD employee appointed, in writing, by the head of a DoD agency to administer the provisions of the Ethics in Government Act of 1978 and the JER. *See also* JER §§ 1-203 and 1-206. The DAEO is responsible for the implementation and administration of the component's ethics program.
 2. Alternate DAEO (JER § 1-203): An employee of a DoD agency who has been appointed by the DoD component head to serve in the absence of the DoD component DAEO.
 3. Deputy DAEO (JER § 1-206): An employee of a DoD agency who has been appointed, in writing, by the DoD component DAEO and who has been delegated, in writing, authority by that DoD component DAEO to act on his behalf.
 4. Ethics Counselor (EC) (JER § 1-212): A DoD employee (must be an attorney) appointed, in writing, by the DAEO or designee to assist generally in implementing and administering the command's or organization's ethics program and to provide ethics advice to DoD employees in accordance with the JER.

VI. THE JOINT ETHICS REGULATION

- A. Created and authorized by DoDD 5500.07, Standards of Conduct.
1. Current version consists of Changes 1-7.
(http://www.dod.mil/dodgc/defense_ethics/ethics_regulation/)
 2. Applies to all DoD Components and personnel.
 3. Punitive. Noncompliance with the regulation is administratively punitive for civilian personnel. Regulations printed in ***bold italics*** in the JER are general orders—they apply to all military members without further implementation and violations may be punishable as violations of a lawful general order, Article 92, Uniform Code of Military Justice (UCMJ).

- B. Foreword to the JER. Cancels all DoD and service directives and regulations that are inconsistent with the JER.
- C. Applies the OGE rules (C.F.R. provisions) to non-covered DoD personnel.
 - 1. Republishes and specifically applies many of the OGE rules to enlisted and national guard members.
 - 2. Rules apply to all “DoD employees” except the following do **not** apply to enlisted personnel: 18 U.S.C. §§ 203, 205, 207, 208, and 209; but provisions *similar* to 18 U.S.C. §§ 208 and 209 do apply. *See* JER 1-300b.
- D. Only the Secretary can waive application of a JER provision, unless the JER provides otherwise (e.g., certain provisions may be waived by the DoD General Counsel).
- E. The JER provides DoD-specific interpretative and procedural guidance for implementation of the regulations. For example, the JER also includes key definitions for identifying who has what responsibilities in implementing the DoD ethics program.
- F. Key definitions under the JER.
 - 1. DoD Employee (JER § 1-209): The JER applies the Executive Branch Standards of Conduct rules to "DoD Employees." The definition essentially includes everyone in DoD:
 - a. Any DoD civilian officer or employee (including special government employees) of any DoD component (including any non-appropriated fund activity).
 - b. Any active duty regular or reserve military officer, including warrant officers.
 - c. Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.
 - d. Any reserve or National Guard member on active duty under orders issued pursuant to Title 10, United States Code.

- e. Any reserve or National Guard member while performing official duties or functions under the authority of either Title 10 or 32, United States Code, or while engaged in any activity related to the performance of such duties or functions, including any time the member uses his reserve or National Guard of the United States title or position, or any authority derived therefrom.
 - f. Foreign national employees if consistent with labor agreements and international treaties and agreement, and host country laws, e.g., German and Japanese national employees are not subject to the JER, but Korean national employees are.
 - g. Employees from outside the U.S. Government, but who are working in DoD under authority of the Intergovernmental Personnel Act, are not included in the definition of “DoD employee.” However, personnel assigned to DoD (appointed or detailed) are covered by the Ethics in Government Act, Standards of Ethical Conduct for Employees of the Executive Branch, and the conflict of interest laws.
2. Agency Designee (JER § 1-202): The first supervisor who is a commissioned military officer or a civilian above GS/GM-11 in the chain of command or supervisor of the DoD employee concerned. Except in remote locations, the agency designee may act only after consultation with his local ethics counselor. For any military officer in grade O-7 or above who is in command and any civilian presidential appointee confirmed by the Senate, the agency designee is his ethics counselor.
 3. Special Government Employee (SGE) (JER § 1-227): Person, including an enlisted member, who performs temporary duties not-to-exceed 130 days during any period of 365 consecutive days. Includes reserve component (RC) officers “serving on active duty involuntarily or for training for any length of time, and one who is serving voluntarily on active duty for training for 130 days or less.” But see also 18 U.S.C. § 202, which provides a slightly different definition regarding when RC officers are SGEs. Consult the websites listed at the end of this outline for future updates and clarification on this matter.

VII. DESIGNATED AGENCY ETHICS OFFICIAL DUTIES AND RESPONSIBILITIES

(All short references are to 5 C.F.R.)

- § 2635.102(c) DAEO and various designees are also agency ethics officials.
- § 2635.107(a) Responsible for managing agency ethics program.
- § 2635.805(c) May authorize, in coordination with the DOJ, service as an expert witness which might otherwise violate 18 U.S.C. §§ 205 or 207.
- § 2634.201(f) Reviewing official (DAEO or alternate) may grant 45-day extension for filing OGE 278.
- § 2634.204(a) May determine that filer will serve less than 60 days in a given year and not have to file OGE 278.
- § 2634.602 OGE 278s are filed with DAEO.
- § 2634.604(a) OGE 278s must be reviewed within 60 days after filing.
- § 2634.604(b) OGE 278s are to be reviewed for facial completeness and apparent conflicts.
- § 2634.604(b) When OGE 278s are incomplete:
- (1) Reviewer must request info by a date certain (usually no more than 90 days)
 - (2) Must give the filer notice and an opportunity to respond
 - (3) Must pursue remedies to resolve conflicts
 - (4) Must notify the head of the agency if the filer is in non-compliance
- § 2634.605(b) DAEO must maintain a list of 278 filers in non-compliance.
- § 2634.803(d) DAEO may enter into ethics agreements to resolve conflicts of interest.
- § 2638.203(b) DAEO duties in managing agency ethics program are:
- (1) Liaison with OGE
 - (2) Maintain financial disclosure system
 - (3) Personally review presidential appointee disclosures
 - (4) Report ethics violations
 - (5) Maintain agency ethics education program
 - (6) Maintain counseling program

- (7) Keep records of advice rendered
- (8) Enforce ethics rules
- (9) Periodically evaluate/audit agency ethics
- (10) Liaison with Inspector General

§ 2638.204 May delegate powers to deputy ethics officials (as used by OGE "deputy ethics officials" includes alternate DAEOs, agency ethics officials, and ethics counselors).

§ 2638.702 In managing the agency ethics training program, the DAEO must:

- (1) Ensure it is legally correct
- (2) Ensure qualified trainers are available
- (3) Submit an annual training plan to OGE

§2641.201(d) DAEO can request exemption of positions, or revocation of exemption, from 18 U.S.C. § 207(c) coverage.

VIII. AUTHORITY AND APPOINTMENT OF ETHICS COUNSELORS

Check with your office to determine if you have been properly delegated authority to act as an ethics counselor. If you do not have a proper delegation, then check with your judge advocate general or general counsel's office.

IX. ETHICS COUNSELOR RESPONSIBILITIES INCLUDING THOSE UNDER THE DOD SUPPLEMENTAL REGULATION (5 C.F.R., PART 3601)

- A. Implements, administers, and oversees all aspects of the organization's ethics program and all matters relating to ethics covered by the DoD supplemental ethics regulation at 5 C.F.R., Part 3601 and the JER. *See* 5 C.F.R. § 2638.201 (in Chapter 11 of the JER) and JER 1-401a.
- B. Specific responsibilities set out in the ethics rules:
 - 1. DoD Supplemental Regulation 5 C.F.R., Part 3601:
 - a. .104 advising on acceptance of group gifts
 - b. .105 advising on written disqualification
 - c. .106 advising on limitation on solicitation of sales to people junior in rank

- d. .107 advising on prior approval for outside activities
 - e. .108 advising on disclaimer for speeches and writings
2. Chapter 2, JER:
- a. 5 C.F.R. § 2635.107(b) - Advice and counsel.
 - b. 5 C.F.R. § 2635.204(d)(2) - Written determination required before certain awards or honorary degrees may be accepted.
 - c. 5 C.F.R. § 2635.205(c) - Advise on proper disposition of improper gifts. *See also* group gifts at 5 C.F.R. § 3601.104
 - d. 5 C.F.R. § 2635.502(a)(1) - Consult with ethics counselor when appearance of a conflict may exist over personal or business relations.
 - e. 5 C.F.R. § 2635.602(a)(2) - Post-government employment advice including advising on written disqualification at 5 C.F.R. § 3601.105
 - f. 5 C.F.R. § 2635.805(c) - Authorize appearance of government employee as an expert witness in a case in which the U.S. Government is a party.
 - (1) Delegated by Army DAEO to Chief, Litigation Division for Army. For the rules, *see* Army Regulation 27-40, paragraph 7-10b
 - (2) Current and former Air Force employees rules are found in Air Force Instruction 51-301 (20 June 2002), Chapter 9.)
 - (3) Current Navy and Marine guidance is at 32 C.F.R. part 725.
 - g. JER § 2-202b - Determination regarding gifts of scholarship and grants.
3. Chapter 3, JER (5 C.F.R. § 2636.103) – Advisory opinions (honoraria, etc.).

4. Chapter 10, JER - EC responsibility to consult on and report violations of the ethics laws.
 5. Chapter 11, JER (5 C.F.R. Part 2638.701 et seq.) - Training responsibilities.
- C. ECs provide guidance to “Agency Designees” when dealing with:
1. Acceptance of Gifts from Outside Sources - Widely Attended Gathering (Chapter 2, JER).
 - a. 5 C.F.R. § 2635.204(g)(3) - Determination of agency interest.
 - b. 5 C.F.R. § 2635.204(g)(3)(i) - Written determination of agency interest--that employee's participation outweighs favoritism appearances.
 - c. 5 C.F.R. § 2635.204(g)(3)(ii) - Blanket determination of agency interest.
 - d. 5 C.F.R. § 2635.204(g)(6) - Authorize accompanying spouse or other guest.
 2. Waiver of Conflicting Financial Interest (Chapter 2, JER). NOTE: ECs must elevate any discussion of a possible 208 waiver through the appropriate component DAEO, which will consult with the U.S. Office of Government Ethics.
 - a. 5 C.F.R. § 2635.402(d)(2)(i) - Official responsible for appointment waives 18 U.S.C. § 208 conflict of interest.
 - b. 5 C.F.R. § 2635.402(d)(3)(ii) - Official responsible for appointment of SGE to a Federal Advisory Committee waives 18 U.S.C. § 208 conflict.
 3. Conflict of Interests - Impartiality (Chapter 2, JER).
 - a. 5 C.F.R. § 2635.502(a) - Consult when appearance of a conflict.
 - b. 5 C.F.R. § 2635.502(c) - Determines if appearance of a conflict.
 - c. 5 C.F.R. § 2635.502(d) - Authorize participation notwithstanding appearance of a conflict of interest.

4. Seeking Employment (Chapter 3, JER) - 5 C.F.R. § 2635.605(b) - Authorize participation in a particular matter notwithstanding appearance of a conflict of interest while seeking employment.
 5. Events sponsored by State and Local Government (JER § 2-202) - Determination of community relations interest.
 6. Outside Employment (JER § 2-206) - Authorize employment.
- D. Act as the Agency Designee for General/Flag Officer in Command (JER § 1-202).
- E. 31 U.S.C. § 1353 (Gifts of Travel and Travel-Related Expenses to the Agency). Travel approval authority may not authorize acceptance without advice and concurrence of EC: 5 C.F.R., Part 304; JER §§ 4-100 & 4-101
1. Army Directive 2007-01, paragraph 15
 2. SECNAVINST 4001.2J (12 Aug 09)
 3. No Specific instruction in Air Force.
- F. Public (OGE Form 278) and Confidential (OGE 450) Financial Disclosure Reports (5 C.F.R. Part 2634).
1. JER §§ 7-205 & 7-305 - Submit financial disclosure report through ECs.
 2. JER §§ 7-206 & 7-306 - EC review of financial disclosure reports.
- G. Provide Written Ethics Opinions to Individuals.
1. Chapter 2, JER, 5 C.F.R. § 2635.107 (In general).
 2. Chapter 2, JER, 5 C.F.R. § 2635.602 (Post-Government Restrictions).
 3. 5 U.S.C. app. 504(b); Chapter 3, JER; 5 C.F.R. § 2636.103 (Compensation for Teaching).
 4. 41 U.S.C. § 2101-2107 (Procurement Integrity).
- H. Additional EC Responsibilities (JER § 1-411).

1. Request assistance through EC channels if issue cannot be resolved locally.
2. Maintain a current copy of JER for review of employees. NOTE: Any link to JER should be back to the DoD Publications website. A local version should not be used. This prevents outdated versions from existing.
3. Maintain thorough understanding of DoD ethics policies.
4. Provide copies of precedential ethics opinions to DAEO.

G. Other EC Responsibilities.

Often, an Agency Ethics Official is appointed in writing by the DAEO, or by the head of a command or organization, who has been delegated the authority to assist in managing the ethics program and provide ethics advice (a.k.a. "Ethics Counselor"). He has the following responsibilities. (All short references are to 5 C.F.R., Part 2635.)

- .102(c) Definition: Has been delegated authority to carry out agency ethics program.
- .107(b) May give authoritative advice on the standards of conduct.
- .204(d)(1) Must make written determination that awards in excess of \$200 in value are bona fide part of a program of established recognition.
- .204(d)(2) Must make written determination that acceptance of an honorary degree would not create an appearance of impropriety.
- .205(a)(2) May decide how to dispose of improper perishable gift (note: all supervisors have this power).
- .205(c) May provide qualified immunity from adverse actions to employees who seek advice on disposition of improper gifts.
- .402(c)(2) May require written disqualification in resolving conflicting financial interest under 18 U.S.C. § 208 (note: all supervisors have this power).
- .502(a)(1) May provide advice to employees on whether an outside interest or relationship creates an appearance of impropriety.

- .502(e)(2) May require written disqualification in resolving appearance of impropriety (note: all supervisors have this power).
- .602(a)(2) May provide advice to employees on post-employment restrictions (including 18 U.S.C. § 207; 5 C.F.R. §§ 2637 & 2641; and 41 U.S.C. § 423).
- .604(c) May require written disqualification while "seeking employment" (note: all supervisors have this power).
- 2636.103(b) May provide advisory opinion on whether honorarium prohibition applies to a specific activity.

FAR 3.104-6(a) Shall, within 30 days of written request, provide written opinion on whether this statute precludes engaging in a specific activity.

X. WHAT AN ETHICS COUNSELOR MAY NOT DO

Certain duties of the DAEO are not delegable. They are:

- A. Determining whether an employee may testify against the Government pursuant to 5 C.F.R. § 2635.805.
- B. Approving teaching as an outside activity by a non-career political appointee pursuant to 5 C.F.R. § 2636.307.
- C. Certifying a public financial disclosure report of a presidential appointee confirmed by the Senate.
- D. Possibly being the final reviewer of the commander depending upon the EC delegation.

XI. COMMAND RESPONSIBILITIES (CHAPTER 1, SECTION 4, JER)

- A. DoD Component Heads (JER § 1-400).
 - 1. Exercise personal leadership.
 - 2. Take personal responsibility.
 - 3. Provide sufficient resources to implement the program.
- B. Heads of DoD Component Commands or Organizations (JER § 1-404).

1. Personally account for command's ethics program.
 2. Exercise personal leadership in maintaining the command's program.
- C. Inspector General (JER § 1-412).
1. Investigate ethics matters.
 2. Report to DAEO or designee potential criminal matters referred to Department of Justice.
- D. Personnel and Administrative Officers (JER §§ 1-413 & 414).
1. Identify employees required to receive ethics training.
 2. Inform new employees of requirement to receive ethics training.

XII. REQUIRED REPORTS

A major part of an ethics program is a series of reports. The Ethics Counselor will be responsible for completing the following reports either as a reviewer for financial disclosure or as the designee responsible for gathering the information in the office to be included in the report.

- A. OGE Form 450 - Confidential Financial Disclosure Reports (or the DoD version of OGE Optional Form 450-A, Confidential Certificate of No New Interests) (Annual reports due 15 February).
- B. OGE Form 278 - Public Financial Disclosure Reports (Annual reports due 15 May).
- C. Gifts of Travel - (31 U.S.C. 1353) to report up to DAEO office as instructed. (Prior approval required prior to acceptance, and final report due within 30 days of travel) (Agency submits semi-annual reports to OGE no later than 31 May & 30 Nov).
- D. Annual Ethics Training Plan. (5 C.F.R. § 2638.702) (Chapter 11, JER § 11-302). Due December each year. (Check your delegation and with your Service to ensure that you must complete this.)
- E. Annual Ethics Program Survey to report up to DAEO office as instructed. (5 C.F.R. § 2638.602(a)). (Due Feb each year).

- F. Enforcement of the Joint Ethics Regulation - (Chapter 10, JER). (As needed for serious criminal misconduct. Matters referred to DOJ or U.S. Attorney are reported on OGE Form 202, "Notification of Conflict of Interest Referral," Nov. 2004. See <http://www.oge.gov/Forms-Library/OGE-Form-202,-Notice-of-Conflict-of-Interest-Referral>).

XIII. RESOURCES (IN ADDITION TO LAW AND REGULATION) THAT MAY HELP THE ETHICS COUNSELOR

- A. GAO Principle of Federal Appropriations Law (Redbook) for Fiscal Law Related Issues. (<http://www.gao.gov/>)
- B. OGE material. (<https://www2.oge.gov/web/oge.nsf/About+OGE/>)
- C. DoD SOCO website. (http://www.dod.mil/dodgc/defense_ethics/index.html)
- D. Your MACOM/MAJCOM/higher command EC.
- E. Navy JAG (Code 13); Navy Assistant General Counsel (Ethics); AF/JAG General Law Division; Army SOCO.
- F. Army Ethics website. (<http://www.jagcnet.army.mil/>) Ethics Forum and SOC Database. (<http://ogc.hqda.pentagon.mil/Ethics.aspx>)
- G. Navy Ethics website. (<http://www.ethics.navy.mil>)
- H. Air Force website. (<http://www.safgc.hq.af.mil/organizations/gca/index.asp>)

XIV. HEAD OF AGENCY AND SGES

- A. Head of Agency

(All short references are to 5 C.F.R., Part 2635.)

- .102(b) Determinations relating to the conduct of the agency head, or actions which must be taken by agency head, must be done in consultation with the DAEO
- .102(i) Definition: "Head of Agency" means head of agency
- .503(c) Waiver of conflict created by extraordinary payments from former

employers shall be in writing and given only by the head of agency. However, this waiver authority may be delegated.

2634.605(b) Must maintain list of OGE278 filers in non-compliance

2638.202(a) and (b) Is personally responsible for agency ethics program, and shall make sufficient resources available for the program, and select the DAEO.

NOTE! The headnote summaries of these sections have been condensed and simplified. However, to the greatest extent possible, the operative verbs and objects in the regulations have been retained.

B. Special Government Employees and How They Are Impacted Under OGE Rules

.102(h) Definition of "employee" includes special government employees (SGE)

.102(1) Definition of "SGE" incorporated from 18 U.S.C. § 202(a), i.e., on temporary duty not to exceed 130 days per year. They generally are consultants or members of an advisory committee. An SGE is an ethics term, and not a personnel term.

.202(c)(4) "Public official" under 18 U.S.C. § 801 (bribery) includes SGEs

.204(e)(2) Gifts: Example 1: For gifts based on outside relationships, SGEs may accept gifts (even from DoD contractors) so long as it is not given for work done as an SGE

.402(d)(3) 208 waivers: SGEs who are members of advisory committees may get 18 U.S.C. § 208 waivers

.603(b)(3) Negotiating for employment: Example 5, SGE used as an example of how sending a resume is not negotiating for employment (implying that SGEs are subject to 18 U.S.C. § 208 conflicts on this issue)

.604(c) Conflicts of interest: Example 4, SGE used as an example of when duties would conflict with negotiating for employment

.801(d) Summarizes four statutes in which SGE is mentioned

.805(a) Restriction on service as an expert witness only applies to SGEs on the same particular matter in which they served as a federal official

.805(b) SGE must get agency permission to act as expert witness in a matter

involving agency where SGE was employed if the SGE is a presidential appointee, serves on a statutory commission, or has served more than 60 days in a given year

- .807(a) SGE prohibited from receiving compensation for speaking, teaching, or writing about official duties

- .807(a)(2)(i)(E)(4) Teaching, speaking, and writing do not relate to SGE official duties when the SGE comments on matters of official agency policy, agency operations, agency programs, general subject matter concerning an industry or economic sector, or matters to which to employee was assigned during the previous year (unless the employee has served more than 60 days during the previous year and 60 days during the subsequent year). In other words, the restriction on SGEs' compensation for teaching, speaking, or writing is limited to the same particular matter in which they were involved personally and substantially. See examples 7, 8, and 9.

- .808(c) SGE may engage in fund-raising in a personal capacity and may solicit a prohibited source, if the prohibited source is not directly affected by the SGE's duties

APPENDIX A

**BASIC OBLIGATIONS OF PUBLIC SERVICE UNDER
EXECUTIVE ORDER 12674**

1. **Public Service is a public trust**, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.
2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty**.
3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.
4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.
5. Employees **shall put forth honest effort in the performance of their duties**.
6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.
7. Employees **shall not use public office for private gain**.

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.
9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.
10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.
11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.
12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.
13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.
14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

CHAPTER B: USE OF GOVERNMENT RESOURCES

Public service is a public trust.
5 C.F.R. § 2635.101(b)(1)
(Basic Obligation of Public Service)

Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.
5 C.F.R. 2635.101(b)(9)
(Seventh Principle of Ethical Conduct)

An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.
5 C.F.R. § 2635.704(a)
(Use of Government Property)

I. INTRODUCTION.

- A. The Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, acknowledge that “there may be circumstances when an employee may properly use Government property or official time for activities other than the performance of the official duties of the employee’s position.” Office of Government Ethics (OGE) Informal Advisory Letter 97x3 (Mar. 21, 1997).
- B. Employees who use Government property in accordance with applicable laws and regulations do not violate ethical standards. OGE Informal Advisory Letter 95 X 13, (Dec. 1, 1995).
- C. Authority to Regulate the Use of Government Property.
 - 1. General Services Administration (GSA) and the Office of Personnel Management (OPM) are authorized to promulgate executive branch-wide regulations governing the use of Government resources.
 - 2. Except as limited by statute or regulation, Federal agencies possess the discretion to promulgate regulations governing the use of Government resources. OGE Informal Advisory Letter 93 X 6 (Mar. 10, 1993).
- D. The Office of Government Ethics (OGE) lacks the authority to promulgate any expansion or limitation of other regulations governing the use of Government property. OGE Informal Advisory Letter 95 X 13 (Dec. 1, 1995).

II. FISCAL FOUNDATION.

- A. Appropriated funds are available only for the objects for which the appropriations were made. 31 U.S.C. § 1301(a) (the "Purpose Statute").
- B. Congress cannot specify every item of expenditure in agency appropriation acts. The "necessary expense rule" allows that appropriations made for particular objects, by implication, confer authority to incur expenses that are reasonably necessary or incident to the proper execution of those objects. *See Internal Revenue Service: Use of Appropriated Funds to Pay for Eldercare Facilities and Counseling Services, 71 Comp. Gen. 527 (1992).*
 1. Application of the "necessary expense rule" is a matter of agency discretion.
 2. In reviewing the propriety of an expenditure, consider whether, under the circumstances, the relationship between the authorized function and the expenditure is so attenuated as to take it beyond the agency's legitimate range of discretion. *See Food and Drug Administration - - Use of Appropriations for "No Red Tape" Buttons and Mementoes, B-257488, Nov. 6, 1995.*
 3. Accountable officers should seek advance decisions regarding legality of payments from agency's general counsel. Under current law, accountable officers receive no legal protection from Comptroller General decisions purporting to relieve them from liability for erroneous or improper payments. *See Letter from Jack L. Goldsmith III, Assistant Attorney General, to Mr. Arnold I. Havens, General Counsel, U.S. Department of the Treasury (Jan. 28, 2004).*
 4. Agencies' general counsels may consult any appropriate persuasive source, including decisions of the Comptroller General, in preparing opinions. *Id.* *See also DoJ Order 2110.39A, Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers, Approved by Janet Reno, Attorney General, Nov. 15, 1995.*

III. DUTY TO PROTECT AND CONSERVE GOVERNMENT RESOURCES.

- A. Employees have a duty to:
 1. protect and conserve Government property, and
 2. refrain from using or allowing its use for purposes other than those for which it is made available to the public *or those authorized in accordance with law or regulation*. 5 C.F.R. 2635.704 (emphasis added).
- B. 5 C.F.R. § 2635.704(b)(1) defines "Government property" to include:
 1. any form of real or personal property;

2. in which the Government has an ownership, leasehold, or other property interest;
 3. as well as any right or other intangible interest; and,
 4. purchased with Government funds (to include services of contractor personnel).
- C. Examples of Government property include, but are not limited to:
1. office supplies,
 2. telephone and other telecommunications equipment,
 3. printing and reproduction facilities,
 4. Government mails, and
 5. Government vehicles.
- D. An employee may not accept for personal use any benefit to which the Government is entitled as the result of an expenditure of appropriated funds. 5 C.F.R. § 2635.204(c)(3) (and example 3 thereafter).
- E. "Authorized purposes" are purposes for which Government property is made available to members of the public, or purposes authorized under law or regulation. 5 C.F.R. § 2635.704(b)(2).
- F. The duty to protect and conserve Government property and to use it only for authorized purposes is attended by an obligation to disclose waste, fraud, abuse, and corruption to appropriate authorities. *See* 5 C.F.R. § 2635.101(b)(11).

IV. RESTRICTIONS ON USE OF PARTICULAR TYPES OF GOVERNMENT RESOURCES.

- A. Official Time. Employees shall use official time in an honest effort to perform official duties, unless authorized under law or regulation to use official time for other purposes. 5 C.F.R. § 2635.705(a).
- B. Public Office for Private Gain. "An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations." 5 C.F.R. § 2635.702. Specific prohibitions include:

1. Coerce or induce any person to provide any benefit to the employee or any person with whom the employee is affiliated in nongovernmental capacity. 5 C.F.R. § 2635.702(a).
 2. Imply official endorsement of personal activities.
 - a. Employees shall not use or permit to be used their Government position or title or authority associated with their public office in a manner that could *reasonably* be construed to imply that their agency or the Government sanctions or endorses their personal activities or those of another. 5 C.F.R. § 2635.702(b). See also JER, para. 3-209.
 - b. Employees may refer to official title or position, as permitted by 5 C.F.R. § 2635.807(b), when teaching, speaking, or writing in a personal capacity. For example, employee may use official title or position when one of several biographical details given to identify him or her in connection with the speech, publication, teaching, and it is given no more prominence than other significant biographical details.
 3. Endorse any product, service or enterprise except as statutorily authorized, or pursuant to agency programs that recognize accomplishments or compliance with agency standards. 5 C.F.R. § 2635.702(c).
- C. Nonpublic Information. Information gained through federal employment that the employee knows or should know is unavailable publicly may not be used in financial transactions, or to further private interests. 5 C.F.R. § 2635.703.
- D. Subordinates.
1. "An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation." 5 C.F.R. § 2635.705(b).
 2. Enlisted aides. See DoD Instruction 1315.09, Utilization of Enlisted Personnel on Personal Staffs of General and Flag Officers, 6 Mar 15. See also AR 614-200, Enlisted Assignments and Utilization Management, 11 Oct 11; Air Force: AFI 36-2123, Management of Enlisted Aides, 2 Oct 08.
 3. Limited use of personnel is authorized to prepare papers for presentation at non-profit professional associations and learned societies, or for professional journals. The participation or paper must be related to the employee's official position or is mission-related, agency must derive some benefit, and cannot interfere with official duties, JER, para. 3-300b.

4. Examples: Subordinates may not: Be asked to draft a letter accepting an invitation to an Air Force reception; Asked to address a superior's personal holiday cards; Pick up/drop off dry cleaning for superior.
- E. Communication Systems. Federal Government communication systems and equipment (including Government-owned telephones, facsimile machines, electronic mail, Internet systems, and commercial systems when the federal Government pays for use) shall be for official use and authorized purposes only. JER, para. 2-301.
1. "Official use" includes emergency communications; communications deemed necessary in the interest of the Government; and "morale and welfare" communications by DoD employees on extended deployments. JER, para. 2-301a(1).
 2. "Authorized purposes," as discussed in JER para. 2-301a(2), include:
 - a. Brief calls home while TDY to notify family of official transportation or schedule changes.
 - b. Personal communications from the workplace that are most reasonably made while at the workplace when the Agency Designee determines that such communications:
 - (1) Do not adversely affect official duty performance;
 - (2) Are of reasonable duration and frequency, and, whenever possible, made during personal time (such as after duty hours or lunch periods);
 - (3) Serve a legitimate public interest (such as keeping employees at their desks, enhancing professional skills of the employees; job searching in response to Government downsizing).
 - (4) Do not reflect adversely on DoD; and
 - (5) Do not overburden the communication system and create no significant additional cost to DoD (including long distance telephone charges).
 - c. Other examples include checking in with spouse or minor children, scheduling doctor and auto or home repair appointments, brief Internet searches, e-mailing directions to visiting relatives. *Note:* Practitioners should determine whether agency guidance exists that permits specific uses of communication resources. *See, e.g.,* Administrative Assistant to the Secretary of the Army memorandum, dated 20 August 2001, Subject: Personal Use of Telephones, E-mail, and the Internet, (for Principal Officials of HQDA). Air Force personnel should check Air Force Instruction Series 33 - Communication and Information, for guidance on proper use of E-mail, telephones, Internet and other

communication resources.

3. Prohibited Uses. Use of communications systems that would adversely reflect on DOD, including all Military Departments, include uses involving pornography, chain e-mail messages, unofficial advertising, soliciting, or selling via E-mail, and other uses incompatible with public service. JER, para. 2-301a(2)(d), AR 25-1, para. 4-2, AR 25-2, para. 4-5a. See also AFI 33-100, para. 3.9.1.1 through 3.9.1.14.
4. Government telephones in personal residences. Permitted when necessary for national defense purposes. 31 U.S.C. § 1348(c). DoDI 4640.07. Additionally, DoD may install telephone lines in certain volunteers' residences. Such volunteers are those who provide medical, dental, nursing, or other health-care related services; volunteer services for museum or natural resources program; or, programs that support service members and their families. 10 U.S.C. § 1588(f).

F. Cell Phones and Other Wireless Phones

1. Special category of communications resources.
2. Service policies.
 - a. Army: AR 25-1, Army Knowledge Management and Information Technology, paragraph 6-4u - Portable, mobile, cellular, and wireless telephones and devices.
 - (1) These types of telephones will not be used in lieu of established 'wired' telephones.
 - (2) These devices are to be used for official business and authorized use only.
 - (3) They may be approved for handheld portable use and/or installed in Government vehicles.
 - (4) Authorized personal use of cell phones is subject to the same restrictions and prohibitions that apply to other communications systems. Authorized use is limited since these types of telephones cannot be used in lieu of established 'wired' telephones.
 - (5) Cellular phones may not be used while operating a vehicle, unless the vehicle is safely parked or a hands-free device is being used. See AR 190-5, paragraph 4-2(c)(3).

- b. Navy: No specific policy except that provided in the JER or by local policy.
- c. Air Force: AFI 33-111, Voice Systems Management, paragraph 26 (24 March 2005). Use a regular telephone (land line) as a first priority when and where available. Use these services only when they are the most cost-effective way to provide necessary communications or mobility is required. They are to be used only for official and authorized purposes.

G. Use of E-Mail and Internet.

1. Limitations

- a. Use of communications systems that could reasonably be expected to cause, directly or indirectly, congestion, delay, or disruption of services to any computing facilities or cause unwarranted or unsolicited interference with others' use of communications. AR 25-13, Telecommunications and Unified Capabilities, para. 3-9. Air Force E-mail use is governed by AFI 33-119, *Air Force Messaging*, para. 3.9.1.
- b. Unauthorized uses include (from AFI 33-119):
 - (1) Distributing copyrighted materials by electronic messaging without consent from the copyright owner;
 - (2) Sending or receiving electronic messages for commercial or personal financial gain;
 - (3) Intentionally or unlawfully misrepresenting your identity or affiliation in electronic messaging communications;
 - (4) Sending harassing, intimidating, abusive, or offensive material to, or about others;
 - (5) Causing congestion on the network by such things as the propagation of chain letters, junk E-mails, and broadcasting inappropriate messages to groups or individuals;
 - (6) Using government systems for political lobbying;
 - (7) Accessing commercial web mail accounts and instant messaging services (i.e., Yahoo, AOL, or MSN mail accounts).

- 2. Official website links to private websites. See DoD Web Site Administration Policies and Procedures, dated 25 November 1998 (updated 11 January 2002), found at <http://www.defenselink.mil/webmasters/>

- a. Requirements:
 - (1) Must include a disclaimer.
 - (2) Do not imply official DoD endorsement.
 - (3) Must include links to similar organizations if requested.
- b. Services' web policies. Individual services may be accessed from the DoD Web Policy website: <http://www.defenselink.mil/webmasters/>
3. Use of Government systems indicates consent to monitoring. 18 U.S.C. 2510 (The Electronic Communications Privacy Act); 50 U.S.C. 1809; 18 U.S.C. 1030 (Computer Fraud and Abuse Act)(The Hacker Statute); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (ad hoc approach to reasonableness); AR 380-53 (Information System Security Monitoring), para. 2-1b. Monitoring guidelines are contained in AR 25-2 (Information Assurance), para. 4-5m(2); *Policy on Use of Department of Defense (DoD) Information Systems Standard Consent Banner and User Agreement*, DOD Chief Information Officer Memorandum, 9 May 2008.
4. May use official e-mail to notify DoD personnel of events of common interest sponsored by non-Federal entities. Email contents must be factual (who, where, when) and should not contain expressions of support of a particular non-Federal entity, which may be construed as official DOD endorsement of the NFE. JER, para. 3-208; para. 3-209.
5. Other Guidance:
 - a. AFI 33-129, *Web Management and Internet Use*.
 - b. Navy guidance. *See* Office of the Under Secretary of the Navy, dated 5 February 1997, Subject: Guidelines for Internet Web Browsing within the Department of the Navy Headquarters Network. *See also* CINCLANFLT message, dated 30 August 93, Subject: Internet Policy, (discussing prohibited uses of Government information systems).

H. Business Cards.

1. DoD Policy: In-house printing of business cards using existing software and commercially purchased card stock is permitted. Contracting with Lighthouse of the Blind is also permissible if costs do not exceed those of in-house printing. *See* Office of the Secretary of Defense, Administration and Management, 15 July 1999, *Printing of Business Cards*.

2. Services Policies.

a. Army Limitations:

- (1) Cards should contain only the necessary business information.
- (2) Color or customized cards must be purchased at the employee's expense.

b. Air Force guidance on using Government computers to create business cards is found at paragraph 5.5.1.7 of the Air Force Supplement (dated 28 February 2007) to DoDI 5330.03, *Defense Automated Printing Service (DAPS)*, 25 Jun 97. Procurement and use must be in accordance with AFI 65-601, Volume I, *Budget Guidance and Procedures*.

I. Holiday Cards. Are not considered official. It is improper to use Government resources to produce holiday greeting cards. See DA OGC Memo, dated December 7, 1998, Subject: Christmas Cards.

J. Use of Appropriated Funds for Postage on Congratulatory Notes. AR 25-51, para. 2-22.

- a. Congratulatory notes to individuals within the technical responsibility or chain of command who have been selected for promotion or advanced schooling serve an official morale and esprit de corps function appropriated fund postage is authorized.
- b. Similar notes to friends, former subordinates or colleagues, or those not within the sender's technical responsibility or chain of command are personal in nature. Appropriated fund postage may not be used.
- c. This issue is also addressed in two other publications: DoD 4525.8-M, DoD Official Mail Manual, December 2001, para. C1.4.7, and Opinion of The Judge Advocate General of the Air Force (OpJAGAF) 1995/103, "Appropriated Fund Postage," 28 Nov 95.

V. PERSONAL USE OF GOVERNMENT RESOURCES (OTHER THAN COMMUNICATIONS SYSTEMS).

A. Section 2-301b, JER authorizes limited **personal** use of Government resources (equipment and property such as typewriters, calculators, and libraries), if the agency designee determines that such use meets the following criteria:

1. Does not adversely affect official duty performance;
2. Is of reasonable duration and frequency and occurs only during the employee's personal time;

3. Serves a legitimate public purpose (such as supporting local charities or volunteer services to the community, developing professional skills, job searching in response to downsizing);
 4. Does not reflect adversely on DoD; and,
 5. Creates no significant additional cost to DoD.
- B. Use of official time and Government equipment for Guard or Reserve duty purposes may be authorized. 5 C.F.R. § 251.202. *See* Comp. Gen. Letter, B-277678, January 4, 1999.
- C. Remember - the use always requires supervisor approval

VI. ENFORCEMENT.

- A. Military members. Penalties for violating the rules republished in, and prescribed by, the JER include the applicable criminal, civil and administrative sanctions for current DoD employees, including punishment under the UCMJ for military members. JER, para. 10-100.
1. The regulations at 5 C.F.R. 2635 in subsection 2-100 of the JER apply to enlisted members pursuant to DoD Directive 5500.07, Standards of Conduct, para. 2.2.5. (29 Nov 07), and JER, 1-300b.
 2. The prohibitions and requirements printed in bold italics in the JER are general orders and apply to all military members without further implementation. DoD Directive 5500.07, para. 2.2.6.1. (29 Nov 07).
- B. Civilian employees.
1. The Merit Systems Protection Board regards misuse of Government resources as a serious charge. The Board has upheld suspensions of 30 days or more for sustained charges of misuse of Government resources. *Barcia v. Department of the Army*, 47 M.S.P.R. 423 (1991) (30-day suspension was reasonable for appellant's misuse of Government computer to maintain private business records and contact computer firms by modem).
 2. The agency is not required to prove intent to sustain a charge of misuse of Government property. *Sternberg v. Department of Defense, Dependents Schools*, 52 M.S.P.R. 547 (1992).
 3. Charge of misusing Government property can be sustained regardless of whether the employee paid for such usage. *Wenzel v. Department of the Interior*, 33 M.S.P.R. 344 (1987).

VII. CONCLUSION.

CHAPTER C: CONFLICTS OF INTEREST

I. REFERENCES

A. Conflicting Financial Interests – Officers and Civilian Employees

1. 18 U.S.C. § 208 - Acts Affecting a Personal Financial Interest
2. 5 C.F.R. Part 2635, Subparts D – Conflicting Financial Interests
3. 5 C.F.R. Part 2635, Subpart F – Seeking Other Employment.
4. 5 C.F.R. Part 2640 – Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208 (Acts Affecting a Personal Financial Interest)
5. DoD 5500.07-R , Joint Ethics Regulation (JER), Chapter 5, Section 3 – Guidance on 18 U.S.C. § 208
6. JER, Chapter 5, Section 4 – Other Conflict of Interest Laws
7. JER 2-204 – Standard for Accomplishing Disqualification
8. Office of Legal Counsel (OLC) Opinion on 18 U.S.C. § 208, Jan. 11, 2006, <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0064.pdf> Re: Nonprofit organizations not having a financial interest in a particular matter solely by virtue of spending money to advocate a position on the policy under consideration in that matter.
9. Office of Government Ethics (OGE) Legal Advisory (LA) LA-15-10, Jul. 27, 2015, “2014 Conflict of Interest Prosecution Survey” [https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/1C3D07B39FDE132B85257EC3003CC34A/\\$FILE/LA-15-10.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/1C3D07B39FDE132B85257EC3003CC34A/$FILE/LA-15-10.pdf?open)
10. Encyclopedia of Ethical Failures: September 2015 Update. http://www.dod.mil/dodgc/defense_ethics/dod_oge/eef_complete.pdf
11. DoD Contracts Exceeding \$25K in FY 2015, http://www.dod.mil/dodgc/defense_ethics/resource_library/contractor_list.pdf
12. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions (Final Rule), 76 Fed. Reg. 68017-68026, Nov. 12, 2010-- <http://www.gpo.gov/fdsys/pkg/FR-2011-11-02/pdf/2011-27780.pdf>; 48 C.F.R. Parts 1, 3, 12, and 52--http://www.ecfr.gov/cgi-bin/text-idx?SID=5d78aa0768cb9e6d6d617ae7a068f482&tpl=/ecfrbrowse/Title48/48cfrv1_02.tpl#0

13. Organizational Conflicts of Interest in Major Defense Acquisition Programs (Final Rule), 75 Fed. Reg. 81908-81915, Dec. 29, 2010--<http://www.gpo.gov/fdsys/pkg/FR-2010-12-29/pdf/2010-32713.pdf>; 48 C.F.R. Parts 209-- http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title48/48cfr209_main_02.tpl; and 252-- http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title48/48cfr252_main_02.tpl

B. Conflicting Financial Interests – Applicability to Enlisted Personnel and National Guard Members, JER 1-300.b.(1) and 5-301

C. Definition of Special Government Employee (SGE)

1. 18 U.S.C. § 202 - Definitions

2. JER 1-227 – Note that the definition of SGE in 18 U.S.C. § 202 does not include enlisted members. However, for purposes of the JER, enlisted members shall be considered SGEs to the same extent that military officers are included in the meaning of the term.

D. Other Conflicts of Interest Laws and Pertinent Regulations

1. Bribery

a. 18 U.S.C. § 201 – Bribery of Public Officials and Witnesses

b. JER 5-400 – Bribery of Public Officials and Witnesses

2. Representational Restrictions (Officers and Civilian Employees Only)

a. Compensated

(1) 18 U.S.C. § 203 – Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government

(2) JER 5-401 – Compensation to officers and others in matters affecting the Government

b. Compensated or Uncompensated

(1) 18 U.S.C. § 205 – Activities of Officers and Employees in Claims Against and Other Matters Affecting the Government

(2) JER 5-403 – Representation of Others. Prohibition Under 18 U.S.C. 205.

(3) OLC Memo on Application of 18 U.S.C. § 205 to Employees Serving on an Intergovernmental Personnel Act Assignment, Jan. 11, 1999.

http://www.justice.gov/sites/default/files/olc/opinions/1999/01/31/op-olc-v023-p0025_0.pdf

- c. 18 U.S.C. § 206 – Exemption of Retired Officers of the Uniformed Services
- 3. Supplementation of Federal Salary
 - a. Officers and Civilian Employees
 - (1) 18 U.S.C. § 209 – Salary of Government Officials and Employees Payable Only by United States
 - (2) 10 U.S.C. § 12601 – Compensation: Reserve on Active Duty Accepting from any Person
 - (3) JER 3-205 – Remuneration;
 - (4) JER 5-404 – Compensation from Other Sources
 - b. Applicability to Enlisted Personnel and National Guards, JER 1-300.b.(1) and JER 5-404
- E. Impartiality in Performance of Official Duties
 - 1. 5 C.F.R. Part 2635, Subpart E – Impartiality in Performing Official Duties
 - 2. 48 CFR Subpart 3.6 – Contracts with Government Employees or Organizations Owned or Controlled by Them
 - 3. JER 5-402 – Contracts with DoD Employees
 - 4. 18 U.S.C. § 211 – Acceptance or Solicitation to Obtain Appointive Public Office
 - 5. 18 U.S.C. § 219 – Officers and Employees Acting as Agents of Foreign Principals
 - 6. 5 U.S.C. § 3110 – Employment of Relatives; Restrictions
 - 7. 5 C.F.R. Part 2635, Subpart H, Outside Activities
 - 8. 5 C.F.R. Part 2636, Subpart C, Limitations on Outside Earned Income, Employment and Affiliation for Certain Non-career Employees
 - 9. JER 3-203 – Impartiality of Agency Designee and Travel-Approving Authority
 - 10. JER 3-204 and 3-302 – Impartiality of DoD Employees
 - 11. JER 2-205 – Limitation on Solicited Sales

12. JER 2-206 and 3-304 – Prior Approval of Outside Employment and Business Activities

13. JER 5-408 – Assignment of Reserves for Training

14. JER 5-409 – Commercial Dealings Involving DoD Employees

F. OGE Advisories and Opinions – <https://www2.oge.gov/web/oge.nsf/All%20Advisories>

II. INTRODUCTION - ETHICS PRINCIPLES COMMONLY INVOLVED

A. Employees shall place loyalty to the Constitution, the laws, and ethical principles above private gain. 5 C.F.R. 2635.101(b)(1).

B. Employees may not hold financial interests that conflict with the conscientious performance of their duties. 5 C.F.R. 2635.101(b)(2).

C. Employees shall not engage in financial transactions using nonpublic information or allow the improper use of such interest to further any private interest. 5 C.F.R. 2635.101(b)(3).

D. Employees shall not use public office for private gain. 5 C.F.R. 2635.101(b)(7).

E. Employees shall act impartially and not give preferential treatment to any private organization or individual. 5 C.F.R. 2635.101(b)(8).

F. Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official duties and responsibilities. 5 C.F.R. 2635.101(b)(10).

G. Basic Definition: Conflict of Interest – a personal or imputed interest, as defined by law or regulation, that conflicts with the faithful performance of one’s official duty.

III. CONFLICTING FINANCIAL INTERESTS, 18 U.S.C. § 208

A. Standard: 18 U.S.C. § 208(a) prohibits an officer or employee from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

(1) The statute is intended to prevent an employee from allowing personal interests to affect his official actions and to protect government processes from actual or apparent conflicts of interest. If an employee has a financial interest in a particular matter, it may prevent him from being entirely objective in carrying out his official duties related to that matter.

(2) The fact that an employee is an honest person is not relevant.

- (3) The fact that an employee does not make the final decision is not relevant.
- (4) All that is required for a violation is that the employee participate personally and substantially in a particular matter and that the particular matter have a direct and predictable effect on his financial interest.
- (5) Criminal Statute. Violators are subject to the penalties provided in 18 U.S.C. § 216.

Note: Employees may have conflicts with entities that are not reportable on financial disclosure reports. Do not be lulled into a false sense of security after reviewing such reports or by using lists of DoD contractors, either local lists or DoD's 25K list. See the Financial Disclosure chapter for additional information on reviewing reports and using such lists.

B. Definitions

1. Agency Designee: See JER 1-202.
2. Particular matter: The term "particular matter" includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not, however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons. Particular matters include a judicial or other proceeding, application or request for a ruling or other determination, contract, claim, controversy, charge, accusation, or arrest. 5 C.F.R. 2640.103(a)(1).
 - a. Particular matter involving specific parties: Typically involves specific proceedings affecting legal rights of parties or an isolatable transaction or related set of transactions between parties. 5 C.F.R. 2640.102(l).
 - b. Particular matter of general applicability: A particular matter focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties (such as most legislation, rulemaking, or policy making). 5 C.F.R. 2640.102(m).
 - c. OGE DAEogram DO-06-029, Oct. 4, 2006, "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter."
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/624E14B0D710694B85257E96005FBE7E/\\$FILE/06x9_.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/624E14B0D710694B85257E96005FBE7E/$FILE/06x9_.pdf?open)
3. Participate "personally" and "substantially":
 - a. To participate "personally" means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter.

- b. To participate "substantially" means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation, or the rendering of advice in a particular matter. 5 C.F.R. 2640.103(a)(2).
4. Direct and predictable effect:
- a. A particular matter will have a "direct" effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this part.
 - b. A particular matter will have a "predictable" effect if there is a real, as opposed to a speculative, possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial. 5 C.F.R. 2640.103(a)(3).
5. Financial interests. For purposes of 18 U.S.C. § 208(a), the term financial interest means the potential for gain or loss to the employee or other persons specified in § 208, as a result of governmental action on the particular matter. The disqualifying financial interest might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate. Additionally, a disqualifying financial interest might derive from a salary, indebtedness, job offer, or any similar interest that may be affected by the matter. 5 C.F.R. 2640.103(b).
6. Imputed interests of others. The financial interests of the following persons will serve to disqualify an employee to the same extent as the employee's own interests:
- a. The employee's spouse. **Includes same-sex marriages.** See OGE LA-13-10: "Effect of the Supreme Court's Decision in United States v. Windsor on the Executive Branch Ethics Program," Aug. 19, 2013.
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/6D38C1EBF15F873885257E96005FBF02/\\$FILE/LA-13-10.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/6D38C1EBF15F873885257E96005FBF02/$FILE/LA-13-10.pdf?open);

- b. The employee's minor child;
 - c. The employee's general partner;
 - d. An organization or entity in which the employee serves as an officer, director, trustee, general partner, or employee; and
 - e. A person with whom the employee is negotiating for, or has an arrangement concerning, prospective employment. 5 C.F.R. 2640.103(c).
7. Diversified. The fund, trust, or plan does not have a stated policy of concentrating its investments in any industry, business, country (other than the United States), or bonds of a single state within the United States, and, in the case of an employee benefit plan, means that the plan's trustee has a written policy of varying plan investments. 5 C.F.R. 2640.102(a).

OGE Ethics DAEOgram DO-00-030, Aug. 25, 2000, "Diversified and Sector Mutual Funds"

[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/7D490EAB13BE635385257E96005FBD7C/\\$FILE/DO-00-030.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/7D490EAB13BE635385257E96005FBD7C/$FILE/DO-00-030.pdf?open)

and OGE LA-15-09, Jun. 30, 2015, "Diversified and Sector Real Estate Funds (Exemption under 5 C.F.R. 2640.201)"

[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/D29929348204E59C85257E96005FBF1A/\\$FILE/68f1f42d9f5c411986192496267a76452.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/D29929348204E59C85257E96005FBF1A/$FILE/68f1f42d9f5c411986192496267a76452.pdf?open)

Note: Generally use the standards and definitions in Part 2640 in preference to those in Part 2635. Part 2640 is the later of the two and addresses only conflicts of interest.

C. Applicability

1. Officers and Civilians – Direct application by the statute.
2. Application to Enlisted Personnel, JER 1-300.b.(1)(a) and 5-301. These sections apply a prohibition similar to § 208 to enlisted members and make it subject to the UCMJ. "Except as approved by the DoD Component DAEO or designee, a "Title 32 National Guard member" and an enlisted member of the Uniformed Services, including an enlisted special Government employee, shall not participate personally and substantially as part of his official DoD duties, in any particular matter in which he, his spouse, minor child, partner, entity in which he is serving as an officer, director, trustee, partner or employee, or any entity with which he is negotiating or has an arrangement concerning prospective employment, has a financial interest."

3. Application to Special Government Employees (SGEs)

a. Definition.

- (1) An officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis. 18 U.S.C. § 202(a).
- (2) A Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as an SGE while on active duty solely for training, regardless of the amount of time. 18 U.S.C. § 202(a).
- (3) A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of 18 U.S.C. §§ 203, 205 through 209, and 218. 18 U.S.C. § 202(a). The orders govern. If the orders stipulate voluntary service in excess of 130 days, then the officer is serving the entire time as a regular officer, but if the orders stipulate 130 days or less, the officer is serving as an SGE.
- (4) A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as an SGE. 18 U.S.C. § 202(a). Although there is no definition of involuntary service in § 202, it is recommend that it be considered any service pursuant to a call or order to active duty other than under 10 U.S.C. § 12301(d).
- (5) Under 18 U.S.C. § 202, the terms "officer or employee" and "special Government employee" as used in 18 U.S.C. §§ 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

- b. JER 1-227 provides that, for the purposes of the JER, enlisted members shall be considered SGEs to the same extent that military officers are included in the meaning of the term.

D. Reserve Personnel. Prior to the start of active duty for Reserve personnel, Ethics Counselors should screen such personnel to prevent conflicts of interest, the appearance of conflicts of interest, or organizational conflicts of interest. Reservists have an affirmative obligation to disclose material facts in this regard. Reserve personnel also should not be assigned to duties in which they could obtain non-public information that they or their private employer could use to gain an unfair competitive advantage. JER 5-408.

E. Remedies. Remedies for conflicts of interest include regulatory exemptions, disqualification from participation in a conflicting particular matter, divestiture of the conflicting financial or other interest (to include resignation from the conflicting outside position), transfer, reassignment or limitation of duties, qualified trust, waiver, and resignation.

1. Regulatory Exemptions to the Statutory Prohibition (18 U.S.C. § 208(b)(2)).

a. Exemptions for Pooled Investment Vehicles.

- (1) Diversified Mutual Funds and Unit Investment Trusts: An employee may participate in any particular matter that affects one or more of the holdings of a diversified mutual fund or diversified unit investment trust where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or trust. 5 C.F.R. 2640.201(a).
- (2) Sector Mutual Funds and sector unit investment trusts: An employee may participate in any particular matter affecting one or more holdings of a sector mutual fund or sector unit investment trust where (a) the affected holding is not invested in the sector in which the fund or trust concentrates and where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or unit investment trust or (b) the disqualifying interest in the matter arises because of ownership of an interest in the sector fund or a unit investment trust and the aggregate market value of interests in any affected sector funds or unit investment trusts does not exceed \$50,000. 5 C.F.R. 2640.201(b).
- (3) Employee Benefit Plans: An employee may participate in any particular matter affecting the holdings of (a) a Thrift Savings Plan (TSP), (b) a pension plan established or maintained by a state government or political subdivision of a State government for its employees, or (c) a diversified employee benefit plan. Note that for a diversified employee benefit plan to qualify for the exemption, the plan must (i) be administered by an independent trustee, (ii) not allow the employee to participate in the selection of the plan's investments, and (iii) not be a profit-sharing or stock bonus plan. Most plans today give options of specific mutual funds from which to choose and would not fit within this exemption. 5 C.F.R. 2640.201(c). OGE LA-15-06, May 5, 2015, "Employee Benefit Plans through which Employees Hold Diversified Pooled Investment Funds and Employee Benefit Plans Established or Maintained Outside the U.S."; [https://www2.oge.gov/Web/OGEL.nsf/All%20Advisories%20by%20Year/7D7F24A707C3035F85257E96005FBF17/\\$FILE/839be259811a4b0da33edbf6bdc0e74c2.pdf?open](https://www2.oge.gov/Web/OGEL.nsf/All%20Advisories%20by%20Year/7D7F24A707C3035F85257E96005FBF17/$FILE/839be259811a4b0da33edbf6bdc0e74c2.pdf?open)

b. Exemptions for Securities.

- (1) De Minimis for Party Matters: An employee may participate in any particular matter involving specific parties in which the disqualifying financial interest arises from ownership of publicly traded, long-term Federal Government, or municipal securities issued by one or more of the entities affected by the matter and in which the aggregate market value of the securities does not exceed \$15,000. 5 C.F.R. 2640.202(a). Long-term Federal Government Security means a bond or a note, except for a U.S. Savings bond, with a maturity of more than one year issued by the U.S. Treasury. 5 C.F.R. 2640.102(i).
- (2) De Minimis for Matters Affecting Nonparties: An employee may participate in any particular matter involving specific parties in which the disqualifying financial interest arises from ownership of publicly traded, long-term Federal Government, or municipal securities issued by entities that are not parties to, but are affected by, the matter, and in which the aggregate market value of the securities of all affected entities (including those discussed in b.(1), above,) does not exceed \$25,000. 5 C.F.R. 2640.202(b).
- (3) De Minimis for Matters of General Applicability: An employee may participate in any particular matter of general applicability (such as rulemaking) in which the disqualifying financial interest arises from ownership of publicly traded or municipal securities issued by entities that are affected by the matter if the aggregate market value does not exceed \$25,000 in any one entity and \$50,000 in all affected entities, or the securities are long-term Federal securities the value of which does not exceed \$50,000. 5 C.F.R. 2640.202(c).
- (4) Short-term Federal Government Securities and U.S. Savings Bonds: An employee may participate in any particular matter affecting these holdings. 5 C.F.R. 2640.202(d). Short-term for this purpose is a bill with a maturity of one year or less issued by the U.S. Treasury. 5 C.F.R. 2640.102(s).
- (5) Securities Owned by Tax-Exempt Organizations: An employee may participate in any particular matter in which the disqualifying financial interest arises from ownership by a tax-exempt organization (26 U.S.C. § 501(c)(3) or (4)) of publicly traded, long-term Federal Government securities, or municipal securities, in which the employee is an unpaid officer, director, trustee, or employee; the matter affects the organization's investments (not the organization directly); the employee plays no role in investment decisions; and the organization's relationship to the issuer is only that of investor. 5 C.F.R. 2640.202(e).
- (6) General Partners: An employee may participate in any particular matter in which the disqualifying financial interest arises from the general partner's ownership of publicly traded, long-term Federal Government, or municipal

securities if (a) ownership is not related to the general partnership and the value does not exceed \$200,000, or (b) any interest of the general partner if the employee's relationship to the general partner is as a limited partner in a partnership that has at least 100 limited partners. 5 C.F.R. 2640.202(f).

c. Miscellaneous Exemptions (partial listing).

- (1) **Hiring Decisions:** An employee may participate in the hiring decision of an applicant who is currently employed by a corporation if the disqualifying financial interest arises from ownership of publicly traded securities issued by the corporation or participation in a pension plan sponsored by the corporation. 5 C.F.R. 2640.203(a).
- (2) **Leave of Absence from Institutions of Higher Education:** An employee on a leave of absence from an institution of higher education may participate in a particular matter of general applicability affecting the institution's financial interests provided the matter will not have a special or distinct effect on the institution other than as part of a class. 5 C.F.R. 2640.203(b).
- (3) **Multi-Campus State Institutions of Higher Education:** An employee whose disqualifying financial interest is employment at such an institution may participate in any particular matter affecting one campus if employed in a position with no multi-campus responsibilities at a separate campus. 5 C.F.R. 2640.203(c).
- (4) **Official Duties that Affect Interest of Federal Employees:** An employee whose disqualifying financial interest is a Federal Government salary or benefits or Social Security or veterans benefits may participate in any affected particular matter but may not make determinations that individually or specially affect their own salary or benefits, or those of persons whose interests are imputed to the employee under 18 U.S.C. § 208. 5 C.F.R. 2640.203(d).
- (5) **Commercial Discount and Incentive Programs:** An employee may participate in any particular matter affecting the sponsor of a discount, incentive or other similar benefit program if the disqualifying interest arises because of participation in the program, it is open to the general public, and the employee has no other financial interest in the sponsor. 5 C.F.R. 2640.203(e).
- (6) **Mutual Insurance Companies:** An employee may participate in any particular matter affecting a mutual insurance company if the disqualifying financial interest arises because of an interest as a policy holder unless the matter would affect the company's ability to pay claims under the terms of the policy or to pay the cash value of the policy. 5 C.F.R. 2640.203(f).

(7) Special Government Employees: SGEs serving on advisory committees established pursuant to the Federal Advisory Committee Act (FACA) may participate in particular matters of general applicability when the disqualifying financial interest arises from his non-Federal employment provided the matter will not have a special and distinct effect on the employee or employer other than as part of a class. This would not apply if the financial interest is ownership of stock in the non-Federal employer. 5 C.F.R. 2640.203(g).

(8) Official Participation in Nonprofit Organizations. An employee may participate in any particular matter where the disqualifying financial interest is that of a nonprofit organization in which the employee serves (or is seeking to serve), solely in an official capacity, as an officer, director or trustee. 5 C.F.R. 2640.203(m). OGE LA-13-05, Apr. 9, 2013, “18 U.S.C. 208(b)(2) Exemption for Official Participation in Nonprofit Organizations.”

[https://www2.oge.gov/Web/OGEL.nsf/All%20Advisories%20by%20Year/CE1F23774940E1E685257E96005FBEFB/\\$FILE/9182469fbb6f484db9fc9c2e6dc837a92.pdf?open](https://www2.oge.gov/Web/OGEL.nsf/All%20Advisories%20by%20Year/CE1F23774940E1E685257E96005FBEFB/$FILE/9182469fbb6f484db9fc9c2e6dc837a92.pdf?open)

2. Disqualification. Disqualification is the statutory default remedy. Unless and until the conflict is remedied by any other means, resolution of the conflict is accomplished by not participating in the particular matter. In a program review, OGE will review all written notices of disqualification. Where disqualification is required, JER 2-204 requires a written notice of disqualification to the supervisor. See 5 C.F.R. 3601.105.

3. Waivers. Before a waiver is considered, all other remedies should be examined and determined to be inadequate or inappropriate.

a. Individual Waiver (18 U.S.C. § 208(b)(1) and 5 C.F.R. 2640.301).

(1) Procedure. DoD employees must make a written request through their supervisors to the cognizant Ethics Counselor. The Ethics Counselor will forward the request, along with findings of fact regarding the items listed in JER 5-302.d(1)-(8), up their chain of command to the Agency DAEO. JER 5-302.b. The Agency DAEO will make a recommendation to the appointing official as to whether the waiver may be granted.

(a) The disqualifying financial interest, and the nature and circumstances of the particular matter or matters, must be fully disclosed to the appointing official. 5 C.F.R. 2640.301(a)(1).

(b) The waiver must be issued in writing by the Government official responsible for appointing the individual to his position. 5 C.F.R. 2640.301(a)(2).

- (c) The waiver should describe the disqualifying financial interest, the particular matter or matters to which it applies, the individual's role in the matter or matters, and any limitations on the individual's ability to act in such matters. 5 C.F.R. 2640.301(a)(3).
 - (d) The waiver must be issued prior to the individual taking any action in the matter or matters. 5 C.F.R. 2640.301(a)(5).
 - (e) The waiver may apply to both present and future financial interests. 5 C.F.R. 2640.301(a)(6).
- (2) Standard. On behalf of the Agency, the individual responsible for appointing the employee may determine that a disqualifying financial interest in a particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government. 5 C.F.R. 2640.301(a)(4). Statements regarding the employee's good character are not relevant in making this determination. The appointing official should consider the following factors in 5 C.F.R. 2640.301(b) in making this determination:
- (a) The type of interest that is creating the disqualification (*e.g.*, stocks, bonds, real estate, other securities, cash payment, job offer, and enhancement of spouse's employment).
 - (b) The identity of the person whose financial interest is involved and if that interest is not the employee's, the relationship of that person to the employee.
 - (c) The dollar value of the disqualifying financial interest, if it is known or can be estimated (*e.g.*, the amount of cash payment that may be gained or lost, the salary of the job that may be gained or lost, the predictable change in either the market value of the stock or the actual or potential profit or loss or cost of the particular matter to the company issuing the stock, or the change in the value of real estate or other securities).
 - (d) The value of the financial instrument or holding from which the disqualifying financial interest arises (*e.g.*, face value of the stock, bond, other security, or real estate) and its value in relationship to the individual's investments. In making a recommendation, Ethics Counselors must include the current value of all investments. When the financial interest of an organization is imputed to a DoD employee, also include the value of the particular matter to the organization and the relationship between that value and the organization's net worth or annual net income.
 - (e) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter.

(f) Other factors: The sensitivity of the matter; the need for the employee's services in the particular matter; and adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that the integrity of the employee's services would be questioned by a reasonable person.

(3) When practicable, the DoD Component DAEO shall consult formally or informally with OGE prior to granting a waiver. 5 C.F.R. 2640.303, JER 5-302.b. A copy of each waiver is to be forwarded to OGE. 5 C.F.R. 2640.303. A copy of the waiver is publicly available upon request. 5 C.F.R. 2640.304.

Note: DoD recommends that you use two memoranda. One is the actual waiver signed by the appointing official containing the statutory determination language and sufficient supporting facts, which is releasable, and the other is a legal memorandum discussing the facts in more detail for the official, which is not releasable.

(4) In a program review, OGE will review all waivers, so be careful.

(5) See OGE DAEOgram DO-07-006, Feb. 23, 2007, "Waivers Under 18 U.S.C. 208."

[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/F8A84B311D2A189C85257E96005FBE58/\\$FILE/07x4.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/F8A84B311D2A189C85257E96005FBE58/$FILE/07x4.pdf?open)

(6) See OGE DAEOgram DO-10-005, Apr. 22, 2010, "Guidance on Waivers under 18 U.S.C. 208, Authorizations under 5 C.F.R. 2635.502(d), and Waivers under Agency Supplemental Regulations."

[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/F0D8053747931EAD85257E96005FBB7A/\\$FILE/438cb0a3fe89437e877ef22c26c6fada4.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/F0D8053747931EAD85257E96005FBB7A/$FILE/438cb0a3fe89437e877ef22c26c6fada4.pdf?open)

(7) See OGE LA-12-07, Dec. 6, 2012, "Continuing Waiver for Transferred Employees."

[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/D6379804EB8AEEB785257E96005FBEF3/\\$FILE/1fcb1d8d5c9f4547858c6f92169d081d1.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/D6379804EB8AEEB785257E96005FBEF3/$FILE/1fcb1d8d5c9f4547858c6f92169d081d1.pdf?open)

b. Waiver for Special Government Employees (18 U.S.C. § 208(b)(3) and 5 C.F.R. 2640.302). An agency may determine, in an individual case, that the prohibition of 18 U.S.C. § 208(a) should not apply to a SGE serving on, or an individual being considered for appointment to, an advisory committee established under the FACA, notwithstanding the fact that the individual has one or more financial interests that

would be affected by the activities of the advisory committee. The agency's determination must be based on a certification that the need for the employee's services outweighs the potential for a conflict of interest created by the financial interest involved. 5 C.F.R. 2640.302(a).

- (1) Waivers under 18 U.S.C. § 208(b)(3) must comply with the following requirements set forth in 5 C.F.R. 2640.302(a):
 - (a) The advisory committee must be one within the meaning of the FACA;
 - (b) The waiver must be issued in writing by the Government official responsible for the individual's appointment;
 - (c) The waiver must include a certification that the need for the employee's services on the advisory committee outweighs the potential for a conflict of interest.
 - (d) The facts upon which the certification is based should be fully described in the waiver, including the nature of the financial interest, and the particular matter or matters to which the waiver applies;
 - (e) The waiver should describe any limitations on the individual's ability to act in the matter or matters;
 - (f) The waiver must be issued prior to the individual taking any action in the matter or matters; and
 - (g) The waiver may apply to both present and future financial interests of the individual, provided the interests are described with sufficient specificity.
- (2) Standard. The agency's determination must be based on a certification that the need for the employee's services outweighs the potential for a conflict of interest created by the financial interest involved. In making this determination, the appointing official should consider the following factors set forth in 5 C.F.R. 2640.302(b):
 - (a) The type of interest that is creating the disqualification (*e.g.*, stock, bonds, real estate, other securities, cash payment, job offer, or enhancement of spouse's employment).
 - (b) The identity of the person whose financial interest is involved and if that interest is not the employee's, the relationship of that person to the employee.

- (c) The uniqueness of the individual's qualifications;
 - (d) The difficulty in locating a similarly qualified individual without a disqualifying financial interest to serve on the committee.
 - (e) The dollar value of the disqualifying financial interest, if it is known or can be estimated (*e.g.*, the salary of the job that may be gained or lost, the predictable change in either the market value of the stock or the potential profit or loss, or the change of value of real estate or other security.)
 - (f) The value of the financial instrument or holding from which the disqualifying financial interest arises (*e.g.*, face value of stock, bond, or other security) and its value in relationship to the individual's investments. In making a recommendation, Ethics Counselors must include the current value of all investments. When the financial interest of an organization is imputed to a DoD employee, also include the value of the particular matter to the organization and the relationship between that value and the organization's net worth or annual net income.
 - (g) The extent to which the disqualifying financial interest will be affected individually or particularly by the actions of the advisory committee.
- (3) When practicable, a Government official is required to consult formally or informally with OGE prior to granting a waiver. 5 C.F.R. 2640.303. A copy of each such waiver is to be forwarded to OGE. 5 C.F.R. 2640.303. A copy of the waiver is publicly available upon request. 5 C.F.R. 2640.304. In a program review, OGE will review all waivers.

Note: DoD recommends that you use two memoranda. One is the actual waiver signed by the appointing official containing the statutory determination language and sufficient supporting facts, which is releasable, and the other is a legal memorandum discussing the facts in more detail for the official, which is not releasable.

4. Other Remedies.

- a. Reassignment.
- b. Change of Duties.
- c. Divestiture of Financial Interest. If an employee agrees to divest the disqualifying financial interest, he may be able to defer recognition of the capital gains tax with a Certificate of Divestiture (CD) issued by the Director, Office of Government Ethics. 5 C.F.R. Part 2634, Subpart J. CDs must be issued before the individual divests. If it is not issued before, the individual cannot use it to defer taxes.

We recommend putting that fact in writing to employee. Note that CDs are given only to defer taxes on capital gains and not other types of income.

See OGE DAEOgrams DO-06-030, Oct. 11, 2006 “Procedures for Requesting a Certificate of Divestiture,” [https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/7C03AC9A0AF52FC085257E96005FBDD9/\\$FILE/f03bdb9644a74d51a9afad5a298df9553.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/7C03AC9A0AF52FC085257E96005FBDD9/$FILE/f03bdb9644a74d51a9afad5a298df9553.pdf?open) and DO-07-035, Sep. 25, 2007, “Suggested Format for Requesting a Certificate of Divestiture” [https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/75BBE1822DBB6BFB85257E96005FBDF9/\\$FILE/DO-07-035.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/75BBE1822DBB6BFB85257E96005FBDF9/$FILE/DO-07-035.pdf?open)

IV. PROHIBITED FINANCIAL INTERESTS, 5 C.F.R. 2635.403

- A. Basic prohibition. 5 C.F.R. 2635.403. Employees shall not acquire or hold any financial interest that they are prohibited from acquiring or holding by statute, by agency supplemental regulation, or by reason of an agency determination of substantial conflict.

NOTE: There is no statute of Government-wide applicability prohibiting employees from holding or acquiring any particular financial interest. Statutory restrictions, if any, are contained in agency statutes which, in some cases, may be implemented by agency regulations. DoD has no such statute at this time. But see, Intelligence Community (IC) Directive 117, dated June 9, 2013, implementing 50 U.S.C. 403-1(u) requiring the DNI to establish policy prohibiting an officer or employee of an element of the intelligence community from engaging in outside employment if such employment creates a conflict of interest or appearance thereof. IC Directive 117 requires review and approval of all outside employment for IC personnel.

- B. Agency regulation prohibiting certain financial interests. 5 C.F.R. 2635.403(a). An agency may, by supplemental agency regulation issued after February 3, 1993, prohibit or restrict the acquisition or holding of a financial interest or a class of financial interests by agency employees, or any category of agency employees, and the spouses and minor children of those employees, based on the agency's determination that the acquisition or holding of such financial interests would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered. Where the agency restricts or prohibits the holding of certain financial interests by its employees' spouses or minor children, any such prohibition or restriction shall be based on a determination that there is a direct and appropriate nexus between the prohibition or restriction as applied to spouses and minor children and the efficiency of the service. DoD has no such regulation at this time.
- C. Agency determination of substantial conflict. 5 C.F.R. 2635.403(b). An agency may prohibit or restrict an individual employee from acquiring or holding a financial interest

or a class of financial interest based upon the agency designee's determination that the holding of such interest or interests will:

1. Require the employee's disqualification from matters so central or critical to the performance of his or her official duties that the employee's ability to perform the duties of the position would be materially impaired; or
2. Adversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned to perform work from which the employee would be disqualified by reason of the financial interest.

D. Definition of financial interest. 5 C.F.R. 2635.403(c)(1).

1. Except as provided in 5 C.F.R. 2635.403(c)(2), the term financial interest is limited to financial interests that are owned by the employee or by the employee's spouse or minor children. However, the term is not limited to only those financial interests that would be disqualifying under 18 U.S.C. § 208(a) and 5 C.F.R. 2635.402. The term includes any current or contingent ownership, equity, or security interest in real or personal property or a business and may include an indebtedness or compensated employment relationship. It thus includes, for example, interests in the nature of stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust, and liens, and extends to any right to purchase or acquire any such interest, such as a stock option or commodity future. It does not include a future interest created by someone other than the employee, his spouse, or dependent child or any right as a beneficiary of an estate that has not been settled.
2. Under 5 C.F.R. 2635.403(c)(2), the term financial interest includes service, with or without compensation, as an officer, director, trustee, general partner, or employee of any person, including a nonprofit entity, whose financial interests are imputed to the employee under 5 C.F.R. 2635.402(b)(2)(iii) or (iv).

E. Reasonable period to divest or terminate. 5 C.F.R. 2635.403(d). Whenever an agency directs divestiture of a financial interest, the employee must be given a reasonable period of time, considering the nature of their particular duties and the nature and marketability of the interest, within which to comply with the agency's direction. Except in cases of unusual hardship, as determined by the agency, a reasonable period shall not exceed 90 days from the date divestiture is first directed. As long as the employee continues to hold the financial interest, however, he remains subject to any restrictions (disqualification) imposed by this subpart.

F. An employee required to sell or divest a financial interest may be able to defer recognition of the capital gains tax with a CD issued by the Director, Office of Government Ethics. See Section III.E.4.c and d. above.

V. IMPARTIALITY IN PERFORMING OFFICIAL DUTIES, 5 C.F.R. 2635, SUBPART E

A. Standard.

1. Determination by Employee. Without prior authorization, an employee should not participate in a particular matter involving specific parties that he knows is likely to have a direct and predictable effect on the financial interests of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. 5 C.F.R. 2635.502(a).
2. Catch-all Provision. An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter. 5 C.F.R. 2635.502(a)(2).
3. Hidden Provision. To ensure that the performance of his official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment, an employee whose duties would affect the financial interests of a friend, relative or person with whom he is affiliated in a non-Governmental capacity shall comply with any applicable requirements of section 2635.502. 5 C.F.R. 2635.702(d).
4. Determination by agency designee. An agency designee may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter. Ordinarily, this is initiated by the employee informing his agency designee of the potential appearance problem. However, the agency designee may make this determination on his own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment. If the agency designee determines that the employee's impartiality is not likely to be questioned, the employee's participation in the matter would be proper. This determination may be made at any time, including after the employee has disqualified himself from participation. The agency designee's determination controls. If the agency designee determines that the employee's impartiality is likely to be questioned, he shall then determine whether the employee should be authorized to participate in the matter. 5 C.F.R. 2635.502(c).
5. An employee's reputation for honesty and integrity is not a relevant consideration for purposes of this determination.

B. Definitions (5 C.F.R. 2635.502(b)).

1. "Member of household" includes grown children, significant others, in-laws, and roommates.
2. Employees have a "covered relationship" with:
 - a. A person (other than a prospective employer under 2635.603(c), in which case 5 C.F.R. Subpart F applies) with whom they have or seek a business, contractual, or other financial relationship that involves other than a routine consumer transaction;
 - b. A person who is a member of their household, or who is a relative with whom they have a close personal relationship;
 - c. A person for whom the employee's spouse, parent, or dependent child, to their knowledge, is serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.
 - d. A person for whom they have, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; or
 - e. An organization, other than a political party described in 26 U.S.C. 527(e), in which they are active participants. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or solicitation of financial support does not, in itself, constitute active participation.
3. Direct and predictable effect has the meaning set forth in 2635.402(b)(1). See III.B.4, above.

C. Resolution of an Impartiality Concern. Similar to conflict under 18 U.S.C. § 208 except there are no regulatory exemptions and an administrative authorization by an agency designee is substituted for a statutory waiver.

1. Disqualification. Disqualification is the regulatory default remedy. Unless and until the impartiality concern is remedied by other means, resolution is accomplished by not participating in the particular matter. Where disqualification is required, JER 2-204 requires a written notice of disqualification to the supervisor. In a program review, OGE will review all written notices of disqualification.

2. Authorization by Agency Designee. Where an individual's participation in a particular matter involving specific parties would not violate 18 U.S.C. § 208(a), but would raise a question in the mind of a reasonable person about his or her impartiality, the agency designee may authorize the individual to participate in the matter based on a determination, made in light of all the circumstances, that the interest of the Government in the individual's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 C.F.R. 2635.502(d).
 - a. Factors that should be considered in making this determination include:
 - (1) The nature of the relationship involved;
 - (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
 - (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
 - (4) The sensitivity of the matter;
 - (5) The difficulty of reassigning the matter to another employee; and
 - (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.
 - b. Documentation. Authorization by the agency designee shall be documented in writing at the agency designee's discretion or when requested by the employee. It is recommended that the determination be written to protect the employee. An employee who has been authorized to participate in a particular matter involving specific parties may not thereafter disqualify himself from participation in the matter on the basis of an appearance problem involving the same circumstances that have been considered by the agency designee.

VI. EXTRAORDINARY PAYMENTS FROM FORMER EMPLOYERS, 5 C.F.R. 2635.503

In the absence of a waiver, employees who have received an extraordinary severance or other payment from a former employer prior to entering Government service are subject to a two-year period of disqualification from participation in particular matters in which that former employer is or represents a party. The two-year period of disqualification begins to run on the date that the extraordinary payment is received.

A. Definitions. For purposes of this section, the following definitions shall apply:

1. Extraordinary payment means any item, including cash or an investment interest, with a value in excess of \$10,000, which is paid:
 - a. On the basis of a determination made after it became known to the former employer that the individual was being considered for or had accepted a Government position; and
 - b. Other than pursuant to the former employer's established compensation, partnership, or benefits program. A compensation, partnership, or benefits program will be deemed an established program if it is contained in bylaws, a contract or other written form, or if there is a history of similar payments made to others not entering into Federal service.
2. Former employer includes any person for which that employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.

Waiver of disqualification. The disqualification requirement of this section may be waived based on a finding that the amount of the payment was not so substantial as to cause a reasonable person to question the employee's ability to act impartially in a matter in which the former employer is or represents a party. The waiver shall be in writing and may be given only by the head of the agency or, where the recipient of the payment is the head of the agency, by the President or his designee. Waiver authority may be delegated by agency heads to any person who has been delegated authority to issue individual waivers under 18 U.S.C. § 208(b) for the employee who is the recipient of the extraordinary payment.

VII. OTHER CONFLICT OF INTEREST STATUTES

A. Bribery, 18 U.S.C. § 201

1. Standard. It is a crime to corruptly give, offer or promise anything of value directly or indirectly to a public official with the intent to influence any official act (§ 201(b)(1)); or to corruptly receive anything of value as a public official to be influenced in the performance of an official act (§ 201(b)(2)).
2. Definitions.
 - a. "Public Official" includes anyone acting for or on behalf of the United States; can include persons who are not Federal personnel.
 - (1) Includes enlisted members. JER 5-400.
 - (2) Includes support contractor employees.

- b. "Thing of Value" is used throughout Title 18 and is broadly construed to include intangibles as well as tangibles. It is the value attached to the bribe by the defendant rather than its commercial value.
 - c. "Official Act" is any decision or action on any matter or controversy in which the United States has an interest.
3. Intent. Proof must show two specific elements:
- a. The offender must have acted "corruptly," that is, "willfully."
 - b. The offender must have also acted with the intent to influence (*i.e.*, there must be an actual or intended quid pro quo).
4. Lesser Included Offense - Unlawful Gratuities - 18 U.S.C. § 201(c) - Must not offer or take anything of value for or because of any official act performed or to be performed.
- a. Varying degrees of same conduct.
 - b. Primary difference between bribes and gratuities -- intent to influence.
 - c. 1989 Ethics Reform Act gave OGE the authority to define exceptions to 18 U.S.C. § 201(c) -- see 5 C.F.R. 2635.202(b).
 - d. See United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999).
- B. Prohibition Against Private Compensation for Services Before Government Agencies, 18 U.S.C. § 203; JER 5-401. This prohibition does not apply to enlisted members.
1. Standard. Officers or employees may not:
- a. demand, seek or receive compensation for any representational services as agent or attorney, rendered personally or by another, while an officer or employee;
 - b. before any Executive or Judicial branch agency, court or commission in relation to a "particular matter" in which the United States is a party or has a direct and substantial interest.
2. Exceptions:
- a. Special Government Employees (subsection 203(c)). The prohibition applies only to particular matters involving specific parties in which the individual participated personally and substantially as a Government employee or SGE. The prohibition also applies to particular matters involving specific parties that are pending in the agency in which SGE is serving, but only if the SGE served more than a total of 60 days during the preceding 365 days. As such, an SGE serving more than 60 days, even if uncompensated (e.g., most FACA members), may have severe

representational restrictions. This is especially the case for a full-time employee who resigns and then becomes an SGE as it will take 10 months to clear a 60-day period. See SGE Review Guide: “An Ethics Guide for Consultants and Advisory Committee Members at the Department of Defense”, http://www.dod.mil/dodgc/defense_ethics/resource_library/sg_e_rvw_guide.pdf

- b. Representing Family Members or Estate (subsection 203(d)). A Federal employee may represent his parents, spouse, children, or any person or estate for which he serves as a fiduciary. The exception does not apply, however, if:
 - (1) he participated personally and substantially in the particular matter; or
 - (2) the particular matter is under his official responsibility.
 - c. Performance Under Government Contract or Grant (subsection 203(e)). There is also an exception for an SGE representing another person regarding performance under a grant or contract with the U.S. if the head of the agency certifies in writing that the national interest requires the representation and publishes the certification in the Federal Register.
 - d. Testifying Under Oath (subsection 203(f)). There is an exception for providing testimony under oath or for making statements required to be made under penalty of perjury.
 - e. Retired Officers. 18 U.S.C. § 203 does not apply to a retired officer not on active duty (and not otherwise an officer or employee). 18 U.S.C. § 206.
3. A military officer on terminal leave or engaged in off-duty employment (moonlighting) is covered, and so may not represent his civilian employer to U.S. officials during this period. Almost all work in a Federal workspace as a contractor employee would trigger this prohibition. Ensure a discussion of 18 U.S.C. § 203 is included in all outside employment/activity and post-government employment counseling and advice.
 4. This prohibition may also affect an employee who leaves government service and shares in the proceeds of a partnership or business for representational services that occurred before the employee terminated government service (e.g., lobbying, consulting, and law firms).
- C. Prohibitions Against Representing Others in Claims against, and in other matters affecting, the United States, 18 U.S.C. § 205; JER 5- 403. This prohibition does not apply to enlisted members.
1. Standard. Officers or employees may not:
 - a. Act as agent or attorney to prosecute any claim against the United States, or receive any gratuity, or share of any such claim, in exchange for assistance; or

- b. Act as agent or attorney before any Executive or Judicial branch agency, court or commission concerning a covered matter in which the United States is a party or has a direct and substantial interest.
2. A "covered matter" is virtually the same as a "particular matter." 18 U.S.C. § 205(h).
 3. See OGE DAEOgram DO-07-015, May 17, 2007, "Immigration Support Letters and 18 U.S.C. § 205." Where an employee makes a communication to the Government in support of the interests of another person, the employee does not violate 18 U.S.C. § 205 unless there is some degree of control by the principal over the agent who acts on his or her behalf.
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/1255C9994C3FC65785257E96005FBDED/\\$FILE/ca99ebaadebd4393b4271146e59828592.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/1255C9994C3FC65785257E96005FBDED/$FILE/ca99ebaadebd4393b4271146e59828592.pdf?open)
 4. Exceptions.
 - a. Special Government employees. 18 U.S.C. § 205(c). See VII.B.2.a., above.
 - b. Federal employees may, without compensation, represent other Federal employees in disciplinary, loyalty, or other personnel administration proceedings. 18 U.S.C. § 205(d)(1)(A).
 - c. Employees may provide uncompensated representation for non-profit cooperative voluntary, professional, recreational, or similar organizations, if a majority of members are current officers or employees of U.S. or the District of Columbia, their spouses or dependent children. The exception does not apply, however, if the covered matter is a claim involving the U.S., a proceeding in which the organization is a party, or involves a grant, contract, or other agreement for disbursement of Federal funds to the organization. 18 U.S.C. § 205(d)(1)(B).
 - d. Family members or estate. 18 U.S.C. § 205(e). See VII.B.2.b., above. See OGE LA-12-09, Dec. 14, 2012, "Scope of Exception for Representation of a Parent or Child before the Government Under 18 U.S.C. § 205(e)."
[https://www2.oge.gov/Web/OGE.nsf/Legal%20Advisories/4E6E0CFDACC5E1E85257E96005FB5/\\$FILE/12-09.pdf?open](https://www2.oge.gov/Web/OGE.nsf/Legal%20Advisories/4E6E0CFDACC5E1E85257E96005FB5/$FILE/12-09.pdf?open)
 - e. Performance under Government Contract or Grant. 18 U.S.C. § 205(f). See VII.B.2.c., above.
 - f. Testifying Under Oath. 18 U.S.C. § 205(g). See VII.B.2.d., above.
 - g. Retired officers. 18 U.S.C. § 206. See VII.B.2.e., above.
 - h. Labor Organization Activities under Chapter 71 of Title 5. 18 U.S.C. § 205(i).

5. A military officer on terminal leave or engaged in off-duty activities is covered, and so may not represent others to U.S. officials during this period. Ensure a discussion of 18 U.S.C. § 205 is included in all outside employment/activity and post-government employment counseling and advice.
- D. Restrictions on Post-Government Employment Activities, 18 U.S.C. § 207. See Deskbook Chapter on Post-Government Employment Restrictions.
- E. Prohibition against Compensation by Private Parties for Official Services of Regular Government Officials (improper supplementation of salary), 18 U.S.C. § 209; JER 5-404. 18 U.S.C. § 209 does not apply to enlisted members. However, JER 5-404 is applicable to enlisted personnel and prohibits similar conduct.
1. Based on the principle that Government officials should not be paid for their official acts by private parties having the discretion to terminate such payments at will. One concern is that Government officials whose salaries are supplemented by private parties will tend to show favoritism to their paymasters even in the absence of any specific quid pro quo. See Perkins, "The New Federal Conflict of Interest Law", 76 Harv. L. Rev. 1113, 1119, 1137-38 (1963).
 2. Must demonstrate that the payment was made specifically for the officer's or employee's services as such an officer or employee; the statute does not prohibit receipt of payment for the official's non-Government work nor gifts unrelated to Government service. United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979). Be careful, and see 5 C.F.R. 2635.202(c)(4). If a gift is actually compensation prohibited by § 209, it may not be accepted under the Part 2635 gift exceptions.
 3. Recurring issue. Whether a payment made to a Federal official upon entry into Federal service from private industry is a payment for past services or was instead made to supplement his Federal salary. Relevant factors include the form of the payment (lump sum or monthly payments), or the presence of dealings between the former employee and the Federal official's agency.
 4. This section does not prohibit a member of the reserve components of the armed forces on active duty pursuant to a call or order to active duty under a provision of law referred to in 10 U.S.C. § 101(a)(13) from receiving from any employer before the call or order, any payment of any part of the salary or wages that such person would have paid the member if the member's employment had not been interrupted by such call or order. 18 U.S.C. § 209(h) and 10 U.S.C. § 12601.
 5. OGE DAEOgram DO-02-016/016A; Jul. 1, 2002, "18 U.S.C. 209 Guidance," and "Attachment – Summary of Restrictions on Supplementation of Salary 18 U.S.C. 209." [https://www2.oge.gov/Web/OGEnsf/All%20Advisories%20by%20Year/FD6CFFC6A2D8006085257E96005FBDAF/\\$FILE/DO-02-016.pdf?open](https://www2.oge.gov/Web/OGEnsf/All%20Advisories%20by%20Year/FD6CFFC6A2D8006085257E96005FBDAF/$FILE/DO-02-016.pdf?open)

6. OGE DAEOgram DO-08-037; Nov. 6, 2008, Recent Legislative Activity Affecting Executive Branch Programs.” Employee participation in loan forbearance or payment programs under the College Opportunity and Affordability Act, Pub. L. 110-315, would not violate 18 U.S.C. § 209.

[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/9C1CFECA645532E985257E96005FBE9F/\\$FILE/3b71907fcbf54699a909510a961defcc2.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/9C1CFECA645532E985257E96005FBE9F/$FILE/3b71907fcbf54699a909510a961defcc2.pdf?open)

- F. The Procurement Integrity Act, 41 U.S.C. § 4201 et seq.; FAR Subpart 3.104. See Chapter on Post-Government Employment Restrictions.
- G. Additional Pay and Allowances, 5 U.S.C. § 5536, JER 5–405. See Chapter on Outside Activities.
- H. Interference with Military Duties, 10 U.S.C. § 973(a), JER 5–406. See Chapter on Outside Activities.
- I. Civil Office Prohibition, 10 U.S.C. § 973(b), JER 5-407. See Chapter on Outside Activities.

VIII. HELPFUL HINTS - HOW TO IDENTIFY A CONFLICT

- A. Financial Disclosure Reports (OGE Form 278/OGE Form 450).
- B. Training (Briefings for Procurement Boards).
- C. Frequent Interaction with Supervisors.
- D. Know Your Client.

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FINANCIAL DISCLOSURE RUNNING AN EFFECTIVE PROGRAM

I. REFERENCES & RESOURCES.

A. General

1. Compilation of Federal Ethics Laws (<https://www2.oge.gov/Web/oge.nsf/Resources/Compilation+of+Federal+Ethics+Laws>):
 - a. Ethics in Government Act of 1978, 5 U.S.C. App 4 (Pub. L. 95-521)
 - b. Ethics Reform Act of 1989, 5 U.S.C. App 4 (Pub. L. 101-194)
 - c. Stop Trading on Congressional Knowledge Act (STOCK Act), Pub.L. 112-105, S. 2038, 126 Stat. 291, enacted April 4, 2012, as amended.
2. DoD 5500.07-R, Joint Ethics Regulation (JER), Chapter 7 (www.dtic.mil/whs/directives/corres/pdf/550007r.pdf)
3. Army Financial Disclosure Management program (FDM), Resources tab under Help & Support (<https://www.fdm.army.mil/>)

B. Public Financial Disclosure (OGE Form 278)

1. 5 U.S.C., App. 4 §§ 101-111: Public financial disclosure requirements (www.gpo.gov/fdsys/pkg/USCODE-2009-title5/html/USCODE-2009-title5-app-ethicsing-titleI.htm)
2. 5 C.F.R. § 2634.101 to 805 (<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=06f812f26e7ed9f364bb87944757b912&rgn=div5&view=text&node=5:3.0.10.10.8&idno=5>)
3. OGE materials
 - a. Public Financial Disclosure Guide (<https://www.oge.gov/Web/278Guide.nsf>)

- b. Helpful Resources for Public Financial Disclosure (Reviewers & Filers) (<https://www2.oge.gov/web/oge.nsf/Public%20Financial%20Disclosure/F8C35F18BF846D1C85257E96006B95B1?opendocument>) Includes:
 - (1) PAS Nominee Ethics Agreement Guide (2014)
 - (2) Certificate of Divestiture (CD) Request
 - (3) Procedures for Requesting a CD (DAEOgram DO-06-030)
 - (4) Model Qualified Blind and Diversified Trust Documents
 - c. OGE Form 278 software and forms: (http://ogc.osd.mil/defense_ethics/resource_library/forms_software.htm)
 - d. STOCK Act Periodic Transaction Report (OGE 278T) and implementing Guidance:
 - (1) Legal Advisory 12-01: Post-Employment Negotiation and Recusal Requirements under the STOCK Act ([https://www.oge.gov/web/oge.nsf/All%20Advisories/9ACFEF2B2C153CD485257E96005FBEEC/\\$FILE/LA-12-01.pdf](https://www.oge.gov/web/oge.nsf/All%20Advisories/9ACFEF2B2C153CD485257E96005FBEEC/$FILE/LA-12-01.pdf))
 - (2) Legal Advisory 12-02: Mortgage Reporting Requirement under the STOCK Act (<https://www2.oge.gov/web/oge.nsf/0c373046e722a7b085257f6b00420525/b5e72748380c845f85257e96005fbeebeeb?OpenDocument&Highlight=0,LA,12-02>)
 - (3) Legal Advisory 12-04: Public Financial Disclosure – Periodic Transaction Reports ([https://www2.oge.gov/Web/OGE.nsf/All%20Documents/13EFE4B85EBDBB7385257E96005FBEEF/\\$FILE/12x04.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Documents/13EFE4B85EBDBB7385257E96005FBEEF/$FILE/12x04.pdf?open))
 - (4) Legal Advisory 13-01: Periodic Reporting of Spouse and Dependent Children Transactions (<https://www2.oge.gov/Web/OGE.nsf/0c373046e722a7b085257f6b00420525/aa0385b494d5d0b585257e96005fbef8?OpenDocument>)
 - (5) Program Advisory 15-01 Implementation of Integrity and New Public Financial Disclosure Report Form ([https://www2.oge.gov/web/oge.nsf/Program%20Management%20Advisories/9EA51A6F90C1543085257E96005FBBF10/\\$FILE/PA-15-01.pdf?open](https://www2.oge.gov/web/oge.nsf/Program%20Management%20Advisories/9EA51A6F90C1543085257E96005FBBF10/$FILE/PA-15-01.pdf?open))
4. DoD 5500.07-R, the Joint Ethics Regulation (JER) Sections 7-200 to 7-209

C. Confidential Financial Disclosure (OGE Form 450)

1. 5 C.F.R. § 2634.901 to 909 (<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=06f812f26e7ed9f364bb87944757b912&rgn=div5&view=text&node=5:3.0.10.10.8&idno=5>)
2. JER 7-300 to 7-310
3. OGE materials
 - a. Guidance for Reviewers of the OGE Form 450, Part I (Assets & Income) (<https://www.oge.gov/Web/OGE.nsf/Resources/Guidance+for+Reviewers+of+the+OGE+Form+450,+Part+I>)
 - b. OGE Confidential Financial Disclosure (<https://www2.oge.gov/Web/oge.nsf/Confidential%20Financial%20Disclosure>) Includes:
 - (1) OGE 450 Forms Library
 - (2) Helpful Resources for Filers and Reviewers
 - (3) OGE 450 FAQs

NOTE: Per JER 7-300.b.2.c, DoD filers who elect to use the optional form must secure supervisory review of the 450-A, which requires inclusion of DoD certification language.

II. ROLE OF FINANCIAL DISCLOSURE.

- A. Report helps to provide notice of potential conflicts of interest (18 U.S.C. § 208, 5 C.F.R. §§ 2635.402 and 502, and 5 C.F.R. § 2640).

Warning: The report is a compromise—It does not collect all the information necessary to conduct a contemporaneous and complete conflict analysis, so some potential conflicts may not be identified, which is why providing guidance and training to filers is so important.

- B. Program requires **diligent follow-through** to be effective.

III. BENEFITS OF FINANCIAL DISCLOSURE – EDUCATIONAL.

- A. **For employees:** By completing the form, employees **identify** their financial interests. They may **recognize** whether these interests conflict with their official duties, and **remember** their interests if a potential conflict should arise in the future.
- B. **For supervisors:** By reviewing the form, supervisors **identify** financial interests that may conflict with their employees' official duties and can assign duties accordingly.
- C. **For ethics officials:** By reviewing the form, ethics officials ensure its technical compliance and identify financial interests that may conflict with a filer's official duties. By sending warning letters, ethics officials **remind** filers of their financial interests, **educate** them about the rules applicability to their particular interests, and **demonstrate** official interest in their potential conflicts of interest.
- D. The financial disclosure report provides excellent evidence of knowledge if violations occur and are prosecuted.

NOTE: *Unless an exception applies, DoD requires electronic filing of all financial disclosure forms using either the Financial Disclosure Management (FDM) or Integrity system.* (Manual forms filed by exception must use the most current version - e.g., OGE Form 278 should be dated March 2014, and OGE Form 450 should be dated June 2015).

IV. PUBLIC FINANCIAL DISCLOSURE PROGRAM (OGE FORM 278)

The public financial disclosure report and program was created by the Ethics in Government Act, and implemented by Office of Government Ethics (OGE) by regulation, to assist in identifying conflicts of interests for those personnel most likely to have potential and actual conflicts because of their duties and responsibilities.

- A. **Who Files?** There is a specific list based on position and pay.
1. Generals and Admirals (O-7's and above). Does not include “frocked” O-7s, who wear the rank but do not receive the pay.
 2. Senior Executive Service (SES, career and non-career).
 3. Civilian employees, including SGEs and people serving in established and classified positions, including those serving pursuant to the Intergovernmental Personnel Act, 5 U.S.C. § 3371-3376, or under other similar authorities, when the position’s rate of basic pay is equal to or greater than 120% of GS 15, step 1.

4. Political Appointees with the advice and consent of the Senate (PAS)(regardless of pay grade) and Designated Agency Ethics Officials (DAEOs).
5. Other Political appointees (e.g., PA, Schedule C, regardless of pay grade).
6. Civilians detailed to positions mentioned in 2, 3, and 5, above.
7. Reserve and National Guard officers (O-7's and above) if they served on active duty more than 60 days in a calendar year. NOTE: AF requires all reserve GOs to file regardless of days served.
8. Senior Mentors Highly Qualified Experts by DoD equal classification determination with concurrence of OGE. *See* <http://www.acq.osd.mil/dpap/dars/docs/SeniorMentorPolicy.pdf>.

B. Filing Exclusions/Exceptions. Consult 5 C.F.R., Part 2534, Subpart B for specifics:

1. New entrants serving in one of the above positions, who are expected to work less than 61 days in a calendar year. 5 C.F.R. § 2634.204.
2. Special Government Employees (18 U.S.C. § 202—who are part-time intermittent employees who are expected to work for less than 130 days), who receive a waiver from the Director of the U.S. Office of Government Ethics. 5 C.F.R. § 2634.205(a).
3. Upon agency request, OGE at its sole discretion may grant exclusion from filing for certain Schedule C appointees who are engaged in non-policy-making duties (e.g., confidential assistant). 5 C.F.R. § 2634.205.

NEW:

- As of January 2016, OGE requires that all Presidential Appointees, confirmed by the Senate (PASs) and Designated Agency Ethics Officials (DAEOs) (the General Counsel of DoD agency components as designated in 5 C.F.R. § 3601.102) electronically file using the OGE Integrity.gov system.
- FDM's output is the new 278 form, which will facilitate data migration to Integrity, enabling pre-population of reports, in the future.

C. **Filing Status.** Consult 5 C.F.R., Part 2534, Subpart B for specifics.

1. **New Entrant/Nominee Reports** – Ethics counselors must identify, notify, and collect reports from new filers/nominees. JER 7-202.

Best Practices:

- Work with the client office action officers (AOs) & HR to get reports of new SES promotions, new O-7 promotions (not frocking), and any new employees at the appropriate pay level. *See* JER 1-414 and 7-202.
- Notify filer of all ethics program requirements at same time—completion of annual and termination disclosure reports, annual ethics training, and annual post-Government employment certification (see below discussion).

- a. **Report Coverage:** *See* front page of instructions. Part 1 (Filer’s positions held outside US Govt) and Part 4 (Filer’s sources of compensation exceeding \$5,00 in a year) preceding two calendar years and current year to filing date; Part 2 (Filer’s employment assets and income), Part 5 (Spouse’s employment assets and income), Part 6 (Other assets and income), Part 8 (Liabilities) preceding calendar year and current year to filing date; Part 3 (Filer’s employment agreements and arrangements) as of date of filing. New entrant filers do NOT need to complete Part 7 (Transactions) or Part 9 (Gifts and Travel Reimbursements). *See generally*, 5 C.F.R. § 2634.308.
- b. **Dates and Times:** New entrants must file **within 30 days** of assuming a new position, unless an extension is granted.

TIP: Try not to provide extensions to new entrants, as these filers are unaware of possible conflicts and are in the most need of review of their possible conflicts. Likewise, if an extension or other clarification is required, recommend you provide the filer general conflict of interest guidance even before certifying the report.

- (1) **SGE.** If it was not anticipated that an **SGE** would serve over 60 days, file **within 15 days after the 61st day of duty**. This means that some SGEs may file both the 450 and the 278 in the same year. Alternatively, they could file a 278 at the start. Especially for Reserve/NG Generals, in appropriate circumstances, after they first file a new entrant 278, they may file an annual 278 if the need arises again.
- (2) **Nominees** must file between nomination and 5 days after transmission of the nomination to the Senate. Reports must be retained 6 years.
- (3) **Air Force policy** requires all Reserve and National Guard GOs to file a 278. *See* Air Force General Counsel memorandum, “Federal Recognition Standards and Ethics Reporting for Air National Guard

and Air Force Reserve General Officers,” dated May 10, 2011.

Best Practice: If there is less than a 30-day gap in service, get a copy of a transferring filer’s most recent report to avoid them having to complete a new report, but remember you must obtain his new supervisor’s review, complete a new substantive conflict review, and certify the report. See 5 C.F.R. §§ 2634.201(b)(2)(i); 2634.902(b)(2)(i).

- c. **Supervisory Review.** At DoD, part of the review chain requires that the filer’s supervisor review and sign the report confirming that there is no conflict of interest between reported financial interests and reporting individual’s current and anticipated official duties. See 5 C.F.R. 2634.605(b). Supervisor can provide the reviewer with additional information or data, including comments on the existence of actual or apparent conflicts of interest, and forward the report to the Ethics Counselor. JER 7-206(a).

NOTE: Supervisory review is *required* by DoD regulation. Supervisors are in the best position to know whether conflicts exist or are likely to arise. Since the premise is that the supervisor help identify the potential conflicts, you should *not* certify the report before supervisory review is complete; although when using e-filing systems like FDM, an ethics counselor may review a report for completeness even before the supervisor signs (to avoid having to have them resign an amended report), but final certification must be *after* supervisory review.

- d. **Certification within 60-days.** OGE program advisory 11-04 clarifies that final certification of the OGE Form 278 and OGE Form 450 must occur within 60 days of *the date of agency receipt* when the reports do not require additional information or remedial action. No extensions! 5 C.F.R. § 2634.605; JER 7-206(b). PA-11-04 ([https://www2.oge.gov/Web/OGE.nsf/Program%20Management%20Advisories/4BC30D40D7094A6D85257E96005FBEC0/\\$FILE/a8ba28f2f88748999445dfd533c306181.pdf?open](https://www2.oge.gov/Web/OGE.nsf/Program%20Management%20Advisories/4BC30D40D7094A6D85257E96005FBEC0/$FILE/a8ba28f2f88748999445dfd533c306181.pdf?open)).

Best Practice: OGE program reviews look for 30-day completion of initial review, or better yet, certification.

- (1) Technical deficiency reviews—procedural review to ensure form is signed, dated, complete, and include all relevant parts, etc.—will *not* meet the requirements of an initial review and stop the 60-day clock.
- (2) If no additional information is required, the reviewer should immediately implement any required remedy or provide guidance, and certify the report.
- (3) If the report cannot be certified as filed, initial review is not complete

until the reviewer transmits questions back to the filer. 5 C.F.R. § 2634.605(b)(3). This may toll the 60-day certification requirement if prompt follow-up is sought. Only once all required clarifications are obtained, should the reviewer conduct the conflict of interest review, implement any required remedy or provide guidance, and then certify the report.

TIP: For new entrant reports, ensure filer receives a checklist of common omissions or errors, or meet with them in person. Better yet, ask probing questions after receiving the new entrant report to ensure it is complete and is a good base-line for moving forward.

- e. **Post-Government Employment (PGE) Certification.** DoD personnel who file 278s must certify annually that they are aware of the disqualification and employment restrictions, and have not violated them. FDM and Integrity include as part of e-signature process – no separate certification need be collected. If paper reports are filed by exception, collect certifications with the disclosure filing requirement. JER 8-400. A model Post-Government Employment Certification, which also constitutes the required notice to senior officials of the “cooling-off” period per 5 C.F.R. § 730.104, is on the DoD SOCO website, under Forms. See http://ogc.osd.mil/defense_ethics/resource_library/post_emp_cert.pdf
- f. Recommend sending final reminder within two weeks of deadline, alerting filers of the \$200 late filing fee, and of the possibility of requesting a written request for a good cause extension, preferably prior to expiration of the filing deadline. 5 C.F.R. § 2634.704.
- g. **Spouse.** Following the Supreme Court in *United States v. Windsor*, 133 S. Ct. 2675 (June 26, 2013), nullifying a portion of the Defense of Marriage Act, OGE interprets the terms “marriage” and “spouse” to include a same-sex marriage and a same-sex spouse where those terms appear in federal ethics provisions, regardless of the employee’s state of residency, so long as the marriage is valid in a State. OGE now similarly interprets the term “relative” to include a same-sex spouse when used in federal ethics provisions. OGE LA 13-10 ([www.oge.gov/OGE-Advisories/Legal-Advisories/Assets-non-searchable/LA-13-10--Effect-of-the-Supreme-Court-s-Decision-in-United-States-v--Windsor-on-the-Executive-Branch-Ethics-Program-\(PDF\)/](http://www.oge.gov/OGE-Advisories/Legal-Advisories/Assets-non-searchable/LA-13-10--Effect-of-the-Supreme-Court-s-Decision-in-United-States-v--Windsor-on-the-Executive-Branch-Ethics-Program-(PDF)/)). For example, OGE now construes 18 U.S.C. § 208, the primary criminal conflict of interest statute, to impute the financial interests of a federal employee’s same-sex spouse to the employee. Likewise, OGE deems a federal employee’s same-sex spouse to be an “eligible person” with regard to the issuance of a Certificate of Divestiture. 5 C.F.R. § 2634.1003. This does not apply in the same manner to employees in domestic partnerships or civil unions.

Best Practice: Ensure new entrant reports are complete. Ask filer questions about common omissions, such as former non-Federal employer benefits. The better the new entrant report, the better the subsequent reports will be.

2. Annual Reports -

- a. **Report Coverage:** See front page of instructions. Part 1, Part 3, and Part 4 preceding calendar years and current year to filing date; Part 2, Part 5, Part 6, Part 7, Part 8, and Part 9 preceding calendar year. Annual filers do NOT complete Part 4. *See generally*, 5 C.F.R. § 2634.308.
- b. Use the ethics office database to determine who are filers - All annual filers from prior year, minus the termination reports, plus the new entrant filers who entered prior to November 2 of the prior year and any transferred 278 filers. If a new entrant report was filed between November 2 and December 31 of the prior year, the filer does not need to file an annual report because they must work over 60 days in the preceding calendar year before filing is required.

NOTE: FDM will automatically assign annual reports to filers in FDM using the above criteria, as long as your ethics counsel has elected this option. It will not send notifications.

- c. **Notifications:** Ethics counsel can use FDM functionality to notify filers. SOCO recommends sending notifications to OGE 278 filers in March to minimize volume in FDM during OGE 450 season. Notifications should include information on accessing reports, late filing fees, and penalties for non-compliance, as well as how to request extensions. Notices should also include a link to the OGE Public Financial Disclosure Guide (see references above).
- d. The ethics office should use the assistance of the individual client office Action Officers (AOs) to ensure filers receive notice. *See* JER 1- 414 and 7-202. **Note:** Ensure that newer filers are reminded to verify that the correct e-mail address appears under the “My Info” tab in FDM. FDM pulls from the global and may pull an outdated e-mail address – only the user can update their e-mail address in the system.
- e. **Dates:** Reports must be filed no later than May 15, which means they may be filed prior to that date, but not earlier than January 1. Reports must be retained 6 years, or longer if there is a law enforcement or investigative hold.
- f. **Certification reviews** must be conducted **within 60 days from the date of agency receipt**. No extensions! *See above*, IV.C.1.d.

- g. **General and Flag Officers** assigned outside of their Military Department (for example, at a Combatant Command or Defense Agency) file their report with their Service DAEO but the current component should at a minimum conduct the initial review since it is in the best position to identify conflicts. *See* 5 C.F.R. § 2634.602(f); JER 7-205(b). The Military Department DAEO is the official custodian of the official report, e.g., for public posting or release. For those reports in FDM, the component where the officer is assigned should certify the report and transmit a PDF copy to the appropriate Military Department as the official copy. **Note:** Once DoD moves to Integrity, it is anticipated that Military Department DAEO's will retain certification and custody.
- h. **Detailees** outside DoD should comply with 5 C.F.R. § 2634.602. DoD is required to retain the official records for personnel detailed (e.g., to the Department of State), but coordination and substantive conflict review should occur at agency where detailee is assigned.
- i. Recommend sending final reminder in early May, alerting filers to the \$200 late filing fee, and to the possibility of requesting a written request for a good cause extension, preferably prior to expiration of the filing deadline. 5 C.F.R. § 2634.704.

3. Termination Reports:

- a. **Report Coverage:** Parts 1-3 and 5-9 cover end of period covered by last prior filing up to the termination date. Termination filers do NOT complete Part 4. *See generally*, 5 C.F.R. § 2634.308.
- b. **Dates:**
 - (1) Due Date - Reports must be filed no later than 30 days after termination and no earlier than their last day. This requirement does not apply to individuals who assume another covered position within 30 days. With creative use of annual and termination extensions, an employee could possibly file a combination annual/termination report if the termination is prior to August 15. DoD recommends notifying filers of this requirement as part of their post-government employment briefing, and requesting contact information from them to allow for courtesy follow-up notices should they fail to file within 30- days after termination.
 - (2) Early Submission – **NEW!** OGE now permits submission of reports up to 15 days PRIOR to termination, provided that certain requirements are meant, including that the filer agrees in writing to update the information to reflect any changes occurring between filing and termination date. (see PA-16-06) FDM includes this agreement language.
 - (3) Retention - Reports must be retained 6 years.

NOTE: Termination is the last date in Federal status, this means after expiration of all permissive and terminal leave for military personnel.

- c. **Certification reviews** must be conducted **within 60 days from the date of agency receipt**. No extensions! *See above*, IV.C.1.d. Particular attention should be given to Part 3, Filer's employment agreements and arrangements, where the filer should list the terms of any arrangements for post-Government employment.
- d. A **Post-Employment Certification** should accompany the filing of any paper Termination report if it is combination annual/termination 278, or otherwise not already filed that calendar year. *See above* IV.C.1.e.
- e. Try to remind filer within two weeks of due date. *See above* IV.C.1.g.

D. Filing Extensions – DAEO (or authorized designee) may grant extensions for good cause up to 45 days past the filing deadline. 5 C.F.R. § 2634.201(f). Any requests for extensions beyond the first 45-days after the filing extension must be written and set forth in writing (email suffices) specific reasons why such additional extension of time is necessary (show good cause). Denial or approval of the additional extension must be in writing and retained as part of the report file. Except as discussed below, no filer can receive an extension of more than 90-days. Check with your Ethics Counselor delegations to determine if they are broad enough to include the designee authority.

- 1. **Combat Extension.** There is an automatic extension for anyone serving in support of the Armed Forces in areas designated as combat zones. Reports are due 180 days after the last day of service in such an area or after the last day of hospitalization resulting from such service. 5 U.S.C. App 4 section 101(g)(2)(A). This extension is different for confidential filers.

Best Practice: STOCK Act requires the public posting of certain 278 filer extensions, therefore it is essential that ethics programs properly record extensions in the system or on the designated area for paper forms.

- E. **Final Review** – After the technical deficiency and initial review, conduct the final substantive conflict of interest review. Compare current report to last report and determine any differences. If you have questions or something on the report requires clarification, contact the filer for answers and **only** with the filer's express permission annotate the report accordingly. Review ethics guidance folders to determine if there are reportable gifts, outside activities, etc. Be persistent and use a tickler system for follow up.

Tip: Where there were many changes, recommend you send filer a copy of the corrected, amended report for their records and to ensure the next report includes them.

1. **Identify interests in prohibited sources.** Check for potentially conflicting financial interests such as publically traded stock interests or sector funds. *See* OGE Legal Advisory 15-09, Diversified and Sector Real Estate Funds (Exemption under 5 C.F.R. § 2640.201) ([https://www2.oge.gov/Web/OGE.nsf/Legal%20Advisories/D29929348204E59C85257E96005FBF1A/\\$FILE/68f1f42d9f5c411986192496267a76452.pdf?open](https://www2.oge.gov/Web/OGE.nsf/Legal%20Advisories/D29929348204E59C85257E96005FBF1A/$FILE/68f1f42d9f5c411986192496267a76452.pdf?open)) to help distinguish between diversified and sector mutual funds. If your organization has a list of contractors or prohibited sources, you may want to use that to identify possible conflicts. SOCO Deputy DAEOs and Ethics Counselors minimally should compare reports against the DoD \$25K list (*see* Ethics Resources Library at http://ogc.osd.mil/defense_ethics/resource_library/index.html); all others must consult with their DAEOs to determine the correct procedure for their components. But the substantive review does not end there.

2. **Determine likelihood of a conflict arising with filer’s duties.** Familiarize yourself with the filer’s duties and office’s projects and activities, or talk to the filer’s supervisor if you have concerns that a potential entry may pose a conflict with his position’s duties. A contractor list is on the start. Look to see if filer is engaged in “particular matters” (either involving specific parties or of general applicability). This can include such activities as grants, CRADAs, Tech Transfer and policies directed at a discrete group, such as funding Federally-Funded Research and Development Centers. *See* as a resource USASpending.gov. Finally, when all information is contained on the form, review the report against the filer’s duties to identify possible conflicts.

3. **Resolve any conflicts and educate filer.**
 - a. If no actual or potential conflicts are found, certify the report.

Best Practice: Recommend sending filers periodic reminder guidance: restate the law, identify potentially applicable exemptions, exemplify how potential conflicts might arise, and provide general ethics guidance, e.g., for outside activities—customized to their individual interests. Emails suffice, preferably with a copy to the filer’s supervisor. OGE has identified this DoD's practice as a best practice.

 - b. If an actual or potential conflict is found, only after you ***resolve the conflict and provide prudential advice*** should you certify the report. *See* Ethics Counselor Desk Book chapter on Conflict of Interest (i.e., recuse or divest).

F. Documentation.

1. Develop a good tracking system that can alert you to impending deadlines, such as review date of 60 days from date of filing, and late filings. There is a simple tracking system in Excel at

http://ogc.osd.mil/defense_ethics/resource_library/forms_software.htm under the heading Financial Disclosure Report Tracking System.

2. What is the **date of agency receipt**? It is the date of delivery to the 1st reviewing office, which starts the 60-day review clock. For those not using e-filing systems, DoD recommends that the Ethics Office enter the date received in its office in the Agency Use Only box. Ethics programs may however decide to make this the date the supervisor receives the report for review. This will however start the 60 day clock and ethics officials will lose control of ensuring timely certification of reports where supervisors delay review or transmission to the ethics office For e-filing systems, it is the date the report is submitted by the filer in the system.
 3. Retain reports for six (6) years, or longer if placed on law enforcement or investigative hold.
- G. Time Management - Make the process work more quickly and smoothly, and educate staff and filers on how to correctly report information to reduce delay in certification. Consider investigating how to expand filer accuracy, including:
1. Creating a sample with correct entries and putting it on an Internet site, and providing filers with a tip sheet on common errors or inadvertent omissions.
 2. Being available to answer questions for filers preparing their report, including on-line (email) assistance, and train your office program staff on the same.
 3. Offering training on how to complete the report and supervisory review of reports. Tools and samples are available on the OGE websites listed at I.B. above.
 4. Offering available software and resources.
- NOTE:*** DoD requires use of e-filing systems, unless an exception applies. Most filers will use FDM for the near term. Senate confirmed presidential appointees and DAEOs must file in OGE's Integrity system. DoD is not yet mandating use of Integrity, however, DoD DAEOs may permit their subordinate organizations to voluntarily migrate to Integrity.
5. DoD recommends that filing instructions remind employees to print/save a copy of their report for their records.
 6. Establishing written procedures, so new personnel in the ethics office can pick up the system easily.
 7. If you are not the final reviewing office, review promptly, correct simple errors, and utilize system functions such as comments and attachments to provide context. Ask the final reviewer to contact you if there are questions.

- H. **Confidentiality of the Process and Public Posting of Reports.** OGE 278 reports must be released, if requested, 30-days after agency receipt. For those reports which are also certified by OGE, reports filed after January 1, 2012, will be requested through the OGE website after completion of the OGE electronic form 201. Access to the reports requires compliance with OGE's systems of record requirements. *See* 5 C.F.R. § 2634.603(c) and (d). Remember drafts and reports still within the first 30 days after submission are **not** releasable.

NOTE: STOCK Act, as amended, requires that certain high-level filer reports (those occupying positions at Level I and II of the Executive Schedule) be posted or electronically released on OGE's website.

1. **Over-reporting.** Reviewers should ensure that all over-reporting is eliminated from reports to protect the privacy interests of the filer. This includes items like but not limited to: spouse or dependent child names, street addresses, account number, actual value or number of shares.
2. **Release or Posting of Reports.** Ethics officials should carefully consider Privacy Act protected or non-releasable information on a report is appropriately redressed before release.
 - a. **Intelligence Exemption.** At this time, DoD agencies do not have any applicable Ethics in Government Act Section 205, intelligence exemption to withhold OGE 278s; however, certain information may be redacted under specific statutory authority, such as [10 U.S.C. § 424](#) (Disclosure of Organizational and Personnel information: Exempt for Specified Intelligence Agencies).

I. Collection/Enforcement –

1. **Notify Filers.** *See* 5 C.F.R. § 2634.703(c). Filers have a 30 day grace period (this is not an automatic extension) after missing the filing deadline or after any granted extension expires, whichever is later. Once late, ethics officials should promptly remind filers to file their report, and notify them of the potential for a late filing penalty for untimely filing if filed more than 30 days late.

Best Practice: Ethics counselors should annotate the reports that come in late (e.g., late but within grace period or late and late filing fee paid/waived).

2. **Late Filing Fee.**
 - a. If a report is filed more than 30 days late, ethics officials **must** notify the filer of application of the late filing penalty (and the option of requesting a waiver but only for extraordinary circumstances), and collect the fee or grant a waiver.
 - b. Filers are personally accountable for untimely filed reports. If a report is more than 30 days late, the filer must personally remit a \$200 late filing fee (they may

not seek reimbursement from DoD). 5 C.F.R. § 2634.704. The check must be made out to the “U.S. Treasury,” and deposited as miscellaneous receipts through the appropriate financial office.

Best Practice: Ethics counselors should retain records showing receipt and appropriate remittance of any late filing penalty.

- c. Filers may submit a written request, with supporting documentation, detailing the extraordinary circumstances warranting waiver of the late filing penalty, to their DAEO or designee.
- d. OGE will audit collection of late filing fees and whether waivers granted were in accordance with the regulations, so ethics officials *must* annotate the report to indicate whether a fee was collected or a waiver granted in the comments section of the report. 5 C.F.R. §§ 2634.605(a) and 2634.704(c).
- e. Remember, the late filing fee is not the exclusive remedy. The late filing fee is in addition to other sanctions, which may be imposed for late filing. See 5 C.F.R. §§ 2634.701 and 2634.704(c) (e.g., filer will be subject to agency debt collection procedures). Do not accept or certify the report until the fee is received or waiver determination granted.

Best Practice: Ethics counselors should make clear that a late report is not considered filed unless accompanied by the late filing fee or an appropriate request for waiver.

3. **Criminal and Civil Penalties.** Willful failure to file a report or information required in the report, or falsifying information on the report, will result in greater penalties, including referral to the Department of Justice for civil and criminal action (up to a \$50,000 fine), as well as administrative action at DoD. See 5 C.F.R. § 2634.701. Ethics officials must refer these cases to the DoD component DAEO for review and, as appropriate, referral to Justice (Office of Federal Program).

V. PERIODIC TRANSACTION REPORT (OGE FORM 278T)

The Stop Trading on Congressional Knowledge (STOCK) Act, which amends the Ethics in Government Act, requires public filers to submit a report of certain transactions with 30 days after the transactions. Filers must use the new form OGE 278T, the Periodic Transaction Report (or PTR) to report transactions that meet the reporting requirements. See also OGE’s Legal Advisory (LA-12-04) (www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2147488443).

- A. **Who Files?** All OGE 278 filers, except nominees to Presidential Appointments confirmed with the advice and consent of the Senate.
- B. **When does the filing requirement start and end?** (1) On or after later of July 3, 2012, or 1st day of service in covered position; and (2) on or before last day of

service in a covered position.

C. **What must be reported?** Each report must contain individual transactions exceeding \$1,000 that occur within the covered reporting period. Negative reports are not required, so if a filer has no reportable transaction, no OGE 278T need be filed.

1. **Includes:** Any purchase, sale, or exchange of securities owned or acquired by the filer. This includes *spouse or dependent child* transactions on or after January 18, 2013. See OGE LA-13-01

([https://www2.oge.gov/Web/OGE.nsf/Legal%20Advisories/AA0385B494D5D0B585257E96005FB8E8/\\$FILE/LA-13-01.pdf?open](https://www2.oge.gov/Web/OGE.nsf/Legal%20Advisories/AA0385B494D5D0B585257E96005FB8E8/$FILE/LA-13-01.pdf?open)).

2. **Excludes:**

a. All other reportable assets, including: (1) real property; (2) excepted investment funds (EIF); (3) underlying holdings of an EIF, a qualified blind or diversified trust, or an excepted trust; (4) Treasuries; (5) life insurance and annuities; (6) cash accounts; (7) assets in a retirement system under title 5, USC; (8) assets in any other retirement system maintained by the U.S. Government for officers or employees.

b. The maturing of bonds is not a transaction.

c. Receipt of securities by gift, in heritage, or transfer is not a transaction and does not require the filing of a 278T.

NOTE: Filers may elect to include other transactions, not required to be reported on the OGE 278T but reportable on their next OGE 278. OGE's new Integrity system will include 278-Ts.

D. **When? By the earlier of: (a) 45 days after the transaction or (b) 30 days after notification of the transaction. First day to be counted** is the first full day after the date of the triggering event.

Example: If you receive a statement from a trust on August 10 regarding a transaction that occurred on July 31, the reporting deadline is September 9. If, instead, the August 10 statement indicates the transaction occurred on July 1, the deadline is August 15.

- E. **Collection & Enforcement** – *See above* V.I. **Late Filing Fee.** Filers are personally accountable for untimely filed reports. If a report is more than 30 days late, the filer must personally remit a \$200 late filing fee. 5 C.F.R. § 2634.704. However, the Office of Government Ethics Legal Advisory 12-04 makes clear that there is broad discretion to grant extensions, including after-the-fact, and waivers for OGE Form 278T reports. *See* [https://www2.oge.gov/Web/OGE.nsf/Legal%20Advisories/13EFE4B85EBDBB7385257E96005FBEEF/\\$FILE/12x04.pdf?open](https://www2.oge.gov/Web/OGE.nsf/Legal%20Advisories/13EFE4B85EBDBB7385257E96005FBEEF/$FILE/12x04.pdf?open).

Best Practice: Ethics counselors should make clear that a late report is not considered filed unless accompanied by the late filing fee or an appropriate request for waiver.

- F. **Public Posting of Reports.** *See above* V.H. The same rules apply to release of OGE Form 278T reports. Access to the reports requires compliance with OGE’s systems of record requirements (OGE Form 201) or equivalent electronic requirements (OGE 201-A). *See* 5 C.F.R. § 2634.603(c) and (d). Remember drafts and reports still within the first 30 days after submission are *not* releasable.

VI. CONFIDENTIAL FINANCIAL DISCLOSURE PROGRAM (OGE FORM 450, OGE OPTION FORM 450A OR ALTERNATIVE 450 FORM).

The U.S. Office of Government Ethics (OGE) created the confidential financial disclosure report and program to mirror the Public Financial Disclosure Report, OGE Form 278. The confidential program applies to employees below the level of SES/0-7/or comparable pay level under other authority (such as NSPS). The OGE Form 450 does not require the collection of as much detailed information as the OGE Form 278. These filers hold positions where they exercise discretion warranting a review of their interests for any potential for conflicts of interest. DoD Ethics Counselors manage the financial disclosure program, which may constitute the bulk of work in the ethics area.

- A. **Who files?** – DoD recommends that Ethics Counselors maintain collaborative relationships with Administrative Officers (AOs), or their equivalent, and review Position Descriptions (PDs). Are too many employees filing? Can some positions be exempted or excluded? If the number of filers can be reduced, this will also reduce the overall workload. This is a large time investment up front, but it pays off over the years.

TIP: Consider providing AOs or supervisors DoD’s customized “Determination Worksheet” to determine if personnel are filers. *See* http://ogc.osd.mil/defense_ethics/resource_library/oge450_filing_determination_worksheet.pdf

1. Personnel in “**Covered Positions:**” (including personnel detailed to

these positions.)

a. Commanding officers, heads, deputy heads, and executive officers of: Navy shore installations with 500 or more employees; and all Army, Air Force, and Marine Corps installations, bases, air stations or activities. *See* JER 7-300(a)(1).

b. Special Government Employees (SGEs).

(1) SGEs are defined at 18 U.S.C. § 202(a): Generally, employees performing temporary duty for 130 days or less in any 365 day period, including Reserve and National Guard officers while on active duty solely for training, or while serving involuntarily. While section 202(a) does not include enlisted members as SGEs, the JER, at section 1-227, applies the definition to enlisted members the same as it applies to officers.

(2) Unless excluded from filing or an OGE Form 278 filer, all SGEs must file an OGE Form 450. *See* 5 C.F.R. § 2634.904(b); *see also* JER 7-300(a)(2) (exceptions). For example, DoD excludes reservists on active duty for less than 30 consecutive days in a calendar year, or reserve and national guard officers on active duty for training or while serving involuntarily unless the supervisor determines that the duties of the position otherwise require the individual to file.

c. Civilian employees at grade GS-15 and below (or comparable pay level under other authority, e.g. NSPS), and military members below grade 0-7 when:

(1) they participate **personally and substantially**, through decision or exercise of **significant judgment**, and **without substantial supervision and review**, in taking an official action for:

(a) contracting or procurement,

(b) administering or monitoring grants, subsidies, licenses, or other Federal benefits,

(c) regulating or auditing any non-Federal entity, or

(d) other activities in which the **final decision** may have a **direct and substantial economic impact** on the interests of any non-Federal entity (catch-all). Note that it is the final action or decision in a particular matter, not the individual's action, which triggers the filing requirement.

(2) determined by the supervisor. DoD strongly recommends that DoD ethics counselors require supervisors to review whether their subordinates' positions require filing every year prior to providing notice of the annual filing requirement. This ensures that the list of filers is kept current, deleting those

no longer required to file, such as those who left, and adding those who need to file. Because the definition of who files changed in 2007, this may be a good opportunity to review and scrub your “covered positions” lists.

Best practice: To reduce unnecessary filings, scrub these lists yearly. You may also request supervisors make an initial determination of whether a new employee should be a filer.

- d. Personnel serving under the **Intergovernmental Personnel Act** (IPA) (5 U.S.C. § 3371-3376) and **Highly Qualified Experts** (HQEs) (5 U.S.C. § 9903), unless otherwise required to file an OGE Form 278 (e.g., Senior Mentors), serving in a position requiring filing under c, directly above.
- e. Contracting Officer’s Representative (CORs). Pursuant to DoD Instruction 5000.72, the CO may determine that a COR’s duties meet the criteria detailed in paragraph (c) above, even if their regular duties are not a “covered position.” See <http://www.dtic.mil/whs/directives/corres/pdf/500072p.pdf>. This does not mean all CORs are filers.

Note:

- Because COR duties are generally short-lived, it may be unnecessary to amend the individual’s position description to indicate they are filers.
- 450 filing status should only be included in a PD where it is clear that the permanent duties will make the position a covered position.

2. Who Is **Excluded**?

- a. Authority to Exclude: Generally, a **DoD Agency head** or designee may exclude positions from filing because the duties are such that the possibility that the employee will be involved in a real or apparent conflict of interest is remote. DoD agencies that have DAEOs are identified at 5 C.F.R. § 3601.102; JER 1-201. The Department of the Army has not delegated this authority; however, the DoD remainder component, Department of the Navy and Department of the Air Force have delegated the authority of the agency head to their General Counsels.
- b. Specific Exclusions:
 - (1) Personnel not employed in contracting or procurement who have authority to make purchases less than \$2,500 per purchase and less than \$20,000 cumulatively per year. See JER 7-300(b)(2).

NOTE: This provision is subsumed by the exclusion at (2).

- (2) The Army, Navy, Air Force and OSD made separate determinations under a., above, to exclude from filing Government purchase cardholders and micro-purchasers (the threshold for which is \$3,000) with authority up to the simplified acquisition threshold, currently \$150,000.
- (a) SECARMY Memorandum of Oct. 11, 2001, subj: Exclusion from OGE Form 450 Filing Requirement. The Army presumptively excluded additional categories of employees from the filing requirement (officers O-3 and below, enlisted E-6 and below, and civilian GS-6 and below; volunteers providing gratuitous services under 10 U.S.C. § 1588; intermittent employees who work 120 days or less; and members of the Center for Military History Board/Department of the Army Historical Advisory Sub-Committee).
 - (b) Air Force General Counsel Memorandum of Sep. 5, 2007, subj: Exemption of Certain Government Purchase Card Users from Requirement to File OGE Form 450, Confidential Financial Disclosure Report.
 - (c) Navy General Counsel Memorandums, subj: Determination Concerning Exclusions from Filing the Confidential Financial Disclosure Report, dated Sep. 28, 1999, and Dec 14, 2006 (added an exclusion for certifying officers of micro purchasers totaling less than \$150,000).
 - (d) DoD DAEO Memorandum of Jan. 20, 2010, subj: Exclusion from Confidential Financial Disclosure Report Requirement for Certain Government Purchase Card Holders.
- (3) The Army, Navy, and OSD made separate determinations under a., above, to exclude from filing reservists unless a supervisor determines that their duties trigger the filing requirement under 5 C.F.R. 2634.904(a).
- (a) SECARMY Memorandum of Oct. 11, 2001, subj: Exclusion from OGE Form 450 Filing Requirement.
 - (b) Navy General Counsel Memorandums, subj: Determination Concerning Exclusions of Reservists from Filing the Confidential Financial Disclosure Report, dated Nov. 18, 2011.
 - (c) DoD DAEO Memorandum of Dec. 2, 2011, subj: Exclusion of Reservists from Filing the Confidential Financial Disclosure Report.

- c. Personnel who file OGE Optional Form (OF) 450-A, Certificate of No New Interests are excluded from filing an OGE Form 450, *but not from filing*.
- d. Alternate Forms. Filers who are authorized to file alternative forms with OGE approval file these forms in lieu of a 450. 5 C.F.R. § 2634.905. For example, many FACA members.

NOTE: OGE 450s filed in FDM are considered to be OGE approved "Alternate" forms.

- 3. Finality of Determination: An agency head or designee decides who shall file. 5 C.F.R. § 2634.906. There is no right to appeal this designation beyond the agency head.

B. New Entrant Reports – OGE Form 450

- 1. **Identify.** Ethics counselors must identify, with assistance from Human Resources (HR) offices and/or AOs, new employees who must file. OGE concentrates on new entrant filing in its audits. There should be more than the mere existence of standard operating procedures for identification of new entrants, if they are not being systematically identified. Ethics Counselors should seek innovative solutions for identifying new entrant filers.
 - a. Work with HR/AOs to get at least monthly, preferably bi-weekly, reports of new employees, SGEs, and changes to covered positions (e.g., new acquisition duties).
 - b. Include filer determination worksheets for supervisors to complete as part of in-processing packages. (see form at: http://ogc.osd.mil/defense_ethics/resource_library/forms_software.htm)
 - c. Provide live initial ethics orientation training to provide information and identify filers, as well as give potential new filers forms.
 - d. If a determination as to filing needs to be made, afterward notify HR to update the notation on official rolls.
 - e. Ensure that there is a system in place to identify individuals who transfer into your organization and who filed an OGE Form 450 with their former organization.

Best Practice: If there is less than a 30-day gap in service, get a copy of a transferring filer's most recent report to avoid them having to complete a new report, but remember you must obtain his new supervisor's review, complete a new substantive conflict review, and certify the report. See 5 C.F.R. § 2634.903(a)(2)(i).

- f. Ensure that there is a system in place to identify personnel whose duties change, e.g., when an employee becomes a contracting technical representative. If the new duties require filing, ensure that they file a new entrant report within 30 days of assuming the new duties.

NOTE: Date of appointment is the date they assumed the new duties that made them a filer. E.g., when new COR duties are assigned or when supervisor makes determination, and not necessarily when they assumed duties where not already a covered position.

Best Practice: Consider including this in any required new or refresher supervisory training.

- g. Develop a relationship with HR so they inform the ethics office of new PDs with a filing requirement or to determining the filing status. Encourage the office to seek assistance on new PDs to determine if there should be a filing requirement.
 - h. There are a couple other opportunities to find new filers who were missed, when they are identified as part of the annual review cycle or during your annual scrub of the 450 filer lists.
2. **Notify.** Ethics counselors must notify new employees of their filing requirement as soon as possible. If feasible, try to send filers courtesy reminders, e.g., a week before their deadline comes due, copying their supervisor.
 3. **Collect.** Ethics counselors must collect reports within 30 days of entry on duty (or assumed duties that required filing). If filer fails to file within deadline or after expiration of any extensions, follow up with supervisor to ensure compliance.
 4. **Dates and Times:** The report must cover **the 12-month period prior to signature**. It must be **filed within 30 days** of assuming the duties that make them a filer. With a written request (including email), ethics counselors may grant **extensions** up to 90 days, or, for personnel deployed or sent to a combat zone or required to perform services away from his permanent duty station following a Presidential declaration of a national emergency, up to 90 days from the date of return to a permanent duty station. *See* 5 C.F.R. § 2634.903(d)(2). Document any granted extensions. Reports must be retained for 6 years, or longer if on law enforcement or investigative hold.
 5. Supervisory Review. *See above* VI.C.1(c).
 6. **Certification Review.** *See above*, IV.C.1.d.
 7. **DoD SGEs** (including reservists and National Guard who meet the requirements) must **file prior** to assuming duties – *see* JER 7-303(a)(2). This is very difficult to accomplish, but OGE will review. IRs must be conducted within 60 days, but DoD recommends that supervisor and ethics counselor reviews be conducted as soon as possible.

Best Practice: Ensure review is complete by appointment to ensure conflicts do not preclude them from performing the duties for which they are being appointed.

SGEs must also file *new entrant* reports on their anniversary or re-appointment date. Reservists and national guard personnel on active duty for less than 30 consecutive days are SGEs, but are exempted from filing unless their supervisor specifically requires filing. Procurement commands and other similar organizations should consider such a requirement.

C. Annual Reports – OGE Form 450

1. Work with HR/AOs to scrub the list of annual filers before the beginning of the annual filing season – should be done in fall of the prior year. Remind HR/AOs that the report covers the calendar year, so filers should be identified no later than mid-December but preferable earlier. Update the ethics database, FDM, and/or other filing tracking system.
2. **Annual Position Review:** Notify AOs to require supervisors to review positions on the updated list and provide corrections. If new employees who have not filed a new entrant report are identified, determine with the supervisor if they needed to file since becoming a new employee or assuming new duties. In some cases this will require collection of a new entrant report, even if it is late, as well as an annual report. If the supervisor just determined them to require filing, make the report a new entrant report, and annotate the date of appointment as the date the supervisor determined them to be filers.
3. **Filing not required:** If employees start a covered position between November 2 and December 31, they do not need to file an annual report because they must work over 60 days in the preceding period before an annual report is required. A new entrant report must be collected. Remember to annotate in the database or other tracking system (FDM automatically does this) that filer will not need to file until the following filing season.
4. **Dates and Times:** The report covers the preceding calendar year, or any portion thereof not covered by a new entrant report, with information current as of December 31 of that year. OGE filing deadline is **February 15**. Ethics counselors may grant individual extensions as needed. With a written request, ethics counselors may grant extensions up to 90 days from February 15 or, for personnel away from permanent duty station following a Presidential declaration of a national emergency (combat zone), up to 90 days from the date of return to a permanent duty station. See 5 C.F.R. § 2634.903(d)(2). Document any granted extensions on the report. Reports must be retained 6 years

NOTE: The OGE 450 combat zone extension only requires that filers not be at their permanent duty station. It is also *not* automatic like the 278 combat zone extension.

5. **Notifications:** After AOs collect updated information, they should notify the covered employees that filing is required and provide the correct forms—for 450's that the newest version, dated December 2011. *See* http://ogc.osd.mil/defense_ethics/dod_oge/oge_450_june_2015_edition.pdf The ethics office has the option of providing notification. Email is a preferred method of notification. We recommend sending the first late notice by late February; the second, copied to their supervisor, in mid-March. The last one should be addressed to head of division, with list of employees in division who still have not filed. On April 15, request supervisor take administrative action on those who fail to comply and those who file late. Remember to track administrative actions for the OGE annual questionnaire.
6. Supervisory Review. *See above* VI.C.1(c).
7. **Certification within 60-days.** *See above*, IV.C.1.d.
8. **Timelines:** Ensure that there is sufficient time from position review, to employee notification, to filing, to review.
9. For paper filers exempt from using FDM - Annual filers may file **OGE OF 450-A**, instead of the 450, if they have no new interests to report since the last report, and if they do not have a new PD or significantly changed duties. Every 4th year, starting in 2000, annual filers must file the full 450. DoD requires that the most recent 450, which does not have to be the ethics counselor-approved version, be attached. Only the DoD-authorized version of the form may be used. Download it from OGE's web site: <https://www2.oge.gov/Web/oge.nsf/OGE+Forms>

NOTE: An FDM 450 filing is an OGE-approved alternate form. While FDM does not include an OGE OF 450-A, it pre-populates subsequent reports making it essentially the same as re-certifying no changes if the filer does not revise his new report.

10. Notify HR/AOs of any changes in filing status so it can update their records.

D. Documentation.

1. Develop a good tracking system that can alert you to impending deadlines, such as review date of 60 days from date of filing, and late filings. There is a simple tracking system in Excel at http://ogc.osd.mil/defense_ethics/resource_library/tracking_system.xlsx.

2. What is the date of receipt? It is the date written in the Date Received by the Agency. DoD recommends that the Ethics Office enter the date, which starts the 60-day review clock. This ensures that the ethics office controls the written entry and the time lines, but the risk is that some forms may be filed late if the supervisor holds reports. An alternative is to have supervisors enter the date and give them 60 days to review. The ethics office loses control, but some may be able to do it, if the supervisors can be counted on to enter the date and conduct a review within 60 days. For e-filing systems, the date of receipt is when the filer submits in the system.

3. Make sure that everyone files - reconcile lists from HR/AOs, lists from position review, and ethics office database. Document why employees were dropped. Ensure that a new entrant report for each first time annual filer is received, and if not, document that the filing determination was made by the supervisor during the annual position review, or that the employee transferred into your agency from another covered position. In OGE program reviews, they may want to talk to the HR staff that generates the lists to determine how they fit into the system and the accuracy of the data.

4. Retain reports for six (6) years.

E. **Final Review** – *See above* VI.E.

F. Time Management - Make the process work more quickly and smoothly, and educate staff and filers on how to correctly report information to reduce delay in certification. Consider investigating how to expand filer accuracy, including:

1. Creating a sample with correct entries and putting it on an Internet site, and providing filers with a tip sheet on common errors or inadvertent omissions.
2. Being available to answer questions for filers preparing their report, including on-line (email) assistance, and train your office program staff on the same.
3. Offering training on how to complete the report.
4. Offering available software and resources. *See* http://ogc.osd.mil/defense_ethics/resource_library/forms_software.htm; <https://www2.oge.gov/web/oge.nsf/Confidential%20Financial%20Disclosure>
5. When requested, providing a copy of previous OGE Form 450. DoD recommends that filing instructions should remind employees to make a copy before filing the current year's report.

Best Practice: DoD encourages the use of electronic filing whenever possible.

6. Recommend establishing written procedures, so new personnel in the ethics office can pick up the system easily.

G. Confidentiality of the Process - Protect confidentiality of the filers and the substance of

their reports. Remember AOs should not be seeing the substance of the reports if they are assisting in the collection of reports. Instruct supervisors to put reviewed reports in sealed envelopes addressed to the AO or ethics office, and not to retain a copy for themselves (since they can request review from you when necessary).

H. Collection/Enforcement

1. Unlike OGE Form 278, there is no \$200 late filing fee.
2. Ultimate threat – disciplinary action and/or reassignment/removal. 5 C.F.R. § 2634.909(b). First be sure the position requires filing. If so, and the employee refuses to file, he or she is failing to meet the requirements of the position, and so must be reassigned to a position that does not require filing. If no position is available, removal may be the only option.
3. If report is late, request the supervisor to take administrative action and inform you of the result. 5 C.F.R. § 2634.701(d). Enforcement is one of OGE's top priorities and they will examine it during a Program Review. In an audit, OGE will want to talk to supervisors and the Inspector General personnel to assess whether appropriate administrative action has been taken for violations.
4. Get Command Support - Supervisors must be willing to discipline employees for late or non-filing.

I. Status Report – JER 7-309

NOTE: Until the JER rewrite is completed, each DoD DAEAO should determine whether to continue the report in JER section 7-309 and inform respective commands and installations of a new date, or just discontinue the report. DoD SOCO and SAF/GCA are discontinuing the report.

CHAPTER E: Relations with Non-Federal Entities

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)

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. White House Memorandum, Eliminating Excess Conference Spending and Promoting Efficiency in Government, Sep. 21, 2011 (www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-35.pdf).
 - b. 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.
 - c. GSA Guidance for Conducting Conferences, Aug. 1, 2008.

- d. 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)
 - e. U.S. Office of Government Ethics, *Conferences: A guide for Ethics Officials* (version 1.0), dated May 2008.
 - f. 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)
 - b. DoD 7000.14-R, *Financial Management Regulation*
 - c. Conference Fee collection, Vol. 12, Chap. 32
3. Secretary of Defense Memoranda:
- a. Consideration of Costs in DoD Decision-Making, dated Dec. 27, 2010.
 - b. Track Four Efficiencies Initiative Decisions, Mar. 14, 2011.
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.
 - c. 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
(http://armypubs.army.mil/epubs/pdf/ad2011_05_obs.pdf).
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
- H. Internet Locations of Referenced Materials.
1. C.F.R.: <http://www.gpoaccess.gov/cfr/index.html>
 2. JER: http://www.dod.mil/dodgc/defense_ethics/
 3. DoD Directives and Instructions: <http://www.dtic.mil/whs/directives/>
 4. Office of Government Ethics: <http://www.oge.gov/>

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. (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. Agency Designees should generally decline such attendance when the event provides a limited audience, for example the officers and board members of one company and/or its clients or customers, or has the 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**: Except for 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. As of 2015, 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.

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 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 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:
 - (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 (1/16/09))
 - (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 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 if 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 Obama 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)(2)): 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 must determine 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 \$375 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) Currently, an admission fee of \$722 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.

(a) "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)

- (b) 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.
- (iv) 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 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 \$27,225 in outside earned income (in CY 2015). 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 7th 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.

(2) 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 2nd 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 a day for DoD personnel and members of the Association, and \$699 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 2nd 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 \$722 “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 1st and 3rd 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 2nd day is not even considered a gift to either the Government or to the Commander personally under 5 C.F.R. § 2635.204(g)(1). 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. 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)(2). 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 2nd 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? 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 7 factors. One of the most important factors is the 5th 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.

CHAPTER F: FUNDRAISING

I. REFERENCES.

- A. Exec. Order No. 12,353, 47 Fed. Reg. 12785, Charitable Fund-Raising (Mar. 23, 1982)
- B. Exec. Order No. 12,404, 48 Fed. Reg. 6685, Charitable Fund-Raising (Feb. 10, 1983)
- C. 5 C.F.R. Part 950, Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations (Combined Federal Campaign) (e-CFR current as of September 29, 2015)
- D. 5 C.F.R. § 2635.808, Standards of Ethical Conduct for Employees of the Executive Branch; Fundraising activities
- E. DoD 5500.07-R, Joint Ethics Regulation (JER) (August 30, 1993)(including Change 7, November 17, 2011)(subsections 2-302.a(2), 3-210; 3-211.b.; 3-300.a.)
- F. DoDI 5035.01, Combined Federal Campaign (CFC) Fundraising Within the Department of Defense (January 31, 2008)
- G. DoDI 5035.05, DoD Combined Federal Campaign – Overseas (CFC-O) (February 21, 2008)
- H. 41 C.F.R. § 102-74.410, Public Contracts and Property Management; Facility Management; Conduct on Federal Property; Soliciting, Vending and Debt Collection; What is the policy concerning soliciting, vending and debt collection? (e-CFR current as of Oct. 14, 2016)
- I. 32 C.F.R. Part 234, Conduct on the Pentagon Reservation (May 25, 2007)
- J. 5 C.F.R. § 735.201, Employee Responsibilities and Conduct; Standards of Conduct; What are the restrictions on gambling? (e-CFR current as of Oct. 14, 2016)
- K. 41 C.F.R. § 102-74.395, Public Contracts and Property Management; Facility Management; Conduct on Federal Property; Gambling; What is the policy concerning gambling? (e-CFR current as of Oct. 14, 2016)

- L. DoDD 5410.18, Public Affairs Community Relations Policy (November 20, 2001)
(certified current as of May 30, 2007)
- M. DoDI 5410.19, Public Affairs Community Relations Policy Implementation (November 13, 2001)
- N. DoDI 1000.15, Procedures and Support for Non-Federal Entities Authorized to Operate on DoD Installations (October 24, 2008)
- O. OGE DAEOGRAM, DO-93-024, Answers to Recurring Questions about Fundraising (August 25, 1993)
- P. OGE DAEOGRAM, DO-94-013, Fundraising Activities (March 22, 1994)(collection of nonmonetary items such as food and clothing does not require OPM permission)
- Q. OGE LEGAL ADVISORY, LA-12-08, A Reminder about Holiday Gifts & Fundraising (December 7, 2012)
- R. Army Guidance:
 - 1. AR 600-29, Fund-Raising Within the Department of the Army (7 June 2010)
 - 2. AR 930-4, Army Emergency Relief (22 February 2008)
 - 3. AR 608-1, Army Community Service (13 March 2013) [Appendix J, paragraph J-7 Family Readiness Groups informal funds and paragraph J-8 Family Readiness Groups external fundraising]
 - 4. AR 360-1, The Army Public Affairs Program (25 May 2011)
 - 5. AR 210-22, Private Organizations on Department of the Army Installations (22 October 2001)
- S. Navy Guidance:
 - 1. SECNAVINST 5340.7, Active Duty Fund Drive in Support of the Navy-Marine Corps Relief Society (NMCRS) (8 February 1999)

2. SECNAVINST 5340.2D, Fund Raising and Solicitation of Department of Navy (DON) Personnel, Military and Civilian, in the National Capital Area (NCA) (23 September 1999)
3. SECNAVINST 5720.44C, Department of the Navy Public Affairs Policy and Regulations (21 February 2012)

T. Marine Corps Guidance:

1. MCO 5726.14F, U.S. Marine Corps Reserve Toys for Tots Program (4 March 2004)
2. Standard Operating Procedures; Toys for Tots; Local Toys of Tots Campaigns (2015 Edition)

http://toysfortots.org/about_toys_for_tots/coordinators_corner/2015%20TFT%20SOP.pdf

U. Air Force Guidance:

1. AFI 34-223, Private Organizations (PO) Programs (8 Mar 2007 incorporating Change 1, 30 Nov 2010)
2. AFI 36-3101, Fundraising Within the Air Force (12 July 2002) [addresses CFC] [check for supplements, such as AFI 36-3101-62AWSUP1]
3. AFI 36-3109, Air Force Aid Society (AFAS) (5 March 2004)

V. DoD General Counsel:

1. DoD Military Ball Guidance (Participation in Military Balls Sponsored by Non-Federal Entities and Fundraising)(Revised April 14, 2004)
(http://www.dod.mil/dodgc/defense_ethics/resource_library/military_ball_guidance.pdf)
2. Guidance on Analyzing Invitations to DoD Officials to Participate in Fundraising Activities and to Accept Gifts Related to Events (DoD General Counsel Memo of August 18, 1997)
(http://www.dod.mil/dodgc/defense_ethics/dod_ogc/analyzing_invitations.htm)

W. Internet Locations of Referenced Materials:

1. C.F.R.: <http://www.gpoaccess.gov/cfr/index.html>
2. JER: http://www.dod.mil/dodgc/defense_ethics/
3. Federal statutes: http://www.U.S.A.gov/Topics/Reference_Shelf.shtml
4. Comptroller General opinions: <http://www.gao.gov/legal/index.html/>
5. Executive Orders:
<http://www.archives.gov/federal-register/executive-orders/index.html>
6. Office of Legal Counsel (DOJ) opinions: <http://www.usdoj.gov/olc/opinions.htm>
7. DoD Directives and Instructions: <http://www.dtic.mil/whs/directives/>
8. Office of Government Ethics: <http://www.oge.gov>
9. CFC: <https://www.opm.gov/combined-federal-campaign/>
10. Army publications: <http://www.apd.army.mil/>
11. Air Force publications: <http://www.e-publishing.af.mil/>
12. Navy publications: <http://doni.daps.dla.mil/default.aspx>

II. ETHICS PRINCIPLES COMMONLY INVOLVED (SEE 5 C.F.R. § 2635.101).

- A. **Public service is a public trust**, requiring employees to place loyalty to Constitution, the laws and ethical principles above private gain (Principle #1).
- B. Employees shall not use public office for private gain (Principle #7).
- C. Employees shall not give preferential treatment to ***any private organization*** or individual (Principle #8).
- D. Employees shall not use Government property for other than authorized purposes (Principle #9).

III. ANALYTICAL METHOD TO EVALUATE FUNDRAISING ISSUES.

- A. Fundraising is complicated because no comprehensive fundraising regulation exists. Instead, it is governed by independent, overlapping, and unrelated regulations. Answering the following questions facilitates accurate and consistent analysis of questions involving fundraising.
- B. Is it within the definition of “fundraising”? What kind of “fundraising” is this? Are DoD personnel being asked to solicit funds or gifts-in-kind? (Funds for charities, funds for others, gifts-in-kind?)
- C. What kind of NFE is involved?
- D. Where is the fundraising being conducted? In the Federal workplace?
- E. Is DoD or DoD personnel being asked to endorse a fundraising effort or solicitation? If so, are DoD personnel being asked for an official or personal endorsement?
- F. Is DoD or DoD personnel being asked to support events or other efforts involving fundraising? If so, are DoD personnel being asked for official support or personal support?
- G. Is the fundraising for a partisan political event, party, or cause?

IV. FUNDRAISING DEFINED.

- A. “Solicitation” (fundraising) per CFC Regulations “means any action requesting money either by cash, check or payroll deduction on behalf of charitable organizations.” 5 C.F.R. § 950.101.
 - 1. It does not include collection of gifts-in-kind, such as food, clothing, and toys. See V.C., below.
- B. “Fundraising” is defined in the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. § 2635.808) as “the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. § 572(e), through:
 - 1. Solicitation of funds or sale of items; or

2. Participation in the conduct of an event in which any portion of the cost of attendance or participation may be taken as a charitable tax deduction by the person incurring that cost.” See 5 C.F.R. § 2635.808(a)(1).
 - a. Such participation means “active and visible participation” in the promotion, production, or presentation of the event. It includes, *e.g.*, serving as an honorary chairperson, sitting at a head table during the event, standing in a reception line, or being a celebrity judge.
 - b. The term does not include:
 - (1) mere attendance (which may include a group's brief acknowledgement [standing briefly in the audience or on stage] of receipt of an award, but does not include such an acknowledgement if the award is used by the organization to promote the event); and
 - (2) delivery of an official speech or any seating or other participation appropriate to such delivery (which may include acceptance of an award in conjunction with the official speech). [Note: The definition of “participation” explicitly excludes “mere attendance” and “official speeches.” See 5 C.F.R. § 2635.808(a)(2).]
- C. The term fundraising is also commonly used in conjunction with raising funds for groups that are not 501(c)(3) charitable or non-profit organizations (*e.g.*, parent groups, school projects, Spouses’ Clubs, military ball committees, etc.), or collection of gifts-in-kind, rather than funds. These fundraising activities are not subject to restrictions that apply to the definitions in A. & B., above. See V., below, for applicable restrictions.

V. OFFICIAL SUPPORT OF SOLICITATION OF FEDERAL PERSONNEL.

A. Combined Federal Campaign (CFC).

“Western philosophers, theologians, and statesmen of widely varying viewpoints have affirmed for over two thousand years that charity—the feeding of the hungry, the healing of the sick, and the educating of the ignorant—has a claim on the human conscience that transcends political differences. In response to this ancient claim, the federal government conducts an annual charitable drive among federal employees known as the Combined Federal Campaign.” *NAACP Legal Defense & Educational Fund, Inc. v. Devine*, 727 F.2d 1247 (D.C. Cir. 1984) (Starr, J. dissenting), *rev’d*, *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985).

1. History of Charitable Fundraising within the Federal Government.

- a. Fundraising for charitable organizations in the Federal workplace can be traced to the late 1940's.

“Prior to the 1950's, on-the-job fundraising in the federal workplace was an **uncontrolled free-for-all**. Agencies, charities, and employees were all ill-used and dissatisfied. Some of the problems cited were:

* Quotas for agencies and individuals were freely established and supervisors applied pressure to employees.

* Designations were not allowed.

Even with the frequency of on-the-job solicitations, total receipts for charitable causes that were worthy of employee support were minor. In many cases, employees donated their pocket change. <http://www.opm.gov/combined-federal-campaign/>

Because no system-wide regulations were in place to provide for orderly procedure, fundraising frequently consisted of passing an empty coffee can from employee to employee. Eventually, the increasing number of entities seeking access to federal buildings and the multiplicity of appeals disrupted the work environment and confused employees who were unfamiliar with groups seeking contributions. *Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign (Part 1), Hearings before the House Committee on Government Operations, 98th Cong., 1st Sess., 67-68 (1983).*

- b. Prior to 1957, there were no government-wide rules governing solicitation by charitable organizations in the federal workplace. In some federal facilities managers did not permit any solicitation; in others, there were no restrictions, and solicitations occurred so frequently that they disrupted the workplace. Federal officials in some facilities "were besieged by dozens of agencies seeking endorsements and the privilege of soliciting employees on the job." U.S. Civil Service Comm'n., *Manual on Fund-Raising Within the Federal Service for Voluntary Health and Welfare Organizations Section 1.1 (1977).*
- c. In 1957, President Eisenhower promulgated procedures for a program of charitable solicitation in the federal workplace and established in the President's Committee on Fund-Raising Within the Federal Service to review and modify the fund-raising program. Exec. Order No. 10,728, 22 Fed. Reg. 7219, Establishing

the President's Committee on Fund-Raising Within the Federal Service (Sept. 6, 1957).

- d. In 1961, President Kennedy abolished the Committee and directed the Chairman of the Civil Service Commission to "make arrangements for such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations." Exec. Order No. 10,927, 26 Fed. Reg. 2383, Abolishing the President's Committee on Fund-Raising within the Federal Service and Providing for the Conduct of Fund-Raising Activities (Mar. 18, 1961). The program developed in response to this directive came to be known as the Combined Federal Campaign.
- e. In 1983, President Reagan issued Executive Order No. 12353 to replace the 1961 Executive Order which had established the CFC. The new Order retained the original limitation to "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate" and delegated to the OPM Director the authority to establish criteria for determining appropriateness. Shortly thereafter, the President amended Executive Order No. 12353 to specify the purposes of the CFC and to identify groups whose participation would be inconsistent with those purposes. Executive Order No. 12404. The Order specifically excluded those "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." Section 2(b)(3) of Executive Order 12404.
- f. In *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), the U.S. Supreme Court held that the government did not violate the First Amendment by excluding legal-defense and political-advocacy organizations from participation in the Combined Federal Campaign (CFC), a charity drive directed at federal employees. The Court reasoned that the CFC was a "nonpublic forum," *id.* at 806; that, under this Court's decisions, control over access to a nonpublic forum may be based on subject matter and speaker identity as long as the distinctions drawn are "reasonable in light of the purpose served by the forum" (and viewpoint-neutral), *ibid.* (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)); and that it was reasonable for the government to exclude the speakers in question, because they would "disrupt" the fund-raising program and "hinder its effectiveness for its intended purpose," *id.* at 811. Under the Court's "forum analysis," *id.* at 800, the program at issue in *Cornelius* was deemed property that was not a public forum and the government

was deemed to be acting, not as sovereign, regulating the speech of the citizenry, but simply as the owner of the property. In that circumstance, the Court made clear, restrictions on the speech of those permitted to use the property are reviewed deferentially, because "the Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Ibid.* (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

2. OPM Issues Final Rule to Amend the Combined Federal Campaign Regulations, 79 Fed.Reg. 21,581 (April 17, 2014) to replace 5 CFR Part 950. **Delay of effective date: January 1, 2017.** See OPM Final Rule, 80 Fed. Reg. 64,307 (Oct. 23, 2015).
 - a. In 2011, the CFC celebrated its 50th anniversary. In connection with this landmark anniversary, OPM announced the formation of the CFC–50 Commission. The Commission, formed under the Federal Advisory Committee Act, was asked to study ways to streamline and improve the program; improve accountability, increase transparency and accessibility and make it more affordable.

The Commission delivered its report to the OPM Director on July 20, 2012. The report contained 24 recommendations for improvement in the following areas: donor participation, CFC infrastructure, and standards of accountability and transparency. After OPM issued the proposed rule to amend the CFC in April 2013, OPM received over a thousand comments which were considered for changes represented in the final rule. Some of the changes from the proposed rule to the final rule include:

Solicitation Period: The Director of OPM will be given the authority to annually set the dates for the campaign period, but that it shall start no earlier than September 1 and end no later than January 15. While the CFC-50 Commission recommended expanding the solicitations period into January to give employees an opportunity to contribute after the holidays, OPM agreed with many comments it received that the CFC solicitation period should not be lengthened. The new rule gives the Director the flexibility to determine the solicitation period from year to year based on the input from the CFC’s stakeholders.

Immediate Eligibility. Under current regulations, new employees may not begin participating in the CFC until the next scheduled campaign solicitation period begins. OPM proposed to amend its regulation at § 950.102 to allow new employees to make CFC pledges immediately upon entering Federal service. Under OPM’s proposal, new employees would be provided information on the

CFC at orientation and be able to make pledges within 30 days of being hired if hired outside of the solicitation period. This will enable those employees who wish to make an immediate contribution to do so.

Disaster Relief Program. Under current regulations, the OPM Director is authorized to allow special solicitations to respond to disasters. There is no standing mechanism in place, but rather each disaster requires a new authorization from the Director for a special solicitation period. OPM proposed to create a permanent structure to streamline and facilitate solicitations tied to disaster relief. Accordingly, OPM proposed to amend its regulations at § 950.102 to provide for the creation of a Disaster Relief Program that would be available to donors within hours after a disaster.

Local Federal Coordinating Committees (LFCCs): LFCCs are still a vital stakeholder to the CFC. Local ownership of campaigns still resides with the LFCCs - their responsibilities are simply altered to focus on campaign promotion and employee engagement, such as reviewing charity applications and finding outreach coordinators and fundraisers at the local level.

Outreach Coordinators: similar to the current marketing functions performed by PCFOs, Outreach Coordinators will be responsible for assisting the LFCCs in continuing to provide expertise in employee engagement and a local touch to the campaign.

Electronic Giving and Processing: Cash contributions are eliminated; however checks will be accepted and processed electronically. This will reduce campaign expenses due to the higher cost associated with processing cash contributions. Our research demonstrates that for the campaigns that have access to online giving, less than 10% of donations came through cash donations in 2012. In addition, electronic giving is exploding in growth, and overall (for the campaigns that possess online giving capabilities), the total of electronic giving is on the rise. Paper Charity Lists and pledge forms will be made available for the first five campaign periods after the rule is implemented. These documents will be made available exclusively through electronic means thereafter. This reduces campaign costs and the CFC's carbon footprint.

Charity Application Fees: All charities will pay a non-refundable application fee. Those that are approved may be charged an additional listing fee. These will help to recover the administrative costs that charities pay to participate in the CFC.

Any additional costs will be covered through distribution fees, similar to the current process of deducting campaign costs from charity distributions.

Payroll Deduction Disbursements: Federal payroll offices will disburse and provide detailed reports to the Central Campaign Administrator that will distribute funds to the charities designated by CFC donors. This streamlines the current distribution process by moving from 150+ CFC financial centers to one or a few Central Campaign Administrators (CCA).

3. The CFC is held annually and ***is the only authorized solicitation*** of Government personnel ***in the Federal workplace*** on behalf of charitable organizations. DoD personnel may be authorized to engage in such fundraising. See 5 C.F.R. Part 950 and 5 C.F.R. § 2635.808.
4. The CFC is intended to reduce disruptions in the Federal workplace by consolidating all approved solicitations into a single, annual, officially supported campaign. Solicitations that occur on the Federal installation, but outside of the Federal workplace, and solicitations by organizations that do not affiliate with the CFC (other than those specifically outlined in 5. C.F.R. § 950.102, see sections below) may create additional disruptions and compete with the CFC for donations. ***Except as discussed below, no other solicitations on behalf of charitable organizations may be conducted in the Federal workplace or on a Federal installation.*** See 5 C.F.R. § 950.102(a)-(d).
5. Ethics officials should work with CFC coordinators from the start of the campaign to ensure that fundraising events and strategies comply with the spirit and letter of applicable regulations. Fundraising events must be in compliance with statutes and regulations; truly voluntary; appropriate under the circumstances (not embarrassing or unfavorable to DoD, DoD personnel, or the CFC); and appropriate for the use of taxpayer funds. Guidance on CFC fundraising and innovative techniques follows. ***Note that because the CFC is an official program, most of the techniques discussed below may not be permitted to support other organizations.***
 - a. ***Be Aware:*** DoD personnel may ***not solicit*** individuals or entities that are not Federal personnel (including contractor employees) for prizes or other incentives or to make contributions to the CFC. Contractor employees, credit union employees, and other persons present on Federal premises, as well as retired Federal personnel, however, may make voluntary single contributions to the CFC through checks, money orders, cash, or by electronic means, including credit cards. 5 C.F.R. § 950.103(g). ***Remember no solicitation!***

- b. Contributions must be truly **voluntary**. The DoD Directive guarantees freedom of choice to give or not to give, and guarantees confidentiality of donation decision. Be alert for undue command pressure to contribute. Requests from a senior to a junior, particularly if they are in the same chain of command, inherently may be perceived as coercive. Tracking and requiring that 100 per cent of the personnel are contacted is permissible; tracking contributions is not. Watch for subtle actions like donor badges or ubiquitous awards that identify non-contributors. See 5 C.F.R. § 950.108, Preventing coercive activity.
- c. Fundraising events such as car washes, bake sales, and races are permitted by 5 C.F.R. § 950.602, Solicitation methods. If a special fundraising event is approved, the donor must be given the option of designating a participating organization or the donor must be advised that the proceeds will be donated to the CFC as an undesignated contribution. Note that unit fundraising for CFC should be similarly broadly aimed. See [SOCO ADVISORY 09-07](#) on CFC issues generally.
- d. **Lotteries and raffles** are permitted by 5 C.F.R. § 950.602 (b), when in compliance with gambling regulations and approved by agency head in accordance with agency regulations. Chances to win must be disassociated from the amount of contributions, if any. Raffle prizes should be modest in nature and value. Examples of appropriate raffle prizes may include opportunities for lunch with Agency Officials, agency parking spaces for a specific time period, and gifts of minimal financial value. Any special CFC fundraising event and prize or gift should be approved in advance by the Agency's ethics official. (See guidance on gambling, V.A.5., below, in this section.)
- e. Use of **appropriated funds** is authorized, but limited. Appropriated funds may be used when the proper authority reasonably determines that the proposed expenditure is logically connected to the appropriation's purpose, and that no statute prevents it. The use of appropriated funds is usually limited to expenses related to kick-offs, victory events, awards, and other events to build support for the CFC. The use of appropriated funds for refreshments or personal gifts (other than campaign worker recognition awards or prizes) is not authorized. Prizes must comport to fiscal law. See paragraph 4.4. of DoDI 5035.01. See *Matter of: Occupational Safety and Health Review Commission – Refreshments for a Combined Federal Campaign Event*, B-325023, 2014 U.S. Comp. Gen. LEXIS 196, July 11, 2014 (appropriated funds are not available to pay for food at CFC kick-off event). The expenditure of appropriated funds for any other item or activity that is not essential to support the CFC is not authorized. Appropriated

funds cannot be used to conduct fundraising events. In making the determination, managers should be mindful of all the surrounding circumstances, including the amount of the proposed expenditure, the benefit expected to be gained, the importance to the mission served by the appropriation, prior Departmental practice, and possible public perceptions as to the appropriateness of the expenditure. Be aware that the authority to use appropriated funds is not consistent among Federal agencies. Compare *IRS Purchase of T-Shirts for Employees Contributing Certain Amounts to the Combined Federal Campaign*, 70 Comp. Gen. 248 (February 8, 1991) (The IRS may not use appropriated funds to purchase T-shirts for employees contributing certain amounts to the Combined Federal Campaign) with *Invoice to IRS for that Agency's Share of CFC Solicitation Expenses Incurred in Northern Utah in 1985*, 67 Comp. Gen. 254 (February 12, 1988) (“that agencies may expend appropriated funds to support efforts to solicit contributions to the CFC from their employees.”).

- f. **Overseas program** may receive installation-level CFC administrative and logistical support and the use of military aircraft to transport CFC materials on a "space available" basis. DoDI 5035.05.
- g. Because the CFC is an official program, limited use of **resources** may be authorized in support. Use of DoD facilities, installations, or equipment, such as tours of warships, rides in military aircraft, and tours of historic base housing may be permitted by local commands and organizations. (Each must resolve issues of appropriate use of resources and interference with mission.) [Note: AF does not permit charging for tours of AF base housing, even for CFC or AFAS. See OpJAGAF 1997/59 (1 May 1997).] Awards or incentives derived by waiving regulations or similar rules, such as contributor casual day (exemption from uniform requirement) or time off work, are not allowed. May also officially provide logistical support to CFC events (JER 3-211).
- h. DoD CFC personnel sometimes ask **senior officials** to volunteer their status, position, and time as prizes for auctions or other fundraising events. For example, prizes could include a round of golf with the agency head, donuts served to an office by the installation commander, or use of a prime reserved parking spot. While senior officials may offer such personal contributions, the prerequisite that all contributions to the CFC be truly voluntary applies to them as well as to less senior employees. Special favors, privileges, or entitlements are impermissible. Be careful not to place inappropriate pressure on senior officials to volunteer for CFC activities. Also ensure that personal-service prizes are not inappropriate or potentially embarrassing.

- i. Commanders and organizations may ***officially endorse*** CFC (including use of title and position). JER 3-210. (See also Example 1 to 5 C.F.R. § 2635.808 (b)). This authority does not apply to individual charities within CFC. Note that the suggestion in the initial OPM Katrina Relief memorandum that agencies could “adopt” hurricane-related charities is not a universal change to this policy:

"Individual Departments and Agencies (or subcomponents) may want to consider adopting one or more CFC-participating charities with hurricane relief programs and focus their campaign activities to the benefit of those charities."

Excerpted from [*Director, OPM, Hurricane Katrina Disaster Relief Memo August 31, 2005*](#)
 - j. Don't forget – Just because something was done in the past does not mean that it is now permitted. If past activity violated the rules, it cannot be used as precedent to authorize such action in the future.
6. CFC lotteries or raffles must comply with gambling regulations. (Also applies to all other fundraising related to Federal personnel or property.)
 - a. The Office of Personnel Management (OPM) at 5 C.F.R. § 735.201 prohibits civilian employees from gambling while on duty or while on Government-owned or leased property, unless necessitated by the employee's official duties or unless an agency approved activity. (Be aware of local or state law that may prohibit such activity.)
 - b. JER 2-302 prohibits DoD personnel from gambling on Federally owned or leased property or while on official duty. (Several exceptions exist, including an exception for organizations composed primarily of DoD personnel or their dependents when fundraising among their own members for the benefit of welfare funds for their own members or their dependents when approved by the head of the DoD Component command or organization after consultation with the DAEO or designee, and ***subject to the limitations of local law or regulations***, and other JER provisions.)
 - c. Gambling is also prohibited by Federal building and grounds regulations. For GSA Federal property, see 41 C.F.R. § 102-74.395; for the Pentagon and Navy Annex, see 32 C.F.R. Part 234.
 - d. Gambling Defined: Gambling is generally considered to have three elements: (Federal statutes may apply. See *United States v. DiCristina*, 886 F.Supp.2d 164

(E.D.N.Y. 2012)(U.S. District Judge Jack Weinstein reversed federal conviction against man accused of running an illegal underground poker club in violation of the Illegal Gambling Business Act (IGBA), 18 U.S.C. § 1955, declaring that poker is more a game of skill than chance. Reversed because “Texas Hold’em” poker was not covered by the IGBA), *reversed*, 726 F.3d 92 (2d Cir. 2013)(finding that the plain language of the IGBA covers defendant’s poker business even if the game involves more skill than luck), *cert. denied*, --- U.S. ---, 134 S.Ct. 1281, 188 L.Ed.2d 299 (2014). State statutes or case law may pertain, but see *Brooklyn Daily Eagle v. Voorhies*, 181 F. 579 (C.C.N.Y 1910).)

- (1) Consideration (betting something of value, usually money),
 - (2) A game of chance, **and**
 - (3) An offering of a reward or prize.
 - (4) Events that do not include **all of these elements** are **NOT** considered to be gambling. Clever fundraisers have developed lottery-type games, door prizes and similar events that are not gambling. For example, a drawing using a CFC pledge card, when it is clear that the pledge card may include no contribution at all, is not gambling because the participants in the drawing are not required to furnish consideration to enter the drawing. ***Be aware***, however, because some overzealous fundraisers may fail to indicate in their solicitations that no contribution is required.
- e. The rules on lotteries are discussed in *Matter of: Prize Drawing by General Services Administration’s Public Buildings Service*, Comp. Gen. Dec. B-286536, November 17, 2000.

B. Fundraising For Emergencies And Disasters.

1. The Director, OPM, upon written request, may permit solicitations of Federal personnel to support victims of emergencies and disasters (5 C.F.R. § 950.102). The Director may only approve solicitations that are outside the officially established CFC period, unless there are extraordinary circumstances. Hurricane Katrina was not such an emergency. See V.A.2.i., above.
2. See [Combined Federal Campaign Special Solicitations for Disasters & Emergencies](http://www.opm.gov/cfc/disasters/index.asp) (<http://www.opm.gov/cfc/disasters/index.asp>). Contact Office of the Director of CFC at OPM ((202)-606-2564) or email at cfc.opm.gov for information to conduct

disaster-related workplace fundraising (special solicitations). All requests should be in writing and sent to: Director, U.S. Office of Personnel Management, 1900 E Street, NW, Room 5450, Washington, D.C. 20415. The request should include: background on the emergency or disaster that is being addressed by the fundraiser; information on the agency(ies) and location(s) where the fundraiser will be conducted; dates of the fundraiser; and information on the charitable organization(s) that will be the recipient of the funds.

3. Examples: Director, OPM, Special Solicitation for Victims of Hurricane Sandy (November 2, 2012)

<http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=5121>

Director, OPM, *Relief and Reconstruction Efforts for Victims of the Japanese Earthquake and Tsunami* (March 23, 2011)

<http://www.chcoc.gov/Transmittals/Attachments/trans3702.pdf>

Director, OPM, *Special Solicitation for Haitian Earthquake Relief*, January 14, 2010

(<http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalId=27890>)

Director, OPM, *Hurricane Katrina Disaster Relief Memo, August 31, 2005*, [CFC](#)

[Memorandum 2005-10: Hurricane Katrina Relief Contributions and the Combined Federal Campaign](#) (<https://www.telework.gov/cfc/opmmemos/2005/2005-10.asp>).

CFC Memorandum 2005-1: *Processing Special Solicitations for Victims of the Asian Earthquake and Tsunami Disaster* (<http://opm.gov/cfc/opmmemos/2005/2005-1.asp>).

4. **Practical Advice** --- leave fundraising to the professionals. Identify established charitable organizations with disaster relief missions and direct donors to those organizations. Often the CFC website will list charitable organizations.
 - a. Advantages. Established charities have the resources and experience to receive, account for, and distribute donations (and tax-exempt status!).
 - b. Avoid preferential treatment to any particular organization. Implement objective criteria for referral of donors.

5. ***Again, Be Aware:*** DoD personnel **may not solicit** individuals or entities that are not Federal personnel (including contractor employees) for prizes or other incentives or to make contributions to the CFC. Contractor employees, credit union employees and other persons present on Federal premises, as well as retired Federal personnel, however, may make voluntary single contributions to the CFC through checks, money orders, cash, or by electronic means, including credit cards. 5 C.F.R. § 950.103(g).
 6. May ***officially endorse*** (including use of title and position) approved emergency and disaster solicitations. JER 3-210.a(2)
 - a. For a summary of fundraising and other disaster-related ethics issues, *See* Antolin-Jenkins and Epstein, “How Can We Help? Ethics Issues in Disaster Relief,” Federal Ethics Report, CCH, November 2001.
- C. **Gifts-In-Kind:** Neither the OPM nor OGE regulations apply to the collection of gifts-in-kind, such as food, clothing and toys. **Note:** This can be a key exception for many traditional collection efforts including food drives, coats for the homeless, and toys for children (5 C.F.R. § 950.102(b)). Still must comply with other regulations applicable to solicitations.
1. ***Again, Be Aware:*** DoD personnel in their official capacities **may not solicit** individuals or entities that are not Federal personnel (including contractor employees) (5 C.F.R. § 2635.202(a)).
 2. Generally, Commanders approve this type of solicitation to be held in **public areas** of government buildings, such as lobbies or other entranceways.
 - a. Site regulations: **On GSA controlled property**, personnel may not solicit alms, including non-monetary items, unless sponsored or approved by the occupant agencies (41 C.F.R. § 102-74.410). OGE advises that this regulation does not prohibit employees from placing collection boxes in public parts of building to collect food or clothing for charity (DO-93-024 (August 25, 1993); DO-94-013 (March 22, 1994)).
 - b. **On DoD controlled property**, Commanders may approve use of areas that are ***outside of the Federal workplace***. (The workplace is where the employee normally performs his or her duties.) See V.D., below.

D. Outside the Federal Workplace: The OPM regulations do not apply to solicitations of Federal personnel outside of the Federal workplace (5 C.F.R. § 950.102(b)). **Note**, however, that the OGE regulations do apply. See VI., below, for a more thorough discussion of their application.

1. Agency heads may define Federal workplace, consistent with GSA and other regulations (5 C.F.R. § 950.102(b)). Generally, workplace is the site for the performance of work.
2. The Secretary of Defense, at JER 3-211.b. and 3-300.a.(2), delegated this determination to the heads of DoD component commands or organizations. They may determine which areas, if any, of the DoD installation are outside of the Federal workplace. For example, the housing area may be designated as outside the Federal workplace.
3. See subparagraphs 3 and 4.7 of DoDI 5035.01, which requires the heads of DoD Component organizations to consider, when reviewing requests “by organizations composed of civilian employees or members of the Uniformed Services among their own members for organizational support, or for the benefit of specific member welfare funds,” to raise funds outside the CFC, the negative effects of soliciting on Federal installations, even when outside the Federal workplace, as they may create additional disruptions and possibly compete with the CFC for donations. The CFC is intended to reduce disruptions in the workplace by consolidating all approved solicitations into a single, annual, officially supported campaign. Fund-raising solicitations conducted by organizations composed of civilian employees or members of the Uniformed Services among their own members for organizational support, or for the benefit of specific member welfare funds, are permitted and may be conducted in the workplace. Again, such solicitations should be limited in number and scope during the official CFC period in order to minimize competition with CFC.

E. Organizations of Federal Personnel: The OPM regulations do not apply to solicitations conducted by organizations composed of Federal personnel among their own members for organizational support or the benefit of welfare funds for their members, in accordance with policies and procedures established by the pertinent agency (5 C.F.R. § 950.102(d)). If, for example, contractors are solicited for funds or other support, then the rules prohibiting fundraising in the workplace are applicable.

1. Subsection 3-210.a. of the JER establishes the DoD policy and procedure. Because it is an agency regulation, it also provides the authority for (in accordance with 5 C.F.R.

§ 2635.808(b), the OGE fundraising regulation), and defines the extent of, official participation in such fundraising, whether on or outside the Federal workplace.

2. It provides that DoD personnel may officially endorse membership drives or fundraising for the following organizations.
 - a. Military Relief Societies. The Military Departments have issued their own specific guidance outlining permissible support:
 - (1) Army: AR 930-4, Army Emergency Relief (22 February 2008)
 - (2) Navy: SECNAVINST 5340.7, Active Duty Fund Drive in Support of Navy-Marine Corps Relief Society (NMCRS) (8 February 1999) (At paragraph 3.d, the Navy permits raffles and lotteries in support of Navy-Marine Corps Relief Society, if in accord with local law and site regulations. This authorization does not extend to casino-type games of chance.)
 - (3) Air Force: AFI 36-3101, Fundraising Within the Air Force (12 July 2002)
 - b. Other Organizations: Organizations composed primarily of DoD employees or their dependents *when fundraising among their own members for the benefit of welfare funds for their own members or their dependents* when approved by the head of the DoD Component command or organization after consultation with the DAEO or designee. See JER 3-210.a(6). **NOTE:** Organizations composed of civilian employees and armed forces members have been recognized by Presidential Executive Orders dating back to 1957. See e.g., Section 7 of Executive Order No. 10728 (1957); Section 3 of Executive Order No. 10927 (1961); Section 7 of Executive Order No. 12353 (1983). **Cannot include contractors.**
 - c. National Guard: Charitable, community, or civic organizations as identified in 32 U.S.C. § 508, Assistance for certain youth and charitable groups (eligible organizations include the Boy Scouts, Girls Scouts, Boys Clubs, YMCA, YWCA, Civil Air Patrol, US Olympic Committee, the 4-H Club, Police Athletic League, and other youth or charitable organizations designated by SECDEF)
 - d. Innovative Readiness Training: DoDD 1100.20, when approved by head of DoD component command or organization after consultation with DAEO or designee.

3. Except for support authorized by the Military Departments for their relief societies, see above, any support other than endorsement must be authorized in accordance with paragraph 3-211.b. of the JER.

F. Non-Charitable Fundraising.

1. **On GSA controlled property**, no one may solicit alms (including non-monetary items), or commercial or political donations. Collection of non-monetary items may be authorized when sponsored or approved by occupant agencies. (41 C.F.R. § 102-74.410). OGE advises that this regulation does not prohibit employees from placing collection boxes in public parts of building to collect food or clothing for charity. (OGE DAEOGRAM DO-93-24 (August 25, 1993); OGE Informal Advisory [93x19, Answers to Recurring Questions About Fundraising, August 25, 1993](#); OGE DAEOGRAM DO-94-13 (March 2, 1994)).
2. **On DoD controlled property**, Commanders may approve, on a limited basis, the use of areas that are outside of the Federal workplace (such as public entrances to base and post exchanges, community support facilities, or personal quarters) for DoD personnel's purely personal, unofficial volunteer efforts to support such fundraising (Spouse clubs, DoD school projects, etc.), as long as the efforts do not imply DoD endorsement. See JER 3-300.a.(2).

G. Toys For Tots.

1. The Toys for Tots program is an official activity of the Marine Corps, and an official mission of the Marine Corps Reserve (Marine Corps Order 5726.14F).
 - a. Marine Corps resources and personnel are utilized in accordance with MCO 5726.14F.
 - b. As Toys for Tots is not soliciting for the welfare of its own members, it does not qualify as a JER 3-210 organization. Use C. and D., above, to analyze requests to solicit DoD personnel.

H. Entities Leasing Space in GSA Buildings.

1. GSA regulations (41 C.F.R. §§ 102-74.460 et seq.) permit the GSA Building Administrator to lease portions of GSA buildings to religious and tax-exempt organizations. The lease allows these groups to solicit in public areas. Such solicitations are monitored by the GSA Building Administrator.

2. ***Be Aware***: DoD does not qualify for these types of leases. Just because GSA allows these types of solicitations does not mean that DoD personnel have approval to do similar things.

VI. SUPPORT OF OTHER SOLICITATIONS.

- A. **Official Support Using Logistical Resources (Not Personnel)**: Such support of fundraising by NFEs (including all JER subsection 3-210 organizations when fundraising outside their membership and Toys for Tots [Marine Corps Reserve, See MCO 5226.14F]) must be in accord with JER 3-211.b.
 1. Heads of DoD Component commands or organizations may provide, ***on a limited basis***, the use of facilities and equipment (and the services of DoD personnel necessary to properly use the equipment) to support charitable fundraising events sponsored by an NFE when they determine **all** of the following:
 - a. The support does not interfere with the performance of official duties (including the duties of the entire office, not merely the personnel directly concerned) and does not detract from readiness;
 - b. DoD community relations with the immediate community (community of interest [not merely local physical community], not merely sponsoring organization), legitimate DoD public affairs interests, or military training interests are served by the support;
 - c. It is appropriate to associate DoD or concerned component, with the event;
 - d. The event is of interest and benefit to the local community, DoD component command or organization providing support, or any other part of DoD;
 - e. The DoD component command or organization is able and willing to provide the same support to comparable events sponsored by other similar NFEs; and
 - f. The use is not restricted by other statutes.
 2. Note that these same factors apply to non-charitable NFE-sponsored events, as well as an additional factor, which requires either free attendance or a reasonable cost for attendance, or else only incidental DoD support may be provided. Because charitable fundraisers exceed reasonable cost, by definition, that factor could not be included. Note, however, that DoDD 5410.18, subparagraphs 4.1.4 and 4.2.5.1, generally

require that DoD support to non-public community relations events, which include fundraisers, not exceed an incidental level (Enclosure 2, E2.1.14 “Support (Incidental)” defined).

3. DoD Commanders must also ensure that such support does not constitute DoD endorsement or the appearance of DoD endorsement of the entity or the event (JER 3-209).
4. May use official channels to notify DoD personnel of events of common interest sponsored by non-Federal entities (JER 3-208).

B. Support Using Personnel in Their Official Capacities: This is one of the most complicated areas to analyze, as it involves both the OGE fundraising rule and the JER.

1. Official Participation: Except for 5 C.F.R. Part 950, see V. above, DoD personnel may participate in fundraising only in accordance with 5 C.F.R. § 2635.808(b) (for official capacity) or (c) (for personal capacity). This section addresses official capacity and section C. addresses personal capacity.
 - a. Under 5 C.F.R. § 2635.808(b), DoD personnel may participate in fundraising in an official capacity only if they are authorized to do so by statute, Executive Order, or agency regulation. The only DoD authorizations are JER 3-210 (endorsement of certain organizations), the Military Department relief society regulations. See V.E., above. [For the Army, Public Law 99-145, Section 1459, as amended by Public Law 104-106, Section 280, allows the Secretary of the Army to fundraise on behalf of the National Science Center.]
 - b. When so authorized, DoD personnel may use their official titles, positions, organizations names or other authority associated with their office.
2. Official Speech: An official speech is not considered to be “active and visible participation” in fundraising. Accordingly, DoD personnel may deliver an *official speech*, which is a speech on a subject matter that relates to their official duties, provided that DoD has determined that the event provides an appropriate forum for the dissemination of the information to be presented. Because of the great number of charitable entities and the prohibition on giving preferential treatment, DoD does not generally favor delivering official speeches at fundraising events. See, DoD General Counsel Memo, [Guidance on Analyzing Invitations to DoD Officials To Participate in Fundraising Activities and to Accept Gifts Related to Events.](#)

- (1) Official Duties: The subject matter relates to official duties if it specifically focuses-
 - (a) On the individual's official duties,
 - (b) In significant part with any ongoing or announced policy, responsibilities, programs or operations of DoD (see 5 C.F.R. § 2635.807(a)(2)(i)(E)),
 - (c) In case of a noncareer employee, the general subject matter area, industry, or economic sector primarily affected by DoD programs or operations (see 5 C.F.R. § 2635.807(a)(2)(i)(E)), or
 - (d) On matters of Administration policy on which the individual is authorized to speak.
 - (e) Note that any other speech is considered active and visible participation and is prohibited.
- (2) Appropriate Forum: The head of the DoD Agency organization (or delegee) must determine that the event provides an appropriate forum for the dissemination of the information in the official speech.
- (3) When DoD personnel speak at events in their official capacities sponsored by non-Federal entities (including fundraising events), they must follow both public affairs guidance and the JER.
- (4) DoD Public Affairs Community Relations Policy (DoDD 5410.18, sections 4.1, 4.2, and 4.4) and Implementation (DoDI 5410.19, Enclosure 4): Goal is to inform the public about DoD, U.S. Armed Forces, and national security.
 - (a) Since the public official is paid by the taxpayer, the public should not be required to pay admission to hear a public official speak;
 - (b) When admission is charged, DoD participation must be incidental and may not be a primary attraction. 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 a military color guard, or three DoD speakers at a conference featuring dozens of non-DoD speakers. Thumb rule: If the audience would attend the event even if DoD did not participate, then DoD participation is incidental. (E2.1.14 of DoD 5410.18);

- (c) No preferential treatment;
 - (d) No release of non-public information;
 - (e) Funding programmed for public affairs activities is an integral part of the O&M fund account of each DoD Component. Except for those programmed O&M funds, community relations activities shall not involve any additional cost to the Government;
 - (f) Views must reflect U.S. Government policy;
 - (g) Participation may not appear to endorse views contrary to U.S. Government policy;
 - (h) Speech text and subject matter may require review and clearance for security and policy by proper authority (DoDD 5230.9);
 - (i) May not appear at events staged for controversy or confrontation;
 - (j) Speaking activity may not associate DoD with partisan political cause or activity (see VII., below);
 - (k) May not appear at events at which admission is restricted because of race, creed, color, national origin, or gender; and
 - (l) May not appear at events sponsored by groups that restrict membership based on race, creed, color, national origin, or gender.
- (5) Use the factors at 3-211.b. of the JER. See VI.A.1., above.
- (a) Because most fundraising events are social in nature, rather than attracting an audience whose primary interest is focused on defense issues, DoD must exercise caution and discretion before accepting invitations to speak at fundraising events.
 - (b) Personnel **may not solicit donations** or other support for the nonprofit organization as it would constitute prohibited fundraising.
 - (c) Personnel **may not endorse** the sponsoring organization, the benefiting non-profit organization, or any other activities of either organization.

- (d) Because personnel would be delivering an official speech, the sponsoring organization may use their titles, positions or organization names to identify them in connection with the official speech.
 - (e) **Disclaimers**: As titles and positions will generally be used, DoD personnel must make a disclaimer at the beginning of the speech if they have not been authorized by appropriate DoD authority to present the speech as DoD's position. The disclaimer must state that the views presented are those of the speaker and do not necessarily represent the views of DoD and its components. See 5 C.F.R. § 3601.108 and JER 2-207. 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. Generally, senior officials are the ones invited to speak at fundraising events, and they would be authorized to make official policy speeches.
- (6) Sitting at a head table, dining, and viewing any entertainment that is part of the event is appropriate to the delivery of an official speech and is not considered to be active and visible participation. See 5 C.F.R. § 2635.808(a)(2).
3. **Activities That Are Not "Official Participation"**: DoD personnel may *merely attend* an event provided that the sponsor does not use their attendance to promote the event. See 5 C.F.R. § 2635.808(a)(2). Mere attendance may not include active and visible participation. Attendance in an official capacity is very rare and must comply with fiscal restrictions.
- (1) **Problem area**: Organizations ask senior officials to visibly participate at fundraising events, *e.g.*, receive an award, present an award, or accept position as Honorary Chairperson or as a Celebrity Judge. Senior officials thus become the "star attraction" for the fundraiser. Such support constitutes "active and visible participation."
4. **Gifts**: Sections 1, 2 and 3, above, merely address whether DoD personnel in their official capacities may attend a fundraising event, and if so, what they may do. An entirely different issue is how a gift of free attendance to the event may be accepted. This is extremely important as the attendance costs are generally expensive. -- Dining and viewing any entertainment that is part of the event are a customary and necessary part of making a speech and do not involve a gift to the individual or DoD (5 C.F.R. § 2635.204(g)(1)).

C. Personal Fundraising and Support of Fundraising Events In a Personal Capacity.

1. Under 5 C.F.R. § 2635.808(c), DoD personnel may fundraise in their personal capacities (which includes active and visible participation in fundraising events, merely attending such events, and making non-official speeches at such events) provided they comply with the following:
 - a. They do not personally solicit funds or other support from subordinates or entities that they know are prohibited sources, such as any DoD contractor. Be aware that they **may not** solicit contractor employees who work in the Federal workplace. Other rules apply to special Government employees (SGEs). See 5 C.F.R. §2635.808(c)(1). Note that this prohibits the solicitation of in-kind support as well as funds.
 - (1) Personal solicitation is to request or encourage donations or other support through person-to-person communication or the use of their name in correspondence. Solicitations through media, or oral remarks or mass mailings addressed to many people are not prohibited unless the personnel know that the solicitation is targeted at subordinates or prohibited sources.
 - (2) Personal solicitation does not include behind-the-scenes assistance, such as drafting correspondence, stuffing envelopes, or counting contributions.
 - b. They do not solicit or otherwise support fundraising in the Federal workplace. See 3-300.a.(2) of the JER. Such activity disrupts work, competes with the CFC for donations, invites an abuse of power by superiors, and tempts subordinates to contribute in order to curry favor with seniors.
 - (1) Occasionally, personnel will make collections for items like flowers, a book or even cash, for ill co-workers, or for those with a death in the family. They are collecting for individuals, not on behalf of a charitable organization, so the activity is not considered prohibited fundraising. Sometimes, however, the funds or items collected are given to charitable organizations related to the illness of the personnel or in memory of the decedent, etc. The collection does not become fundraising “on behalf” of that organization, even though it will benefit, because the gift is really to the co-worker or donated on their behalf. See Chapter on Gifts for rules on gifts to superiors.
 - (2) Remember, contractors may not be solicited and, if a contractor contributes to the gift, the gift may not exceed \$20.00.

- c. They do not use, or permit others to use, their official titles, positions, organization names, or any authority associated with their office to assist the fundraising (5 C.F.R. § 2635.802(c)(2)).
 - d. Be aware that the personal capacity of very senior officials (Secretary of Defense, Deputy Secretary of Defense, Secretaries of the Military Departments, and the Chairman, Vice Chair and members of the Joint Chiefs of Staff), especially for fundraising, is only minimal, since, in most cases, they are known to the public only because of their office. Analyze the following criteria on a case-by-case basis to determine if there is personal capacity: the individual's office, public awareness of the individual, and past history of association between the individual and the organization and/or event, and how active and visible the association was. Usually organizations invite senior DoD officials because of their public office. In such cases, attendance should be considered to be in their official capacity. See, DoD General Counsel Memo, [Guidance on Analyzing Invitations to DoD Officials To Participate in Fundraising Activities and to Accept Gifts Related to Events](#).
2. With the authorization of DoD Agency organization heads, DoD personnel may solicit in their personal capacities in designated areas outside the Federal workplace on Federal installations. See JER 3-300.a.(2) and V.C., D. and F., above, for additional information.
3. Non-Official Speech: DoD personnel who are delivering a speech that relates to their official duties (5 C.F.R. § 2635.807) in their personal capacity at a fundraising event must exercise caution to ensure that there is no confusion or appearance that DoD is endorsing the event.
- a. Personnel must be very careful that their official titles, positions, organization names, or any other authority associated with their office are not used except as part of biographical details and are not used prominently. They may use general terms of address, such as "The Honorable" or rank and Service.
 - b. Disclaimers: If the speech deals significantly with any ongoing or announced policy, program or operations of DoD or its components, and their titles and positions will be used in biographical details, DoD personnel must make a disclaimer at the beginning of the speech. The disclaimer must state that the views presented are those of the speaker and do not necessarily represent the views of DoD and its components. See 5 C.F.R. § 3601.108 and JER 2-207.

- c. Compensation for Speech: (See chapter on outside activities.)
- d. Gifts: DoD personnel may be offered gifts of free attendance at fundraising events.
 - (1) If DoD personnel, for example, give an official speech, the offer of free attendance is not considered a gift, so they may accept the offer. 5 C.F.R. § 2635.808(a)(2).
 - (2) If DoD personnel merely attend an event, apply the OGE gift rules discussed in the Gift Chapter.
 - (3) Widely Attended Gatherings. To determine the value of the gift, use the cost of an individual ticket if one is offered to the public to attend. If individual tickets are not sold, and the personnel will be seated at tables, divide the cost of the table by the number seated to determine the value of the gift (5 C.F.R. § 2635.204(g)).

VII. FUNDRAISING FOR PARTISAN POLITICAL PARTIES OR EVENTS.

A. Official Capacity.

DoD personnel may not officially support, endorse, or participate in partisan political fundraising efforts on behalf of candidates or parties ([DepSecDef Memo, dated November 14, 2007](#), Subject: Civilian Employees' Participation in Political Activities) http://www.dod.mil/dodgc/defense_ethics/) and DoDD 1344.10).

B. Personal Capacity.

1. DoD personnel acting in their personal capacities are limited in such fundraising, depending upon their status (military members, career civilian, non-career appointee, career SES), and local political jurisdiction. The short answer is that military personnel and civilian employees of DoD may not solicit, accept, or receive funds for partisan political activities. See the Deskbook Chapter, Political Activities, for guidance on political activities.

VIII. COMMON FUNDRAISING REQUESTS.

- A. **Golf Tournaments:** Some organizations hold golf tournaments to raise funds. Commonly, charitable groups will solicit corporations for sizeable contributions in return for the opportunity for the corporation's employees to play golf and socialize with senior

Government officials who have been offered free tickets to participate. This situation presents real and perceived ethical challenges, specifically:

1. Are Government personnel participating in their **official or personal capacities**?

Answer: Unlikely there is ever a situation in which one may play golf at a fundraiser in an official capacity. While the particular official may be invited because of the official's office, it is unlikely that participation would be included in the official's official duties. Additionally, consider the perception of senior military officials golfing with defense contractors. Apply the "front-page of the newspaper" test.

2. May Government personnel accept the **gift of free attendance**? See the Chapter on Gifts. [Hint: See DAEOGRAM DO-07-047 (December 5, 2007)].

B. **Military Balls**: If a DoD official is making an official speech, he or she may attend in an official capacity. All others must attend in their personal capacities. Wearing of the uniform is determined by the individual Service uniform regulation. If there is an offer of free attendance, it may be accepted if it complies with the OGE gift regulation. See the Chapter on Gifts. If personnel must travel to attend the event, they must pay their own way, unless they may otherwise accept a gift of travel expenses. If they will be in the location because they have traveled officially using Government funds, there must be a bona fide reason for the travel as it will be subject to increased scrutiny. Moreover, personnel cannot incur additional lodging, per diem, or costs to attend. Such expenses are personal expenses and personnel attending in a personal capacity (e.g., non-speaker) must be in a non-duty status.

C. **Requests for DoD Bands**: See 10 U.S.C. § 974. Section 591 of the FY 2010 NDAA amended 10 U.S.C. § 974. Neither Section 591 nor 10 U.S.C. § 974 creates a right for the use of military bands. These statutes merely authorize commanders to employ bands under specific conditions. The use of military bands is still subject to existing directives and regulations, such as DOD 5500.07-R, "Joint Ethics Regulation" and DOD public affairs policies. Significantly, subparagraph 4.2.4.2 of DOD Directive 5410.18, "Public Affairs Community Relations Policy" provides:

A military band or choral group, or portion thereof, is **NOT** logistical support as defined in enclosure 2 (E2.1.15., "Support (Logistical)") and is **not generally available to support non-Federal entity events**. Providing support at events sponsored by non-Federal entities by **Military Service members in uniform performing in a military band, choral group, or portion thereof, is particularly inappropriate because they convey in that context a strong visual appearance of a**

DoD endorsement of the non-Federal entity, its event, or its goals.

When determined to be in the Department's best interest, a military band or choral group, or portion thereof, **may be provided for ceremonial support of non-Federal entity events that are not used for fundraising.**

Accord DOD Instruction 5410.19, "Public Affairs Community Relations Policy Implementation," subparagraph E2.1.8 ("Social events such as concerts, dinners, and other entertainment performances sponsored by non-Federal entities do not meet the criteria for ceremonial support [marching bands, band detachments, and buglers]). The Assistant Secretary of Defense for Public Affairs, set forth interim guidance in a memorandum dated November 5, 2009. In accordance with the interim guidance, performing background, dinner, dance, or other social music at an event that is sponsored by the Army Emergency Relief, the Navy-Marine Corps Relief Society, and the Air Force Aid Society is allowed only at events that do not receive support or donations from prohibited sources and the event is held only for service members or service members and their immediate families. Military musical units are prohibited from performing at events sponsored by a military welfare society when solicitation is not limited to the historical "by our own, from our own, for our own" premise. See Section 7 of Exec. Order No. 12353 and JER 3-210.a(6).

D. Requests for DoD speaker and/or offer to present award:

1. Often an organization will offer to give an award to a senior DoD official, hoping that the individual will attend, which will be an attraction to promote increased attendance at the fundraising event. First, make sure that the award is a bona fide award that may be accepted under 5 C.F.R. § 2635.204(d). Second, ensure that the official will make an official speech. If he or she can't make the speech, then the award may not be accepted or acknowledged at the event, as it would otherwise constitute active and visible participation. Most organizations are more than willing to cooperate and do what is necessary to make it right.
2. If awards are offered to several uniformed personnel, recommend that they be given immediately prior to the event. The group may briefly acknowledge [standing in the audience or very briefly on stage] receipt of the award, as long as attendance by the personnel is not used by the organization to promote the event.

- E. Request for official letter of endorsement or support:** Many organizations request senior officials, such as local Commanders, to sign a letter that endorses the organization,

e.g., USO, AUSA, Joe’s Barbershop. Official endorsements are prohibited. JER 3-209, 5 C.F.R. § 2635.702(c). If appropriate, DoD personnel may sign a factual acknowledgement and thank-you for services received from the NFE. ***Be careful***, such thank-you’s may show up in promotional literature or other materials.

- F. **Serving as Honorary Chairperson**: Senior officials are often asked to “lend their name” as an honorary chairperson for a fundraising event or committee. Permitting the use of their name constitutes an endorsement. If this is done strictly in the official’s personal capacity (without mention of office), it is permitted as long as the correspondence is not targeted to subordinates or prohibited sources. If the official’s office or position is included, or if the official is recognized primarily because of his or her public office, such use constitutes an official endorsement, and is prohibited by JER 3-209 and 5 C.F.R. § 2635.702(c).

- G. **Request for installation Spouses’ Club to hold bake sale**: Since the club is an organization composed of the installation’s personnel and dependents, whose sole purpose is to support those individuals, and is presumably only fundraising among its own members (installation personnel), the Commander may endorse the sale. He or she may also provide the club a place to hold the bake sale (preferably outside the Federal workplace), as long as similar organizations and spouses' clubs receive the same treatment. Other support for the fundraiser may be authorized using the analysis in JER 3-211.

- H. **Fundraising by Impromptu Groups**: What about fundraising by groups that are not charitable or non-profits organizations, such as parent groups raising funds to donate equipment to their school, or a church group raising funds for an injured member of their parish, or a group of employees who are collecting for hurricane victims? These groups don’t qualify for “fundraising” as defined by OGE or OPM.
 - 1. **Site Regulations**:
 - a. **On GSA controlled property**, no one may solicit alms (including non-monetary items), or commercial or political donations. Collection of non-monetary items may be authorized when sponsored or approved by occupant agencies. (41 C.F.R. § 102-74.410) OGE advises that this regulation does not prohibit employees from placing collection boxes in public parts of building to collect food or clothing for charity. (OGE DAEOGRAM, DO-93-024 (August 25, 1993); OGE DAEOGRAM, DO-94-013 (March 23, 1994).)

- b. **On DoD controlled property**, Commanders may approve, on a limited basis, the use of areas that are outside of the Federal workplace (such as public entrances, community support facilities, or personal quarters) for DoD personnel's purely personal, unofficial volunteer efforts to support such fundraising (Spouse clubs, DoD school projects, etc.), as long as the efforts do not imply DoD endorsement. See 3-300.a.(2) of the JER.
2. Endorsement: No official endorsement. (JER 3-209, 5 C.F.R. § 2635.702(c))
3. Support: Use criteria in JER 3-211.

CHAPTER G: POLITICAL ACTIVITIES

I. REFERENCES

- A. 2 U.S.C. § 441a, Federal Election Campaigns: Limitation on Contributions and Expenditures.
- B. 5 U.S.C. §§ 7321-7326, Political Activities of Federal Civilian Employees. (http://www.dod.mil/dodgc/defense_ethics/resource_library/5usc7321_7326.pdf)
- C. 10 U.S.C. § 888, UCMJ Art. 88, Contempt toward Officials;
- D. 10 U.S.C. § 973, Duties of Officers on Active Duty; Performance of Civil Functions Restricted.
- E. 18 U.S.C. Chapter 29, Elections and Political Activities; 18 U.S.C. § 1913
- F. 5 C.F.R. Parts 733, 734, Political Activities of Federal Employees (http://www.dod.mil/dodgc/defense_ethics/resource_library/5cfr733.pdf) and (http://www.dod.mil/dodgc/defense_ethics/resource_library/5cfr734.pdf)
- G. 5 C.F.R. Part 2635, Subparts G & H, Standards of Ethical Conduct for Employees of the Executive Branch.
- H. DoD 5500.07-R, Joint Ethics Regulation, Chapters 2, 3, 5 & 6. (<http://www.dtic.mil/whs/directives/corres/pdf/550007r.pdf>)
- I. DoD Directive 1344.10, Political Activities by Members of the Armed Forces, February 19, 2008. (www.dtic.mil/whs/directives/corres/pdf/134410p.pdf)
- J. DoD Instruction 1334.01, Wearing of the Uniform, October 26, 2005.
- K. Partisan Political Activity Rules for “Less Restricted” DoD Civilians, August 2011. (http://www.dod.mil/dodgc/defense_ethics/resource_library/hatch_act_q_a_less_restricted.pdf)

- L. Partisan Political Activity Rules for “Further Restricted” DoD Civilians, August 2011.
(http://www.dod.mil/dodgc/defense_ethics/resource_library/hatch_act_q_a_further_restricted.pdf)
- M. Air Force Instruction 51-902, Political Activities by Members of the U.S. Air Force, 12 November 2010.
- N. AR 600-20 Army Command Policy, 18 March 2008 (Rapid Action Revision (RAR) 4 August 2011), paragraph 5-3 “Political Activities” and Appendix B.
- O. Secretary of the Navy Instruction 5720.44B, Department of the Navy Public Affairs Policy and Navy Regulations, 1 November 2005.
- P. Marine Corps Order (MCO) 5370.7B -- POLITICAL ACTIVITIES (March 1993.)
- Q. “Politicians in the Ranks: A Review of the Law and Policy Governing Civil Office Holders in Military Service.” Colonel T. Strong, 2004. This paper was submitted in partial fulfillment of the requirements of the Master of Strategic Studies Degree, U.S. Army War College, Carlisle Barracks, Pennsylvania.
(<http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil259.pdf>).
- S. 2016 Election Year Guidance and DoD Support
http://www.dod.mil/dodgc/defense_ethics/
- T. 2016 DoD Public Affairs Guidance for Political Campaigns and Elections (contact your local PAO)
- U. Hatch Act/Frequently Asked Questions on Use of Social Media and Email (December 2015) http://www.dod.mil/dodgc/defense_ethics/ (Ethics Resource Library/DoD Guidance/Political Activities)

II. STATUTORY RESTRICTIONS INVOLVING ELECTIONS AND POLITICAL ACTIVITIES

- A. Limitations on amount of political contributions. 2 U.S.C. § 441a.
- B. No solicitation of fellow Federal employees for campaign contributions. 18 U.S.C. § 602.

- C. No contributing to any other Federal employee who is the contributor's employer or employing authority. 18 U.S.C. § 603.
- D. No threats or intimidation to secure contributions. 18 U.S.C. §§ 601 & 606.
- E. No solicitation or receipt of contributions in any room occupied in discharge of official duties, or in any navy yard, fort, or arsenal. 18 U.S.C. § 607.
- F. No paying/receiving of pay to vote or withhold vote. 18 U.S.C. § 597.
- G. No promising of benefits that depend on an Act of Congress, as reward for political activity. 18 U.S.C. § 600.
- H. No intimidation of voters. 18 U.S.C. § 594.
- I. No coercing political activities of Federal employees. 18 U.S.C. § 610.
- J. No interference with rights under Uniformed and Overseas Citizens Absentee Voting Act. 18 U.S.C. § 608.
- K. No assembling troops at polls. 18 U.S.C. § 592.
- L. No election interference by armed forces. 18 U.S.C. § 593.
- M. No polling of armed forces. 18 U.S.C. § 596.
- N. No use of military authority to influence votes of other military members. 18 U.S.C. § 609.

III. APPLICATION OF THE RULES TO MEMBERS OF THE ARMED FORCES

A. Political Activity by Members of the Armed Forces (DoD Directive 1344.10).
(<http://www.dtic.mil/whs/directives/corres/pdf/134410p.pdf>)

1. Applicability.

- a. Members of the Armed Forces on Active Duty, includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a Service school by law or by the Secretary concerned. See 10 USC § 101. For purposes of this directive only, active duty also includes full-time National Guard duty.
- b. Members of the Armed Forces also includes retirees and members of the Reserve Components not on active duty including, for section 4.3, members of the National Guard even when in non-Federal status.
- c. Includes enlisted members and officers.

2. Spirit and intent.

- a. It is DoD policy to encourage members of the Armed Forces (including members on active duty, members of the Reserve Components not on active duty, and retired members) to carry out the obligations of citizenship. In keeping with the traditional concept that members on active duty should not engage in partisan political activity, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement. Section 4.

- b. “Activities not expressly prohibited may be contrary to the spirit and intent of this Directive. Any activity that may be reasonably viewed as directly or indirectly associating the Department of Defense or Department of Homeland Security (in the case of the Coast Guard) with a partisan political activity or is otherwise contrary to the spirit and intention of this Directive shall be avoided.” Section 4.1.5.

- B. Permitted political activities (Section 4.1). A member of the Armed Forces on active duty may:
 - 1. Register, vote, and express personal opinions on political candidates and public issues;
 - 2. Encourage other military members to exercise voting rights;
 - 3. Join a political club (even if partisan) and attend political meetings when not in uniform. (See DoD Instruction 1334.01 (Reference J));
 - 4. Sign petitions for specific legislative action or to place a candidate’s name on the ballot;
 - 5. Write letters to the editor expressing personal views (so long as not part of organized letter writing campaign or solicitation of votes for or against a political party or partisan political cause or candidate). Requires a disclaimer that the views are those of the individual and not DoD;
 - 6. Make permissible monetary contributions to a political organization, party, or committee;
 - 7. Display a bumper sticker on a member’s private vehicle;
 - 8. Attend a partisan or nonpartisan political fundraising activity, meeting, rally, debate, convention, or activity when not in uniform and when no appearance of sponsorship or endorsement can reasonably be drawn.

- C. Prohibited political activities (Section 4.1.2). A member of the Armed Forces on active duty shall not:
1. Participate in partisan political fundraising activities, rallies, conventions, management of campaigns, or debates. The prohibition is broad and does not depend on whether a member is in uniform or even whether an inference of official endorsement can be drawn;
 2. Use official authority or influence to interfere with an election, affect the course or outcome of an election, solicit votes for a particular candidate or issue, or require or solicit political contributions from others;
 3. Publish partisan political articles or letters that solicit votes for or against a partisan political party, candidate, or cause. Letters to the editor may be allowed as noted above;
 4. Participate in any radio, television, or other program or group discussion as an advocate for or against a partisan political party, candidate, or cause;
 5. Serve in official capacity/sponsor a partisan political club;
 6. Conduct a political opinion survey or distribute political literature;
 7. Speak before a partisan political gathering;
 8. Work for a partisan political committee or candidate during a campaign, on election day or while closing out a campaign;
 9. Engage in fundraising activity for any political candidate or cause in Federal offices, facilities, or on military reservations;
 10. March or ride in partisan parades;

11. Participate in organized efforts to provide voters transportation to polling places if the effort is associated with a partisan political party;
12. Sell tickets for or actively promote partisan political dinners and similar fundraising events;
13. Make a campaign contribution to or receive or solicit a campaign contribution from any other member of the Armed Forces on active duty;
14. Display a partisan political sign visible to the public at one's residence on a military installation.

D. Participation in local nonpartisan political activities is allowed, so long as:

1. Not in uniform;
2. No use of Government property or resources;
3. No interference with duty;
4. No implied Government position or involvement.

E. Nomination or candidacy for covered civil offices set out in section 4.2.

1. A regular member, or a retired regular or Reserve Component member on active duty under a call or order to active duty for more than 270 days may not be a nominee or candidate for a covered civil office unless the Secretary concerned grants permission. The Secretary concerned may not delegate the authority to grant or deny this permission.

2. If a member noted immediately above becomes a nominee or candidate for a covered office prior to entering active duty, then he or she must submit a written request for permission from the Secretary concerned before entering active duty.
3. A retired regular or Reserve Component member on active duty under a call or order to active duty for 270 days or fewer may remain or become a candidate or nominee for covered civil office provided there is no interference with the performance of military duty.
4. Any nominee or candidate for covered civil office who is either granted permission or not otherwise prohibited from being a nominee or candidate for covered civil office must complete the acknowledgement of limitations in enclosure 4 and forward it to the first general or flag officer in his or her chain of command. Those who do not require permission must complete the acknowledgement within 15 days of becoming a nominee or candidate or within 15 days of entry on active duty if already a nominee or candidate.
5. Additional limitations on nomination or candidacy and campaigning (4.3).
 - a. Any nominee or candidate for covered civil office who is on active duty and who is either granted permission to be or not otherwise prohibited from being a nominee or candidate for covered civil office may not participate in any campaign activities. This prohibition is broad and includes open and active campaigning and all behind-the-scenes activities. Such members may not:
 - (1) Direct, control, manage, or otherwise participate in their campaigns;
 - (2) Make statements to or answer questions from the media regarding policies or activities unless specifically authorized;
 - (3) Publish or allow to be published partisan political articles, literature, or documents they have signed, written or approved that solicit votes for or against a partisan political party, candidate, issue, or cause;

- (4) Any nominee or candidate for covered civil office who is on active duty and who is either granted permission or not otherwise prohibited from being a nominee or candidate for covered civil office must:
 - (i) Take documented, affirmative efforts to inform those who work for them that they (the nominees or candidates) may not direct, control, manage, or otherwise participate in campaign activities on their own behalf;
 - (ii) Take all reasonable efforts to prevent current anticipated advertisements that they control from being publicly displayed or running in any media. This includes Web sites. Web sites created before entry on active duty may not be updated or revised any may be ordered shut down by the Secretary concerned;

6. Members not on active duty who are nominees or candidates for covered offices may, in their campaign literature (including Web sites, videos, television, and conventional print advertisements):
 - a. Use or mention their military rank or grade and military service affiliation, but they must clearly indicate their retired or reserve status;
 - b. Include their current or former specific military duty, title, or position, or photographs in military uniform, when displayed with other non-military biological details. This must be accompanied by a clearly displayed disclaimer that the information or photographs do not imply official endorsement;
 - c. Use of photographs, drawings, and other similar media formats of the member in uniform cannot be the primary graphic representation in any campaign material. Depictions of the member in uniform cannot misrepresent their actual performance of duty.

F. Holding and exercising the functions of public office (citations refer to DoDD 1344.10).

	Regular	Reg Ret / RC Less than or = 270	Reg Ret / RC > 270
Hold Fed Office	NO (4.4.2.)	YES, provided no interference w/ duty (4.4.3.)	NO (4.4.4.)
Execute Fed Office	NO (4.4.2.)	YES, provided no interference w/ duty (4.4.3.)	NO (4.4.4.)
Hold non-Fed	NO (4.5.2.)	YES, provided no interference w/ duty (4.5.4.)	NO, unless SEC grants permission after determining no interference w/duty (4.5.3.2.)
Execute non-Fed	NO (4.5.2.)	YES, provided no interference w/ duty (4.5.4.)	NO (4.5.3.)

1. Federal Civil Office.

- a. Limitations apply to these covered offices: elective offices; offices that require appointment by President (no longer requires Senate confirmation too), and certain executive schedule positions.
- b. A regular member, or retired regular or Reserve Component member on active duty under a call or order to active duty for more than 270 days, may not hold or exercise the functions of a covered Federal office.
- c. A retired regular or Reserve Component member on active duty under a call or order to active duty for 270 days or fewer may hold and exercise the functions of a covered Federal office provided there is no interference with the performance of military duty.

2. Non-Federal Civil Office.
 - a. Limitations apply to these covered offices: an office in a State; the District of Columbia; a territory, possession, or commonwealth of the United States; or any political subdivision thereof.
 - b. A regular member may not hold or exercise the functions of a covered non-Federal office.
 - c. A retired regular or Reserve Component member on active duty under a call or order to active duty for more than 270 days may hold a covered office if the Secretary concerned grants permission. The Secretary concerned may not delegate the authority to make this decision.
 - (1) This is a change from the 2004 directive.
 - (2) The 2004 directive established the presumption that the Service member could hold the office unless the Secretary concerned prohibited it.
 - (3) Under the new directive, the Service member cannot hold the office unless the Secretary concerned first grants affirmative permission.
 - (4) A retired regular or Reserve Component member on active duty under a call or order to active duty for more than 270 days who has permission to hold a covered non-Federal office may not exercise the functions of that office.
 - (5) A retired regular or Reserve Component member on active duty under a call or order to active duty for fewer than 270 duty days may hold and exercise the functions of a covered office provided there is no interference with the performance of military duties.

- (6) Any member on active duty authorized to hold or not otherwise prohibited from holding or exercising the functions of a covered office is still subject to the prohibitions of subsection 4.12.

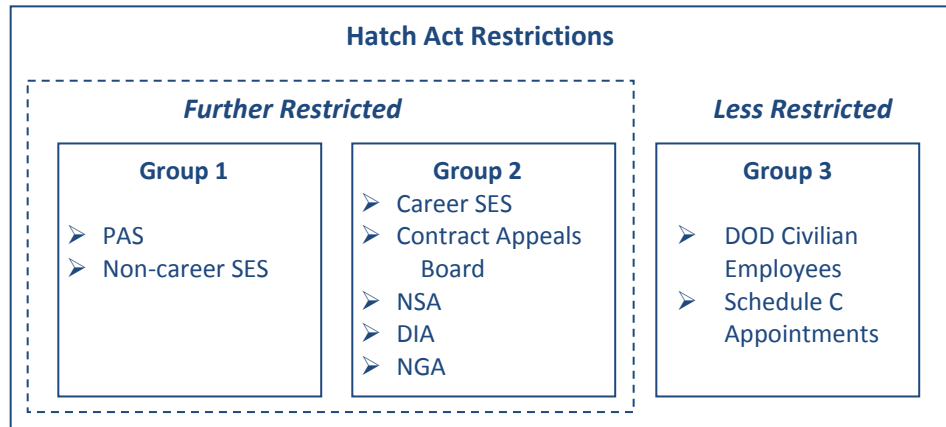
IV. APPLICATION OF THE RULES TO CIVILIAN EMPLOYEES

A. Political Activity of Civilian Employees (5 C.F.R. Parts 733 and 734). The Hatch Act (Act) is the law that restricts the partisan political activity of civilian executive branch employees of the Federal Government.

1. General Information.

- a. For purposes of the Act, “Political Activity” is defined as an activity directed toward the success or failure of a political party, candidate for partisan political office or partisan political group.
- b. The Act does not prohibit employees from participating in or being candidates in nonpartisan elections. A nonpartisan election is one in which none of the candidates is to be nominated or elected as representing a political party, i.e., none of the candidates are running, for example, as representatives of the Democratic or Republican party. Employees who are interested in running for state or local office should first check with their local board of elections to clarify the nonpartisan status of the election. Employees who are candidates for public office in nonpartisan elections are not barred by the Act from soliciting, accepting, or receiving political contributions for their own campaigns.
- c. A nonpartisan election can also include an election involving a question or issue which is not specifically identified with a political party, such as a constitutional amendment, referendum question, or a municipal ordinance (e.g., gun control, gay marriage, tax issues, climate change, and DC statehood).
- d. At DoD, there are 2 sets of rules for 3 groups of employees. The first set of restrictions applies to: (1) individuals appointed by the President and confirmed by the Senate and individuals serving in non-career SES positions, who are further restricted by DoD policy; (2)

career members of the SES, contract appeals board members, and all employees of the National Security Agency (NSA), the Defense Intelligence Agency (DIA), and the National Geo-Spatial-Intelligence Agency (NSA). The second, and more lenient set of restrictions, applies to all other employees (including Schedule C political appointments). Employees in Groups 1 and 2 are prohibited from taking an active part in partisan political management or political campaigns and are referred to as “Further Restricted” employees. Employees in Group 3 are referred to as “Less Restricted.”



2. Prohibited Political Activities Applicable to All DoD civilian employees - All DoD civilian employees are prohibited from:
 - a. Using their official authority or influence for the purpose of interfering with or affecting the result of an election; including coercing subordinates to participate in political activity, using one’s official title while participating in political activity; using agency social media for political purposes;
 - b. Knowingly, personally soliciting, accepting or receiving a political contribution from any person; including hosting or serving as a POC for a fundraising event for a political party or candidate for partisan political office; signing a solicitation letter, collecting money at a fundraising event, soliciting donations through a phone bank;

- c. Running for the nomination or as a candidate for election to a partisan political office (an election where candidates are running with party affiliation, usually as Democrats or Republicans);
- d. Participating in political activity while on-duty or in any room or building occupied in the discharge of official duties by an individual employed by DoD;
 - (1) On-duty. An employee is on duty during the time period when he or she is: (1) in a pay status other than paid leave, compensatory time off, credit hours, time off as an incentive award, or excused or authorized absence (including leave without pay) or (2) representing an agency or instrumentality of the United States Government in an official capacity.
 - (2) Employees are prohibited 24/7 from sending or forwarding political/campaign literature, materials, information (including jokes) while using their DoD email account or while using a DoD computer.
 - (3) All DoD employees are prohibited from displaying political/campaign literature, materials, and information in their DoD workspace (including non-official pictures of a President running for reelection).
- e. Engaging in political activity while wearing a uniform or official insignia identifying the office or position of the DoD employee;
- f. Engaging in political activity while using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof;
- g. Knowingly soliciting or discouraging the participation in any political activity of any person who has an application for any compensation, grant, contract, ruling, license, permit, or certificate pending before the employee's office; and

- h. Knowingly soliciting or discouraging the participation in any political activity of any person who is the subject of or a participant in an ongoing audit, investigation, or enforcement action being carried out by the employee's office.
- 3. Additional Prohibited Political Activities for "Further Restricted" Employees
 - a. "Further Restricted" employees are prohibited from engaging in any political activity which is "in concert" with a political party, partisan political group or candidate for partisan political office.
 - b. "In concert" activity is any activity that is sponsored or supported by a political party, partisan political group or candidate for partisan political office. For example, Further Restricted employees are prohibited from: writing speeches or performing research on political issues for a partisan campaign; making speeches as a surrogate for a candidate for partisan political office; soliciting, accepting or receiving political contributions; holding office in a political party; hosting a fundraiser for a candidate for partisan political office; knocking on doors to solicit votes or handing out political leaflets for a candidate for partisan political office; serving as a delegate to a political party convention or doing any type of volunteer work for a candidate for partisan political office, including serving on a phone bank.
- 4. Permitted Political Activities – All DoD civilian employees may:
 - a. Place a campaign sign in their yard;
 - b. Place a campaign bumper sticker on their car (even if they park their car in a Government parking lot);
 - c. Make a financial contribution to a political party or candidate running for partisan political office;
 - d. Express personal opinions on candidates and political issues;
 - e. Attend political events;
 - f. Participate in nonpartisan elections;

- g. Assist in nonpartisan voter registration drives;
 - h. Work for the city or county as a poll worker on Election Day; and
 - i. Sign a nominating petition.
5. Permitted political activities for “Less Restricted” employees - “Less Restricted” employees are permitted to engage in political activity while off-duty and outside of a Federal building (in their personal capacity), as follows:
- a. Volunteer to work on a partisan campaign;
 - b. Attend and be active at political rallies and meetings;
 - c. Go door to door with the candidate and distribute campaign literature;
 - d. Write speeches for a candidate
 - e. Join and hold office in a political party or political organization;
 - f. Endorse a candidate for partisan political office in a political advertisement (may not use DoD title);
 - g. Organize and work at a fundraising event (no soliciting);
 - h. Serve as a delegate to a state, local or national political party convention;
 - i. Work to get out the vote on Election Day; and
 - j. Serve as an election judge (for a political party or the city or county).

V. SOCIAL MEDIA AND POLITICAL ACTIVITIES

A. Guidance for Members of the Armed Forces

May an Active Duty member express his or her own personal views on public issues or political candidates via social media platforms, such as Facebook, Twitter, or personal blogs?	May an Active Duty member become a “friend” of, or “like,” the Facebook page, or “follow” the twitter account of a political party or partisan candidate, campaign, group, or cause?
➤ Yes, personal views are OK, much the same as writing a letter to the editor of a paper, but may <u>not</u> engage in any partisan political activity	➤ Yes, but must refrain from engaging in activities with respect to partisan political entities’ accounts that would constitute political activity
➤ “Partisan political activity” is activity directed at the success or failure of a political party, partisan political candidate, campaign, group or cause.	➤ Cannot suggest that others “like”, “friend” or “follow” the partisan account
➤ Cannot solicit others, fundraise, etc.	➤ Cannot forward invitations to partisan events, solicit or fundraise
➤ If identifiable as military must disclaim	
➤ No direct links of “likes” to partisan sites (akin to distribution of literature)	

B. Guidance for Civilian Employees*

<p><i>May a Federal employee advocate for or against a political party, partisan political group, or candidate for partisan political office in posts on a blog, Facebook, Twitter or other social media.</i></p>
<p>➤ Less Restricted: YES, may post and blog...while on off-duty and outside of a Federal building. Employees may never post or blog...while on duty or in Federal workplace.</p>
<p>➤ Further Restricted: YES, same as above. Additionally, further restricted employees may not list links to partisan websites or post material from a political campaign on their Facebook page as this would be equivalent of distributing literature.</p>
<p><i>If a Federal employee lists an official title on his/her Facebook profile, may he/she also complete the “political views” filed?</i></p>
<p>➤ All employees: YES – simply identifying one’s political affiliation without more is not engaging in “political activity.”</p>
<p><i>May Federal employees who are “friends” with their subordinate employees advocate for/against partisan parties or candidates on their Facebook page?</i></p>
<p>➤ Less Restricted: Yes, as long as updates are sent to “all” Facebook friends – (for example, posting an update in “Status” field) but, cannot specifically target subordinates – (for example, sending a personal message to a subordinate or posting political comments on a subordinate employee’s Facebook page).</p>
<p>➤ Further Restricted: Same as above; Further, restricted employees may not list links to partisan websites or post material from a political campaign on their Facebook page.</p>
<p><i>May a Federal employee become a “friend” of or “like” or “follow” the Twitter account of a political party or candidate?</i></p>
<p>➤ Less: YES, but employees may not engage in activities with respect to a Facebook or Twitter that would constitute political activity while on duty or in Federal workplace.</p>
<p>➤ Further Restricted: YES, but further, restricted employees may not list links to partisan websites or post material from a political campaign on their Facebook page as this would be engaging in political activity which is prohibited for further restricted employees.</p>
<p>➤ Employees remain subject to Hatch Act and these requirements even if they create an “alias” account.</p>
<p><i>May a Federal employee create a Facebook or Twitter page in his official capacity and advocate for party/candidate?</i></p>
<p>➤ All: NO...any social media page created in an employee’s official capacity must be limited to official business and remain politically neutral.</p>

*See, http://www.dod.mil/dodgc/defense_ethics/ for more detailed information on social media and political activity. (See Ethics Resource Library/DoD Guidance/ Political Activities.)

- C. OSC's Hatch Act Unit provides advisory opinions on political activity of civilian Federal employees. They do not provide advice on DoD's rules concerning military members. Contact OSC attorneys by email at hatchact@osc.gov, or by phone at (202) 653-7143.
- D. OSC retains exclusive jurisdiction to rule on matters affecting the political activities of civilian personnel.
- E. Penalties for violating the Hatch Act cover a range of disciplinary actions, including removal from federal service, reduction in grade, debarment from federal employment for a period not to exceed 5 years, suspension, reprimand, or a civil penalty not to exceed \$1,000.
- F. OSC Advisory Opinions may be found on the US Office of Special Counsel website at <https://osc.gov/Pages/Advisory-Opinions.aspx>

VI. **DOD PUBLIC AFFAIRS GUIDANCE FOR POLITICAL CAMPAIGNS AND ELECTIONS**

- A. DoD newspapers, magazines, and civilian enterprise publications will not publish information provided by a candidate's campaign organization, partisan advertisements and discussions, or cartoons, editorials, and commentaries dealing with political campaigns or elections, candidates, causes or issues.
- B. Access to installation by office holders and candidates. While a candidate for public office is prohibited from engaging in political activity on a military installation, a sitting officer holder who is up for reelection may be granted access to a military installation to engage in duties related to his elected office.
- C. Off-installation political events. All members of the Armed Forces are prohibited from wearing military uniforms at political campaign or elections events. This prohibition is not applicable to the joint color guards at the opening ceremonies of national political conventions.

- D. DoD may not prohibit the use of a military facility for an official polling place for local, State, or Federal elections if the facility was designated as a polling place as of 31 December 2000 or has been used as a polling place since 1 January 1996. There is an exception for the Secretary concerned to waive the provision if he determines that local security conditions require prohibition of the designation or use of that facility as an official polling place for any election. (10 U.S.C. 2670(b))

- E. POC – OASD(PA), (703) 697- 5131. Start with your local PAO.

VII. LOBBYING

The Lobbying Disclosure Act of 1995, [2 U.S.C. §§ 1601–1614 \(2013\)](#) imposes disclosure and registration requirements on lobbyists who contact “covered” Legislative and Executive Branch officials. It also requires that a covered Executive Branch official who is contacted by a lobbyist disclose the fact that he or she is a covered official upon the request of the person making the lobbying contact.

- A. Covered Executive Branch officials include, among others:
 - 1. Any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or EO;
 - 2. Any member of the uniformed services whose pay grade is at or above O-7, under [37 U.S.C. § 201 \(2013\)](#); and
 - 3. Any individual serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character, as described in [5 U.S.C. § 7511 \(b\)\(2\)\(B\) \(2013\)](#).

- B. Generally, the Act applies to “PAS and Schedule C officials,” but does not apply to members of the SES (unless they meet the criteria in the first bullet above). If you have any questions about who is considered a lobbyist, how you should respond to contacts from lobbyists, and what your responsibilities are under the Act, you should contact your agency’s General Counsel.

C. Lobbying Congress.

1. Federal law prohibits the use of appropriated funds, directly or indirectly, to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress under [18 U.S.C. § 1913 \(2013\)](#). This prohibition, however, does not prevent direct communications between Executive Branch officials and Congress.

2. Examples of prohibited activities include:
 - a. An article written by a Commerce Department official and published in *Business America*, a Commerce Department publication, explicitly urging readers to contact their elected representatives in Congress to support certain amendments to the Export Administration Act;

 - b. A campaign by the Defense Department to use contractors' lobbyists and the subcontractor network to lobby Congress in support of an aircraft procurement.

3. Briefings by Executive Branch officials to Members of Congress or their staffs to advise of properly coordinated departmental views on matters before the Congress generally are not prohibited. However, a planned media campaign to further that same objective may fall outside of [18 U.S.C. § 1913 \(2013\)](#).

4. The Department Of Defense Appropriations Act (2013), which is Division A of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 8013, 125 Stat. 786, 807 (Dec. 23, 2011), also restricts lobbying activities. Specifically, section 8013 provides “None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence Congressional action on any legislation or appropriation matters pending before the Congress.”*
5. This provision has a broader reach than the criminal prohibition against grassroots lobbying contained in [18 U.S.C. § 1913 \(2013\)](#). Specifically, these restrictions have been determined to be responsive to particularly egregious instances of agency lobbying through public information campaigns, even though, material provided to members of the public stops short of actually soliciting them to contact their representatives in support of or in opposition to pending legislation.

D. General Guidelines.

1. The provisions are not intended to prohibit an ongoing dialogue or interaction between the Executive Branch and the public in an educational effort to explain administration positions. Public campaigns designed or intended to influence citizen groups to contact Congressional representatives are prohibited.
2. Material distributed to the public should never suggest directly or indirectly that persons or organizations contact their Congressional representatives to indicate support for appropriations for weapons programs or any other DoD program or issue.

*See House Report 112-493 - [Department of Defense Appropriations Bill \(2013\)](#)

3. OSD personnel should be especially circumspect in any contacts with associations or industry. They should not suggest, orally or in writing, that organizations activate their membership to contact members of Congress, nor should they provide multiple copies of materials to be distributed by such organizations.
4. OSD personnel must avoid the appearance of grass roots lobbying efforts or any other attempt to encourage communication with Congress on pending legislation.
5. Coordination of Congressional affairs is the responsibility of the Office of the Assistant Secretary of Defense for Legislative Affairs (ASD (LA)). Proposed contacts with Congress must be coordinated with that office at 703-697-6210.

CHAPTER H: GIFTS

I. REFERENCES

A. Statutes:

1. 5 U.S.C. § 7342 - Receipt and disposition of foreign gifts and decorations
2. 5 U.S.C. § 7351 - Gifts to superiors
3. 5 U.S.C. § 7353 - Gifts to federal employees
4. 5 U.S.C. § 4111- Acceptance of contributions, awards, and other payments
5. 10 U.S.C. § 974 – Military musical units and musicians: performance policies; restriction on performance in competition with local civilian musicians
6. 10 U.S.C. § 1588 - Authority to accept certain voluntary services
7. 10 U.S.C. § 2601 - General gift funds
8. 10 USC § 2601a - Direct acceptance of gifts by members of the armed forces and Department of Defense and Coast Guard employees and their families (Implemented through DoD 7000.14-R, Vol 12, Chapter 34)
9. 10 U.S.C. § 2608 - Acceptance of contributions for defense programs, projects, and activities; Defense Cooperation Account
10. 10 U.S.C. § 2613 - Acceptance of frequent traveler miles, credits, and tickets; use to facilitate rest and recuperation travel of deployed members and their families
11. 31 U.S.C. § 1353 - Acceptance of travel and travel related expenses from non-Federal sources

B. Regulations:

1. Government-wide

- a. 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch, <http://www.ecfr.gov/cgi-bin/text-idx?SID=83d1bb4ab16f75ee9a75f6e838c4114c&node=pt5.3.2635&rgn=div5>
- b. 41 C.F.R. Chapter 304, Payment of Travel Expenses from a Non-Federal Source, <http://www.ecfr.gov/cgi-bin/text-idx?SID=ab5d5f7378f2fcea7864fcc3a8daa21c&tpl=/ecfrbrowse/Title41/41chapter304.tpl>

2. DoD-wide

- a. 5 C.F.R. Part 3601, Supplemental Standards of Ethical Conduct for Employees of the Department of Defense, <http://www.ecfr.gov/cgi-bin/text-idx?SID=ab5d5f7378f2fcea7864fcc3a8daa21c&tpl=/ecfrbrowse/Title05/5chapterXXVI.tpl>
- b. DoDD 5500.07, Standards of Conduct, Nov. 29, 2007 <http://www.dtic.mil/whs/directives/corres/pdf/550007p.pdf>
- c. DoD 5500.07-R, Joint Ethics Regulation (JER), thru Ch. 7, Nov. 17, 2011 <http://www.dtic.mil/whs/directives/corres/pdf/550007r.pdf>
- d. DoDD 1005.13, Gifts and Decorations from Foreign Governments, Feb. 19, 2002, w/ Ch. 1, Dec. 6, 2002, <http://www.dtic.mil/whs/directives/corres/pdf/100513p.pdf>

- e. DoD Financial Management Regulation 7000.14-R, Vol. 12, *Chapter 3*, Contributions for Defense Programs, Projects and Activities (implementing 10 U.S.C. § 2608); *Chapter 30*, Operation and Use of General Gift Funds (implementing 10 U.S.C. § 2601); *Chapter 34*, Direct Acceptance of Gifts by Members of the Armed Forces, DoD Employees, and Their Families and Survivors (implementing 10 U.S.C. § 2601a)
<http://comptroller.defense.gov/FMR.aspx>

- f. SECDEF Memo, Waiver of Application of the Standards of Conduct Prohibition on Acceptance of Gifts from Outside Sources for Enlisted Personnel, E-6 and Below, for the Limited Purpose of Gift Acceptance from Charitable and Veterans Service Tax-Exempt Organizations, May 16, 2013
http://www.dod.mil/dodgc/defense_ethics/resource_library/gift_exception_waiver_for_enlisted_members.pdf

- g. DoD SOCO Holiday Guidance for Federal Personnel, Nov. 2014
http://www.dod.mil/dodgc/defense_ethics/resource_library/dod_holiday_guidance.pdf

- h. DoD General Counsel Memo, Analyzing Invitations to DoD Officials to Participate in Fundraising and to Accept Gifts Related to Events, Aug. 18, 1997
http://www.dod.mil/dodgc/defense_ethics/dod_oge/analyzing_invitations.htm

- i. SOCO White Paper: Application of Emoluments Clause to DoD Civilian Employees and Military Personnel, March 2013; 2 page summary
http://www.dod.mil/dodgc/defense_ethics/resource_library/emoluments_clause_applications.pdf

- j. SOCO Emoluments Clause Summary
http://www.dod.mil/dodgc/defense_ethics/resource_library/summary_emoluments_clause_restrictions.pdf

- k. Office of the Under Secretary of Defense (Comptroller) memorandum “Gifts to Benefit Military Musical Units,” Mar. 9, 2015.
http://comptroller.defense.gov/Portals/45/documents/fmr/current/12/VOL_12_CH_30_2015-03-09_Gifts-Mil_Bands.pdf
3. Army
- a. AR 1-100, The Army Gift Program, Jul. 27, 2015
http://www.apd.army.mil/pdffiles/r1_100.pdf
 - b. AR 215-1, Military Morale, Welfare and Recreation Programs and Nonappropriated Fund Instrumentalities (para. 13-14), Sep. 24, 2010
http://www.apd.army.mil/pdffiles/R215_1.pdf
 - c. SECARMY Memorandum, Policy for Travel by Department of the Army Officials, January 25, 2007 (Army Directive 2007-01),
http://www.apd.army.mil/pdffiles/ad2007_01.pdf
4. Navy
- a. Secretary of the Navy Instruction (SECNAVINST) 4001.2J, Acceptance of Gifts, Aug. 12, 2009,
<http://doni.documentservices.dla.mil/Directives/04000%20Logistica1%20Support%20and%20Services/04-00%20General%20Logistical%20Support/4001.2J.pdf>
 - b. OPNAVINST 4001.1F, Acceptance of Gifts, Jul. 2, 2010
<http://doni.documentservices.dla.mil/Directives/04000%20Logistica1%20Support%20and%20Services/04-00%20General%20Logistical%20Support/4001.1F.pdf>
 - c. SECNAVINST 1650.1H, Navy and Marine Corps Awards Manual, Chapter 9 (Foreign Gifts to U.S. Personnel), Aug. 22, 2006
<http://doni.documentservices.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-600%20Performance%20and%20Discipline%20Programs/1650.1H.PDF>

- d. Marine Corps Order P5800.16A, w/Ch. 1-7, Marine Corps Manual for Legal Administration (Chapter 12, Gifts), Feb. 10, 2014
<http://www.marines.mil/Portals/59/Publications/MCO%20P5800.16A%20W%20CH%201-7.pdf>

- 5. Air Force
 - a. AFI 24-101, Passenger Movement, Oct. 19, 2012, http://static.e-publishing.af.mil/production/1/af_a4/publication/afi24-101/afi24-101.pdf

 - b. AFI 51-601, Gifts to the Department of the Air Force, Nov. 26, 2003, http://static.e-publishing.af.mil/production/1/af_a3_5/publication/afi51-601/afi51-601.pdf

 - c. AFI 51-901, Gifts from Foreign Governments, Feb. 16, 2005, http://static.e-publishing.af.mil/production/1/af_a3_5/publication/afi51-901/afi51-901.pdf

II. GENERAL ETHICAL PRINCIPLES APPLICABLE TO GIFTS

- A. Public service is a public trust - 5 C.F.R. § 2635.101(b)(1).

- B. Employees shall not solicit or accept a gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties – 5 C.F.R. § 2635.101(b)(4).

- C. Employees shall not use public office for private gain – 5 C.F.R. § 2635.101(b)(7).

- D. Employees shall avoid any actions creating the appearance of violating the law or the Standards of Ethical Conduct for Federal Employees – 5 C.F.R. § 2635.101(b)(14).

III. GIFTS FROM OUTSIDE SOURCES

* As of October 2016, Office of Government Ethics (OGE) revisions to 5 C.F.R. § 2635, Subpart B are complete and will be published in the Federal Register by the end of CY2016. The revisions emphasize more explicit consideration of whether acceptance of a gift would call into question an employee's integrity or impartiality, and create new requirements for agency designees to document determinations in writing. Significant changes are indicated in the text below in red font. Attorneys should determine and reference the regulation in effect at the time of their advice.

A. General Punitive Prohibition on Gifts from Outside Sources. An employee shall not solicit or accept, directly or indirectly, a gift from a prohibited source or given because of the employee's official position. 5 C.F.R. § 2635.202.

1. "Prohibited Source" means any person or entity that:
 - a. Is **seeking official action** by the employee's agency;
 - b. **Does or seeks to do business** with the employee's agency;
 - c. Is **regulated** by the employee's agency;
 - d. Has interests that may be substantially **affected by performance or nonperformance of the employee's official duties**; or
 - e. Is an **organization a majority of whose members** fit into one or more of these categories. 5 C.F.R. § 2635.203(d).

See 5 C.F.R. § 3601.102(a) for listing of designated separate agencies for purposes of gift rules under 5 C.F.R. 2635 Subpart B. See DoD \$25K contractor list for FY 2015
http://www.dod.mil/dodgc/defense_ethics/

A person does not become a prohibited source merely because of the offer of a gift.

2. "Indirect Gifts" include gifts:

- a. Given with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative, **or a member of the employee's household** because of that person's relationship to the employee; or
 - b. Given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee. 5 C.F.R. § 2635.203(f). **[OGE's 2016 changes will add "...except the employee has not indirectly solicited or accepted a gift by the raising of funds or other support for a charitable organization if done in accordance with § 2635.808." (Fundraising Activities)]**
3. The test for "official position" is whether the gift would have been solicited, offered, or given had the employee not held the status, authority, or duties associated with his federal position. 5 C.F.R. § 2635.203(e).
 4. Executive Order 13490, Jan. 21, 2009, requires every full-time, political appointee appointed on or after January 20, 2009 to sign an Ethics Pledge.
 - a. See OGE DAEOgram DO-09-003, Jan. 22, 2009, New Ethics Pledge,
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/912EE96BCFEC4A0185257E96005FBB85/\\$FILE/DO-09-003.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/912EE96BCFEC4A0185257E96005FBB85/$FILE/DO-09-003.pdf?open)
 - b. See Summary of Obligations Under the Ethics Pledge, Executive Order 13490 (January 26, 2010),
http://www.dod.mil/dodgc/defense_ethics/resource_library/eo_13490_pledge_handout.pdf
 - c. See OGE DAEOgram DO-09-007, Feb. 11, 2009, "Lobbyist Gift Ban"
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/3BB000F6B9C1309A85257E96005FBB7C/\\$FILE/DO-09-007.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/3BB000F6B9C1309A85257E96005FBB7C/$FILE/DO-09-007.pdf?open)

- d. Political appointees who were appointed after January 20, 2009 must commit that they will not accept gifts or gratuities from registered lobbyists or lobbying organizations (subject only to a limited number of exceptions provided in the OGE Standards of Ethical Conduct, as well as other exceptions that OGE may authorize in the future for situations that do not implicate the purpose of the gift ban).
 - (1) Appointees are defined as every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. **It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.**
 - (2) “Registered lobbyist” is any individual registered with the Clerk of the House of Representatives and the Secretary of the Senate. Generally this will not include media organizations or not-for-profit entities exempt from taxation under 26 U.S.C. § 501(c)(3).

B. Practical Approach. Three-part analysis:

- 1. Is the item actually a gift? The term "gift" is broadly defined and includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, and lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement (5 C.F.R. § 2635.203(b)). It does not include the following items (**exclusions**):
 - a. Modest items of food and **non-alcoholic** refreshments, such as soft drinks, coffee and donuts when offered other than as part of a meal;

- b. Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation, http://www.dod.mil/dodgc/defense_ethics/resource_library/presentation_gifts.pdf; [OGE's 2016 revision will change "solely" to "primarily" for presentation.]

- c. Rewards and prizes in contests open to the public. Contest must be "open to the public" and employee's entry into the contest must not be part of his/her official duties.
 - (1) See OGE DAEOGRAM DO-99-07 (April 26, 1999). This explains that "open to the public" means that there can be no cost or fee (such as a conference fee) to be eligible to win the prize;
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/FB68775F8E280FBF85257E96005FBCFC/\\$FILE/6897dc6635bc4c6fa80e57d8d0c591dc2.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/FB68775F8E280FBF85257E96005FBCFC/$FILE/6897dc6635bc4c6fa80e57d8d0c591dc2.pdf?open)

- d. Commercial discounts available to the general public or to all Government or military personnel, whether or not restricted by geography. Would not apply to discounts to subgroups based on rank, position or organization. The exception in 5 C.F.R. § 2635.204(c)(2)(iii) may apply.
 - (1) See OGE DAEOGRAM DO-99-001 (January 5, 1999) for detailed discussion.
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/2DC58902B6AA552F85257E96005FBD5D/\\$FILE/DO-99-001.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/2DC58902B6AA552F85257E96005FBD5D/$FILE/DO-99-001.pdf?open)

- e. Loans from banks and other financial institutions (entities in the business of loaning money) on terms generally available to the public;

- f. Pensions from continued participation in employee benefits plan maintained by a current or former employer;

- g. Anything paid for by the Government or secured by the Government under Government contract;

PRACTICE TIP: Examine the contract type (Cost or Fixed Price) and whether the item secured by the Government causes additional costs under the contract. Government should not procure items in order to avoid gift rules. “Agencies are responsible for ensuring that such arrangements are otherwise appropriate under applicable law, including their authorizing statutes, procurement law, and principles prohibiting unauthorized augmentation of appropriations.” See OGE DAEOGRAM DO-99-001 (January 5, 1999).

- h. Anything for which the employee pays market value (i.e., retail cost employee would incur to purchase the gift);

PRACTICE TIP: Reliable retail websites (e.g., department store web sites and commercial merchandise catalogs) may be used to establish market value. Private or membership clubs, limited access purchases, or on-line auction sites should not be used to establish market value.

- (1) **For Skyboxes or private suites:** “Market value” is computed as ticket price for the most expensive publicly available ticket to the event plus the value of food, parking, and other tangible benefits provided in connection with the gift of attendance. OGE DAEOGRAM, DO-07-003 (February 9, 2007)
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/D4E583878DA5D27085257E96005FBDE0/\\$FILE/360e646e374e4e96b7fcf40a895d397b2.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/D4E583878DA5D27085257E96005FBDE0/$FILE/360e646e374e4e96b7fcf40a895d397b2.pdf?open)
- (2) **No fee events:** Employees should aggregate the market value of any food, beverages, entertainment, or other tangible benefit offered to attendees in connection with the event, but need not consider the cost incurred by the sponsor to rent the venue where the event is held. In the alternative, an employee may elect to rely on a per-person cost estimate provided by the sponsor of the event, unless the estimate is implausible or would be inconsistent with a fair value estimate. See OGE LA-15-05, May 5, 2015,
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/0F915259E9DD9F6B85257E96005FBF16/\\$FILE/a7cc751a93294643b172464afce828b81.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/0F915259E9DD9F6B85257E96005FBF16/$FILE/a7cc751a93294643b172464afce828b81.pdf?open)

- i. Anything accepted by the Government in accordance with agency gift acceptance statutes. Examples include:
 - (1) Voluntary Services – 10 U.S.C. § 1588.
 - (2) General Gift Funds – 10 U.S.C. § 2601.
 - (3) Fellowships, Scholarships, or Grants – 10 U.S.C. § 2603.
 - (4) Gifts for Defense Dependent Schools – 10 U.S.C. § 2605.
 - (5) Contributions to Defense Programs – 10 U.S.C. § 2608.
 - (6) Competitions of Excellence: Acceptance of Monetary Awards – 10 U.S.C. § 2610.
 - (7) Gifts of Travel – 31 U.S.C. § 1353.
 - (8) Army Specific Gift Statutes:
 - Gifts to United States Military Academy – 10 U.S.C. § 4356.
 - (9) Navy Specific Gift Statutes:
 - (a) Gifts, Bequests, and Loans of Property: acceptance for benefit and use of Naval Academy – 10 U.S.C. § 6973.
 - (b) United States Naval Academy Museum Fund – 10 U.S.C. § 6974.
 - (c) Gifts to Vessels – 10 U.S.C. § 7221.

(d) Gifts for Welfare of Enlisted Members – 10 U.S.C. § 7220.

(10) Air Force Specific Gift Statutes: None.

j. **Free attendance** to an event provided by the event sponsor *to an employee assigned to present information on behalf of the agency*. May also include an accompanying employee deemed essential to the presenting employee's participation. May also include unsolicited offer of free attendance to spouse or guest of the presenting employee, provided others in attendance will generally be accompanied by a spouse or guest and the agency designee has authorized the presenting employee to accept. [OGE's 2016 revision will change what was formerly the 204(g)(1) exception to an exclusion from the gift definition, and incorporates OGE opinions about accompanying employees. The new citation will be 5 C.F.R. § 2635.203(b)(8)]

2. Does an exception apply? Common **exceptions** (5 C.F.R. § 2635.204) when an employee may accept a gift:

a. **Gifts of \$20 or Less (5 C.F.R. § 2635.204(a))**. Unsolicited gifts with a market value of \$20 or less per source, per occasion, so long as the total value of all gifts received from a single source during a calendar year does not exceed \$50. **Does not apply to gifts of cash or investment interests (e.g., stocks or bonds)**.

See OGE LA-15-04, Apr. 30, 2015, "Treatment of Gift Cards under the \$20 De Minimus Gift Exception,"

[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/E72454B5D609228785257E96005FBF15/\\$FILE/LA-15-04.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/E72454B5D609228785257E96005FBF15/$FILE/LA-15-04.pdf?open)

PRACTICE TIP: Employees may decline gifts to keep aggregate value at \$20 or less, but may not pay differential over \$20 to retain gift(s) – No "buy down." Applies to both \$20 per occasion and \$50 per calendar year limits.

- b. **Gifts Based on a Personal Relationship (5 C.F.R. § 2635.204(b)).** Gifts based on a personal relationship, such as a family relationship or personal friendship rather than the position of the employee;

PRACTICE TIP: Relevant factors to consider in making the determination include history of the relationship and whether the family member or friend personally pays for the gift. Also look at the occasion where the gift is presented. For example, Commanding General is personal friends with contractor Program Manager. A “personal” gift given during an official presentation may not satisfy the exception.

- c. **Discounts and Similar Benefits (5 C.F.R. § 2635.204(c)).** In addition to those opportunities and benefits excluded from the definition of a gift by 5 C.F.R. § 2635.203(b)(4), employees may accept:

- (1) Reduced membership or other fees in organization activities offered to all Government employees or all military personnel by professional organizations if the only restrictions on membership relate to professional qualifications (e.g., ABA offers discount membership fee to all Government attorneys);
- (2) Opportunities and benefits, including favorable rates and commercial discounts:
 - (i) Offered to members of a group or class in which membership is unrelated to Government employment;
 - (ii) Offered to members of an organization, such as an agency credit union, in which membership is related to Government employment if the same offer is broadly available to large segments of the public through organizations of similar size;

(iii) Offered by a person who is not a prohibited source to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of type of official responsibility or on a basis that favors those of higher rank or rate of pay;

- (3) See for extensive discussion and examples: OGE DAEOGRAM DO-99-001 (January 5, 1999)
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/2DC58902B6AA552F85257E96005FBD5D/\\$FILE/DO-99-001.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/2DC58902B6AA552F85257E96005FBD5D/$FILE/DO-99-001.pdf?open)

d. **Awards and Honorary Degrees (5 C.F.R. § 2635.204(d)).**

- (1) Awards. Employees may accept gifts that are a bona fide award or incident to a bona fide award in recognition for meritorious public service by a person who does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Awards of cash or investment interests of any amount, or awards with an aggregate value (including any item incident to the award, other than free attendance at the presentation event) in excess of \$200 require a written determination from agency ethics official that the award is part of an established program of recognition made on a regular basis pursuant to written standards.
- (2) Honorary Degrees. Employees may accept an honorary degree from an institution of higher education as defined at 20 U.S.C. § 1001 with agency ethics official determination that timing would not cause reasonable person to question employee's impartiality in a matter affecting the awarding institution.

PRACTICE TIP: If the degree is from a foreign institution, ethics counselors should determine whether the institution is tied to the foreign government and whether the Emoluments Clause of the Constitution would prohibit, or the Foreign Gifts and Decorations Act (FGDA) would allow, acceptance. The Emoluments Clause and FGDA are discussed in more detail below.

- (3) Presentation events. However, OGE’s 2016 revisions will add explicit authority to accept an unsolicited offer of free attendance from the presentation event sponsor for the employee’s family. The revisions will also authorize acceptance of travel to and from the event, but the value of travel is added to the value of the award. 5 C.F.R. 204(d)(4).

e. **Gifts Based on Outside Business or Employment Relationships (5 C.F.R. § 2635.204(e)).** An employee may accept meals, lodgings, transportation, and other benefits:

- (1) Resulting from the business activities of the spouse when it is clear that the benefits have not been offered or enhanced because of the employee's official position;
- (2) Resulting from the employee's outside business or employment activities when it is clear that such benefits have not been offered or enhanced because of the employee's status; or
- (3) Customarily provided by a prospective employer in connection with bona fide employment discussion;
- (4) OGE’s 2016 revisions will add “Provided by a former employer to attend a reception or similar event when other former employees have been invited to attend, the invitation and benefits are based on the former employment relationship, and it is clear that such benefits have not been offered or enhanced because of the employee’s official position.” 5 C.F.R. 204(e)(4).

- f. **Gifts in Connection with Political Activities (5 C.F.R. § 2635.204(f)).** An employee who takes an active part in political management or in political campaigns (consistent with the Hatch Act Reform Amendments of 1993), may accept meals, lodgings, transportation, and other benefits in connection with such participation from a political organization described in 26 U.S.C. § 527(e). **OGE’s 2016 revisions will add to the list of acceptable gifts “...including free attendance at events, for the employee and an accompanying spouse or other guests...”**

PRACTICE TIP: Remember that Political Activities of Uniformed Members are regulated by DoD Directive 1344.10, 19 February 2008, and political activities of DoD civilian employees are governed by the Hatch Act (5 U.S.C. §§ 7321-7326), its implementing regulations (5 C.F.R. Parts 733-734), and DoD policy. This topic is discussed in the Deskbook chapter on Political Activities.

- g. **Widely Attended Gatherings and Other Events (5 C.F.R. § 2635.204(g)).**

- (1) **Speaking and Similar Engagements.** An employee assigned in his official capacity to participate as a speaker, panel member, or to otherwise provide information on behalf of the agency at an event may accept free attendance at the event on the day of his presentation from the sponsor of the event. Free attendance under these circumstances is considered to be a customary and necessary part of the employee’s performance and does not involve a gift to the employee or the agency. See OGE LA-12-05, Sep. 7, 2012, “Speaking and Similar Engagements Involving the Presentation of Information on Behalf of the Agency,” [https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/653EF001057603EC85257E96005FBEF1/\\$FILE/a96ace10f6134bd492d4bcd0b94198832.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/653EF001057603EC85257E96005FBEF1/$FILE/a96ace10f6134bd492d4bcd0b94198832.pdf?open)
- (a) Since the employee’s participation in the event is part of his official duties, the agency may pay the employee’s travel expenses.

- (b) Free attendance may also be accepted for personnel deemed essential by the agency in support of the official agency presenter, e.g., security detail. See OGE DAEogram DO-10-003, Feb. 18, 2010, “Attendance by Staff Accompanying Official Speakers,” [https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/275A17D2010A490D85257E96005FBEA3/\\$FILE/DO-10-003.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/275A17D2010A490D85257E96005FBEA3/$FILE/DO-10-003.pdf?open)

Note: The 2016 OGE revisions will make the *exception* in 204(g)(1) an *exclusion* from the definition of a gift. The new citation will be 5 C.F.R. § 2635.203(b)(8).

- (2) Widely Attended Gatherings. An employee may accept free attendance from the sponsor of a "widely attended gathering" if the agency determines that employee's attendance is in the interest of the agency because it will further agency programs or operations (employee attends in a personal capacity). Free attendance may be accepted from a person other than the sponsor of a "widely attended gathering" if more than 100 people will be in attendance and the cost is \$375 or less.
- (a) “A gathering 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, for example, if it is open to members from throughout the interested industry or profession or if those in attendance represent a range of persons interested in a given matter.”
- (i) See OGE DAEOGRAM DO-07-047, Dec. 5, 2007, for a detailed discussion [https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/E261E1D2EA10003F85257E96005FBDFB/\\$FILE/4defd577ce2f46e381ac5ded0146cc234.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/E261E1D2EA10003F85257E96005FBDFB/$FILE/4defd577ce2f46e381ac5ded0146cc234.pdf?open)

- (3) "Free Attendance" may include waiver of all or part of a conference fee, the provision of food, refreshments, entertainment, instruction, and material furnished to all attendees as an integral part of the event. It does not include travel or lodging expenses.
- (a) Gift bags delivered at the end of an event as guests are departing are rarely an "integral part of the event" and therefore may not be accepted as part of free attendance. See SOCO Advisory 14-02, Nov. 12, 2014.
http://www.dod.mil/dodgc/defense_ethics/
- (b) Meals and receptions that are open only to attendees who pay an additional fee are deemed separate from (collateral) the original event and free attendance may not be accepted unless the collateral event independently qualifies as a widely attended gathering or another gift exception applies. See OGE LA-15-02, Apr. 6, 2015,
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/29F8D6066343DD5785257E96005FBF12/\\$FILE/LA-15-02.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/29F8D6066343DD5785257E96005FBF12/$FILE/LA-15-02.pdf?open)

PRACTICE TIP: When an employee is not speaking or otherwise participating in the event, and accepts free attendance at a widely attended gathering, such attendance must be in a leave or other authorized absence status. The employee may not attend while on or as part of his/her official duties. Moreover, the agency may not expend appropriated funds to send personnel to widely attended gathering events. Use of a government vehicle to attend such an event would not be authorized.

Note: The 2016 OGE revisions will require a written determination by the agency designee (regardless of whether the offeror has interests that may be substantially affected by the performance / nonperformance of the employee's duties). The authorization for a spouse or other guest to accept free attendance must also be in writing. OGE's responses to comments during the rulemaking process indicate the agency is responsible for retaining copies of WAG determinations. Ethics counselors will have discretion as to form (e.g. email) and substance (a simple "I have considered..." may be sufficient). In addition to the current rule's list of factors relevant to determining agency interest, the revised rule instructs the agency designee to also consider whether persons with views or interests that differ from those of the donor will also have opportunities for access to Government officials.

- h. **Social Invitations from Other than Prohibited Sources (5 C.F.R. § 2635.204(h)).** An individual may accept food, refreshments, and entertainment (not travel or lodging) at a social event attended by several persons where the invitation is from a person who is not a prohibited source and where no one in attendance is charged a fee to attend the event.

Note: If either the event sponsor or offeror is not an individual, the 2016 OGE revision will require a written determination by the agency designee that attendance by the employee would not cause a reasonable person to question the employee's integrity or impartiality. The new regulation will allow the employee to also accept the invitation for an accompanying spouse or other guests.

- i. **Meals, Refreshments, and Entertainment in Foreign Areas (5 C.F.R. § 2635.204(i)).** Employees assigned to duty in, or on official travel to, a foreign area may accept food, refreshments, and entertainment in the course of a breakfast, luncheon, dinner, or other meeting or event provided:

- (1) The market value does not exceed the per diem for the foreign area (This includes the complete per diem, not merely that portion of the per diem for food.);

- (2) There is participation in the meeting or event by non-US citizens or representatives of foreign governments or entities;
- (3) Attendance at the meeting or event is part of the employee's official duties; and
- (4) The gift of meals or entertainment is from a person other than a foreign government.

j. **Gifts Authorized by Supplemental Agency Regulation (5 C.F.R. § 2635.204(k)).** An employee may accept a gift, the acceptance of which, is authorized by supplemental agency regulation.

- (1) Unsolicited gifts of free attendance for DoD employees (and spouses) at events sponsored by state or local governments or non-profit, tax-exempt civic organizations, where the agency has determined its community relations interests are served by attending the event (JER 2-202.a);
- (2) Educational scholarships and grants for DoD employees or their dependents (JER 2-202.b).

k. **Gifts Accepted Under Specific Statutory Authority (5 C.F.R. § 2635.204(l)).**

- (1) 10 U.S.C. § 2601a - Direct acceptance of gifts by members of the Department of Defense and Coast Guard employees and their families, as implemented by DoD 7000.14-R, Vol. 12, Chapter 34 (See Section XI below);
- (2) 5 U.S.C. § 7342 – Foreign Gifts and Decorations (See Section V below).

1. The 2016 OGE revisions will provide an additional exception allowing employees to accept unsolicited gifts of informational materials. Gifts of informational materials that exceed \$100 from the same person in a calendar year may only be accepted after an agency designee makes a written determination that acceptance would not cause a reasonable person to question the employee's integrity or impartiality.

m. **Additional DoD Gift Exceptions**

- (1) SECDEF Memo, Waiver of Application of the Standards of Conduct Prohibition on Acceptance of Gifts from Outside Sources for Enlisted Personnel, E-6 and Below, for the Limited Purpose of Gift Acceptance from Charitable and Veterans Service Tax-Exempt Organizations, May 16, 2013 http://www.dod.mil/dodgc/defense_ethics/resource_library/gift_exception_waiver_for_enlisted_members.pdf

3. Would using the exception undermine Government integrity?

- a. Appearance concerns. If a gift falls within one of the exceptions, acceptance of the gift will not violate any of the basic obligations of public service set forth in 5 C.F.R. § 2635.101(b), including the principle that employees shall avoid creating even the "appearance" of an ethical violation. However, it is never inappropriate and frequently prudent to decline a gift offered by a prohibited source or given because of one's official position (5 C.F.R. § 2635.204)).

- b. **Considerations for declining otherwise permissible gifts** (New 5 C.F.R. § 2635.201(b)) . An employee who is considering whether acceptance of a gift would lead a reasonable person with knowledge of relevant facts to question his/her integrity or impartiality may consider, among other relevant factors, whether:

- (1) The gift has high market value;
- (2) The timing of the gift creates the appearance that the donor is seeking to influence an official action;

- (3) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; and
- (4) Acceptance of the gift would provide the donor with significantly disproportionate access.

c. ***Notwithstanding the applicability of any exception, 5 C.F.R. § 2635.202(c) provides that an employee may not:***

- (1) Use his official position to solicit or coerce the offering of a gift;
- (2) Accept a gift in exchange for being influenced in the performance of official action (bribe or illegal gratuity);
See OGE Memorandum DO-99-024, May 19, 1999 ([United States v. Sun Diamond Growers](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/EB8F97E051E8A65D85257E96005FBD65/$FILE/do-99-024.pdf?open)
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/EB8F97E051E8A65D85257E96005FBD65/\\$FILE/do-99-024.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/EB8F97E051E8A65D85257E96005FBD65/$FILE/do-99-024.pdf?open)
- (3) Accept a gift in violation of statute (e.g., 18 U.S.C. § 209).
Note: Gifts accepted in conformity with the Standards (5 C.F.R. §§ 2635.203(b), 2635.204, or 2635.304) fall outside the scope of 18 § U.S.C. 209 (See Attachment to DAEOgram, DO-02-016, Jul. 2, 2002, Summary of the Restriction on Supplementation of Salary)
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/FD6CFFC6A2D8006085257E96005FBD6AF/\\$FILE/DO-02-016.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/FD6CFFC6A2D8006085257E96005FBD6AF/$FILE/DO-02-016.pdf?open); or
- (4) Accept gifts from the same or different sources so frequently that a reasonable person would conclude that the employee is using his public office for private gain;

Note: The 2016 OGE revisions will address limitations in § 2635.205 and add two limitations explicitly, that an employee may not accept a gift in violation of any Executive Order (e.g. the Ethics Pledge) or when specifically prohibited by a supplemental agency regulation issued with OGE's concurrence (e.g. DoD's regulation at 5 C.F.R. § 3601).

C. Handling Improper Gifts from Outside Sources (5 C.F.R. § 2635.205). When an employee cannot accept a gift, the employee shall:

1. Refuse the gift (if possible) and diplomatically explain the restrictions on acceptance of gifts by Federal employees.
2. Return the gift or pay the donor its fair market value. An agency may authorize disposition or return of the gift at Government expense.
3. Perishable items may be donated to charity, shared within the office, or destroyed with the approval of the supervisor or ethics counselor.

Note: The 2016 OGE revisions will address proper disposition in § 2635.206 and provide a new option allowing employees to dispose of gifts with a market value of less than \$100 by destroying the item(s). Disposition must be accomplished promptly, and the regulation will encourage employees to document the disposition.

D. Reporting Gifts from Outside Sources. Employees, who file financial disclosure reports, must report travel-related cash reimbursements or other gifts totaling more than \$375 from any one source received by the employee, spouse, or dependent children during the reporting period on:

1. OGE Form 450 (Confidential Financial Disclosure Report), Part V. This requirement does not apply to New Entrants or Special Government Employees.
2. OGE Form 278e (Public Financial Disclosure Report), Part 9. This requirement does not apply to New Entrants.

IV. FOREIGN GIFTS

- A. U.S. Constitution (Art. I, Sec. 9, Cl. 8) provides:

No Title of Nobility shall be granted by the United States: And no person holding any Office of Profit or Trust under them, shall, without the consent of Congress, accept any present, Emolument, Office or Title from a King, Prince or foreign state.

- a. See SOCO White Paper: Application of Emoluments Clause to DoD Civilian Employees and Military Personnel, March 2013
http://www.dod.mil/dodgc/defense_ethics/resource_library/emoluments_clause_applications.pdf
- b. See SOCO Emoluments Clause Summary
http://www.dod.mil/dodgc/defense_ethics/resource_library/summary_emoluments_clause_restrictions.pdf

- B. 5 U.S.C. § 7342, Receipt and Disposition of Foreign Gifts and Decorations, provides:

1. Employees may accept a gift (or combination of gifts) of "minimal value," i.e., having retail value in the United States at the time of acceptance of \$375 or less, tendered and received as a souvenir or mark of courtesy from a foreign government. "Minimum value" is established by GSA and adjusted every three years based on the Consumer Price Index.
<http://www.gpo.gov/fdsys/pkg/FR-2014-04-02/pdf/2014-07369.pdf>
2. See implementing DoD guidance at DoDD 1005.13 (Gifts and Decorations from Foreign Governments), Feb. 19, 2002.
3. Gifts exceeding "minimum value" may be accepted when the gift is in the nature of an educational scholarship or medical treatment or when it appears that refusal is likely to cause offense or embarrassment or adversely affect foreign relations.
 - a. Such gifts are accepted on behalf of the United States and, upon acceptance, become the property of the United States.

- b. Such gifts must be reported to and deposited with the agency for official use or disposal (or return to donor or forward to GSA for utilization decision or disposal). For Army, report to and deposit gifts with Office of the Administrative Assistant to the Secretary of the Army (Army Gift Program Coordinator), 105 Army Pentagon, Washington D.C. 20310-0105; telephone: 703-697-8440. For Air Force, report the gifts IAW Air Force Instruction 51-901, Gifts from Foreign Governments, 16 Feb 05. For Navy, report to and deposit gifts in accordance with SECNAVINST 1650.1H, Chapter 9.
- c. Gifts retained by the DoD component are not to be used for the benefit or personal use of any individual employee (includes a spouse or dependent). DoDD 1005.13, E3.1.1.1.2. See SOCO Advisory 14-02, Nov. 12, 2014.
http://www.dod.mil/dodgc/defense_ethics/advisories/2014_advisories/adv_1402.htm

4. Calculation of "minimal value".

- a. Aggregate the value of gifts at the same presentation from the same source, i.e., same level of government (city, state, or national). Note that under DoDD 1005.13, para. 4.6, if more than one gift is given from the same source at the same presentation, they shall be considered a single gift and the aggregate value shall be used to determine whether the gift exceeds minimal value.
- b. Do not aggregate the value of gifts from the same source at different presentations (even if on the same day) or different sources at the same presentation.
- c. A gift from the spouse of a foreign official is deemed to be a gift from the foreign official/government.
- d. A gift to employee's spouse is deemed to be a gift to the employee.

C. Gifts of Travel from Foreign Governments. See Section VII below.

V. GIFTS BETWEEN EMPLOYEES

- A. General Punitive Rules (5 C.F.R. § 2635.302(a)). An employee shall not, directly or indirectly:
1. Give a gift or make a donation toward a gift for an official superior or solicit a contribution from another employee for a gift to either his own official superior or that of another; or
 2. Accept a gift from a lower-paid employee, unless the donor and recipient have a personal relationship and are not in an official superior-subordinate relationship.
 3. “Official superior” means any other employee, including but not limited to an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee or those of any other official superior of the employee, i.e., anyone in the employee’s chain of command. 5 C.F.R. § 2635.303(d).
- B. Exceptions (5 C.F.R. § 2635.304).
1. Unsolicited gifts may be given on an **occasional basis** (not routine), including traditional gift-giving occasions, such as birthdays and holidays. This includes:
 - a. Items (no cash) with an aggregate value of \$10 or less per occasion;
 - b. Items such as food and refreshments that will be shared in the office among several employees;
 - c. Personal hospitality (e.g., meals) at someone's home (of a type and value customarily provided to personal friends); and
 - d. Items in connection with the receipt of personal hospitality (of a type and value given on such occasions).

2. A subordinate may give a gift appropriate to the occasion or donate toward a gift to an official superior, and an official superior may accept a gift on **special infrequent occasions** such as:
 - a. In recognition of an infrequent event of personal significance such as marriage, illness, or birth or adoption of a child (would not include a promotion); or
 - b. Upon an occasion that terminates the official superior - subordinate relationship such as transfer, resignation, or retirement.
3. Group gifts on special infrequent occasions are limited to \$300 in value per donating group (JER 2-203.a).
 - a. A donating group is comprised of all contributors to that group gift.
 - b. If one employee contributes to two or more donating groups, then the value of the gifts from groups with a common contributor are aggregated for the purposes of the \$300 limit (JER 2-203.a(2)).

PRACTICE TIP: Although not specifically mentioned in JER 2-203, the \$300 limit in JER 2-203(a) is also subject to the no “buy-down” provisions.

PRACTICE TIP: These gift rules apply only to Federal employees. Such group gifts may not include contributions from parties who are not Federal employees, including contractor personnel who may be working in the same office.

PRACTICE TIP: The so-called “Perry Exception” should no longer be invoked as an exception to the \$300 limit.

4. Solicitations for gifts to an official superior may not exceed \$10 (although employees are free to give more than \$10) and must be completely voluntary (given freely, without pressure or coercion). JER 2-203.b.

VI. TRAVEL PAYMENTS FOR OFFICIAL TRAVEL FROM NON-FEDERAL SOURCES (31 U.S.C. § 1353)

A. Implementing regulations.

1. 41 C.F.R. Chapter 304, a GSA regulation that applies to Executive Branch employees.
2. JER paras. 4-100 & 4-101, which apply to DoD military members and civilian employees.

B. Conditions for acceptance. An employee may accept, on behalf of his or her agency, a travel payment from a non-Federal source to attend a meeting or similar function. 41 C.F.R. § 304-5.1. The DoD Component DAEO or designee must concur with the acceptance of official travel benefits. JER 4-101.c. **All** of the following conditions must be present:

1. The gift is in connection with a meeting or similar function relating to the official duties of the employee. (Note: Travel while on pass or in a permissive TDY status is not considered to be official duty for purposes of accepting a gift of travel under 31 U.S.C. § 1353). The function will take place away from the employee's permanent duty station (i.e., the employee must be in a travel status);
2. The travel is determined to be in the interest of the Government;
3. The non-Federal source is not disqualified due to a conflict of interest; and
4. Acceptance of the gift is approved before the travel. 41 C.F.R. § 304-3.12; JER para. 4-100.c(2). **Acceptance may be authorized after the travel has begun if the above criteria are met and the following additional conditions have been satisfied.** 41 C.F.R. § 304-3.13:
 - a. If the agency has already authorized acceptance of payment for some of the travel expenses for that meeting from a non-Federal source, then personnel may accept on behalf of their agency, payment for any of the additional travel expense from the same non-Federal source as long as –

- (1) The expenses paid or provided in kind are comparable in value to those offered to or purchased by other similarly situated meeting attendees; and
- (2) The employee's agency did not decline to accept payment for those particular expenses in advance of the travel.

PRACTICE TIP: Similarly situated meeting attendees may be defined by functions at the event. For examples, speakers may be offered a room with work areas while attendees are offered rooms without work areas.

- b. If the employee's agency did not authorize acceptance of any payment from a non-Federal source prior to the travel, then –
 - (1) Personnel may accept, on behalf of their agency, payment from a non-Federal source of the following expenses:
 - (a) Only the types of travel expenses that are authorized by the travel authorization; and
 - (b) Only travel expenses that are within the maximum allowances stated in the travel orders (e.g., if the travel orders state that personnel are authorized to incur lodging expenses up to \$100 a night, personnel may not accept payment from the non-federal source for a \$200 per night hotel room);
 - (2) Personnel must request their agency's authorization for acceptance from the non-Federal source within **7 working days** after the trip ends; and
 - (3) If the agency does not authorize acceptance from the non-Federal source, the agency must either –

- (a) Reimburse the non-Federal source for the reasonable approximation of the market value of the benefit provided, not to exceed the maximum allowance stated in the travel orders; or
- (b) Require the employee to reimburse the non-Federal source that amount and allow the employee to claim the amount on the travel claim for the trip.

C. "Meeting or similar function" means a conference, seminar, speaking engagement, symposium, training course, or similar event, and is sponsored or co-sponsored by a non-Federal source. 41 C.F.R. § 304-2.1. A "meeting or similar function" need not be widely attended and includes, but is not limited to:

- 1. An event at which the employee will participate as a speaker or panel member focusing on his or her official duties or on the policies, programs or operations of the agency;
- 2. A conference, convention, seminar, symposium, or similar event the primary purpose of which is to receive training (other than promotional vendor training), or to present or exchange substantive information concerning a subject of mutual interest to a number of parties; or
- 3. An event at which the employee will receive an award or honorary degree, which is in recognition of meritorious public service that is related to the employee's official duties, and which may be accepted by the employee consistent with the applicable standards of conduct regulation.

D. "Meeting or similar function" does **not** include:

- 1. A meeting or other event required to carry out an agency's statutory or regulatory functions (i.e., a function essential to the agency's mission), such as investigations, inspections, audits, site visits, negotiations, or litigation; or
- 2. Promotional vendor training or other meetings held for the primary purpose of marketing the non-Federal source's products or services.

- E. "Non-Federal source" means any person or entity other than the Government of the United States. The term includes individuals, private or commercial entities, not-for-profit organizations, international or multinational organizations, and foreign, state, or local governments (including the District of Columbia). 41 C.F.R. § 302-2.1.
- F. "Travel-approving authority" is not defined in the JER. However, agencies must ensure that the travel-approving authorities are at as high an administrative level as practical to ensure adequate consideration and review of the circumstances surrounding the offer and acceptance of the payment. 41 C.F.R. § 304-5.2. In most organizations, the "travel-approving authority" is the person authorized to sign travel orders.
1. The Secretary of the Army Travel Policy dated 25 January 2007 authorizes heads of an Army command or organizations to delegate approval authority in writing to accept travel payments from a non-Federal source to a division chief under their supervision serving in the grade of Colonel or the civilian equivalent.
- G. Travel on commercial airlines. If the non-Federal source offers the employee a gift of travel on a commercial airline, the employee may accept travel in coach class or in premium class other than first class (e.g., business class). However, the employee may not accept a gift of travel in first class, unless the conditions exist that would authorize the Government to purchase a first class airline seat for the employee. 41 C.F.R. § 304-5.5.
- H. Hotels that cost more than the Government lodging rate. Sometimes a non-Federal source will offer a gift of lodging in a hotel, and the cost of the hotel is more than the Government lodging rate for the city where the hotel is located. In that case, the employee may accept the gift of lodging only if the accommodations are "comparable in value to that offered to, or purchased by, other similarly situated individuals attending the function." 41 C.F.R. § 304-5.4.
- I. Conflict of interest analysis. A travel payment from a non-Federal source shall not be accepted if the approval official determines that acceptance under the circumstances would cause a reasonable person to question the integrity of the agency's programs or operations. 41 C.F.R. § 304-5.3. The approval official shall be guided by all relevant considerations, including the following:
1. The identity of the non-Federal source;

2. The meeting's purpose;
3. The identity of other expected participants;
4. The nature and sensitivity of any matter pending at the agency affecting the interests of the non-Federal source;
5. The significance of the employee's role in the matter; and
6. The monetary value and character of the travel benefits offered by the non-Federal source.

J. Gifts to spouses. A Federal agency may accept payment from a non-Federal source for an accompanying spouse when the spouse's presence at the meeting or similar function is in the interest of the agency. 41 C.F.R. § 304-3.14. A spouse's presence at an event may be determined to be in the interest of the agency if the spouse will:

1. Support the mission of the agency or substantially assist the employee in carrying out his/her official duties;
2. Attend a ceremony at which the employee will receive an award or honorary degree, which is in recognition of meritorious public service that is related to the employee's official duties, and which may be accepted by the employee consistent with the applicable standards of conduct regulation; or
3. Participate in substantive programs related to the agency's programs or operations. JER 4-100.d; *see also* DoD/GC Memorandum entitled "Spouse Travel Under 31 U.S.C. § 1353," 8 Sep 95.

K. Form of payment. DoD employees, and their spouses, may not accept cash payments on behalf of the Government. Payments shall be in kind, or by check or similar instrument made payable to the agency. 41 C.F.R. § 304-6.1;

- L. Format for obtaining approval. The website of the DoD Standards of Conduct Office (DoD-SOCO) has a Fact Sheet on 31 U.S.C. § 1353, as well as a format for a memorandum that approves the acceptance of travel payments under this law. These items are available at:
http://www.dod.mil/dodgc/defense_ethics/resource_library/1353_dod_factsheet_and_draft_memo.doc
- M. Written report of payments received. If the total value of the travel payments received in connection with an event exceeds \$250, the gift must be reported. 41 C.F.R. § 304-6.4. Standard Form (SF) 326 must be used to make this report. SF 326 is entitled “Semiannual Report of Payments Accepted from a Non-Federal Source.” There is also a Standard Form 326A, which is a Continuation Sheet for the SF 326.
- Federal agencies send the reports to the Office of Government Ethics, which is required to make them available for public inspection and copying. 31 U.S.C. § 1353(d)(1). The report must be received by OGE by May 31 (for the period of October 1 – March 31) and November 30 (for the period of April 1 – September 30). **OGE will look at an agency’s gift of travel reporting procedures and files as part of the agency’s program review.**
- N. Financial disclosure report. Travel payments accepted under this authority are considered gifts to the Federal agency and not to the individual employee. Thus, such payments do not have to be reported on the employee's Public Financial Disclosure Report (OGE Form 278e) or Confidential Financial Disclosure Report (OGE Form 450). 41 C.F.R. § 304-3.17.
- O. Gifts of travel that can be accepted under 31 U.S.C. § 1353 and another gift acceptance authority. “A DoD Component may not accept or approve acceptance of travel benefits from non-Federal sources under any other gift acceptance authority, e.g., 10 U.S.C. § 2601, if 31 U.S.C. § 1353 applies.” JER para. 4-101.a(2).

VII. GIFTS OF TRAVEL FROM FOREIGN GOVERNMENTS

- A. The Foreign Gifts and Decorations Act states, in relevant part:

An employee may accept gifts of travel or expenses for travel taking place entirely outside the United States (such as transportation, food, and lodging) of more than "minimal value" if such acceptance is appropriate, consistent with the interests of the United States, and permitted by the employing agency and any regulations which may be prescribed by the employing agency." 5 U.S.C. § 7342(c)(1)(B)(ii).

- B. "Minimal value" is currently \$375. The Foreign Gifts and Decorations Act states that GSA will revise the definition of "minimal value" every 3 years to reflect changes in the consumer price index. 5 U.S.C. § 7342(a)(5)(A).
<http://www.gpo.gov/fdsys/pkg/FR-2014-04-02/pdf/2014-07369.pdf>
- C. The Foreign Gifts and Decorations Act is implemented by DoD Directive 1005.13, Gifts and Decorations from Foreign Governments, Feb. 19, 2002.
- D. Approval authority. DoDD 1005.13 does not indicate who has authority to accept a gift of travel from a foreign government. Check your agency regulation for guidance on this.
 - 1. Air Force. For Air Force members and employees who are assigned or employed in the continental United States (CONUS), the approval authority is the individual's commander. For Air Force members and employees who are assigned or employed outside CONUS, the approval authority is the commander of the overseas MAJCOM where the individual is located. AFI 51-901, Gifts from Foreign Governments, Feb. 16, 2005, Table 1, Rules 1 & 2.
 - 2. Navy. Per SECNAVINST 1650.1H, para. 920.7, gifts of travel that meet the listed criteria may be accepted by the order issuing authority. Look to SECNAVINST 4001.2J for guidance on gift acceptance procedure for gifts to the Navy. A gift of travel may be accepted as a gift to the Navy if it meets the statutory and regulatory requirements, e.g. a gift of travel to a conference in a member's official capacity. The provisions of SECNAVINST 4001.2J would apply in those scenarios.
- E. Travel entirely outside United States. 5 U.S.C. § 7342 authorizes the acceptance of "travel taking place entirely outside the United States." Check your agency regulations for additional guidance on this issue.

1. Air Force. The Air Force Instruction on gifts from foreign governments creates a minor exception to the requirement that the travel take place entirely outside the U.S. The Instruction states that a gift of travel may be accepted if the travel “[w]ill take place entirely outside the United States, except when travel across the continental United States (CONUS) is necessarily the shortest, least costly or only route available to the destination.” AFI 51-901, para. 4.3.2.1.
2. Navy. The comparable provision for the Department of the Navy, in SECNAVINST 1650.1H, para. 920.7, states that the travel must begin and end outside the United States and “not cross the United States, except when travel across the United States is the shortest, least expensive or only available route to the destination (e.g., Canada or Mexico).”
3. Army. The Secretary of the Army Travel Policy states that travel must begin, end and connect entirely outside of the United States.

VIII. OTHER GIFTS TO THE AGENCY

A. 10 U.S.C. § 2601(a)

1. (a)(1) authorizes the Secretary concerned (including the Secretary of Defense) to “...accept, hold, administer, and spend any gift, devise, or bequest of real, personal property, or money made on the condition that it be used for the benefit, or in connection with, the establishment, operation, or maintenance, of a school, hospital, library, museum, cemetery, or other institution or organization under the jurisdiction of the Secretary.”
2. Gifts of cash or proceeds from the sale of property received under 10 U.S.C. § 2601 shall be deposited into the Treasury of the United States in a General Gift Fund for each Department.
3. Funds deposited into the General Gift Fund will be distributed for the benefit or use of the designated institution or organization, subject to the terms of the gift, devise, or bequest.

4. (a)(2) authorizes the Secretary concerned to accept a gift of services for a military museum program from a nonprofit entity established for the purpose of supporting a military museum program. It also permits the Secretary concerned to solicit gifts of certain personal property for the benefit of a military museum program.

B. 10 U.S.C. § 2601 (b):

1. Authorizes the concerned Secretaries to accept, hold, administer, and spend gifts of real or personal property, money, and **services** on behalf of:
 - a. Members of armed forces (including members performing full-time National Guard duty, who incur a wound, injury, or illness while in the line of duty;
 - b. DoD civilian employees who incur a wound, injury, or illness while in the line of duty;
 - c. Dependents of such members or employees; and
 - d. Survivors of such members who are killed.
2. Prohibits acceptance of gifts of services from foreign governments or international organizations under this authority.
3. Permits acceptance of gifts of property or money from foreign governments or international organizations if gifts are not designated for a specific individual.
4. The authority in § 2601(b) was made permanent by the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181, Sec. 593). Sec. 593 also directs SECDEF to promulgate regulations implementing 10 U.S.C. §§ 2601 and 2608 to prohibit solicitation under certain conditions. Current implementing regulation prohibits solicitation.
5. Restrictions on acceptance of gifts under 10 U.S.C. § 2601(a) and (b) imposed by amendments in the National Defense Authorization Act for Fiscal Year 2006, P.L. 109-163, Sec. 374.

- a. May not be accepted if gift would violate any prohibition or limitation otherwise applicable.
 - b. May not be accepted if conditions of gift are inconsistent with applicable law or regulations.
 - c. May not be accepted if the Secretary concerned determines that acceptance would reflect unfavorably on the ability of the Department (or employee of the Department or member of the armed forces) to carry out any responsibility or duty in a fair and objective manner.
 - d. May not be accepted if acceptance would compromise the integrity or appearance of integrity of any program of the Department or individual involved in the program.
- C. For purposes of Federal estate, gift, or income taxes, gifts accepted under 10 U.S.C. § 2601, are considered to be gifts to the United States.
- D. Implementing regulation: Volume 12, Chapter 30, of the DoD Financial Management Regulation (FMR), DoD 7000.14-R.
- 1. Reporting requirements.
 - 2. Services report to Defense Finance and Accounting Service (DFAS) offices.
 - 3. DFAS reports to the Under Secretary of Defense (Comptroller) Deputy Chief Financial Officer.
- E. 10 U.S.C. § 2608. Authorizes the Secretary of Defense to accept from any person, foreign government, or international organization any contribution of money or real or personal property (or services provided by a foreign government or international organization) for use by the Department of Defense.
- F. 10 U.S.C. § 974. Subsection (d) authorizes the Secretary concerned to accept contributions of money, personal property or services for the benefit of a military musical unit under the jurisdiction of the Secretary. Implemented by USD(C) memorandum “Gifts to Benefit Military Musical Units” of Mar. 15, 2015.

G. 10 U.S.C. § 1588. Authorizes the Secretary to accept voluntary services but not goods associated with the services.

1. Categories:

- a. Medical services, dental services, nursing services, or other health-care related services.
- b. Voluntary services to be provided for a museum or a natural resources program.
- c. Voluntary services to be provided for programs providing services to members of the armed forces and the families of such members, including the following programs:
 - (A) Family support programs.
 - (B) Child development and youth services programs.
 - (C) Library and education programs.
 - (D) Religious programs.
 - (E) Housing referral programs.
 - (F) Programs providing employment assistance to spouses.
 - (G) Morale, welfare, and recreation programs, to the extent not covered by another subparagraph of this paragraph.
- d. Service as a member of a funeral honors detail.
- e. Legal assistance services.
- f. Service as a proctor for administering the ASVAB (“Armed Services Vocational Aptitude Batter”) to secondary school students.
- g. Translation and interpreter services by persons registered or approved in accordance with the statute.
- h. Voluntary services to support programs of a committee of the Employer Support of the Guard and Reserve.
- i. Voluntary services to facilitate accounting for missing persons.

- j. Voluntary legal support services provided by law students through internship and externship programs approved by the Secretary concerned.
2. Limitations in voluntary services include supervising the employee providing the voluntary service to the same extent as a compensated employee; ensuring that the person providing the service is licensed or credentialed in accordance with applicable law; not placing the person providing services in a policy-making position; and compensating for voluntary services, except for necessary incidental expenses.
3. DoD Guidance: DoDI 1100.21, Voluntary Services in the Department of Defense, Mar. 11, 2002
<http://www.dtic.mil/whs/directives/corres/pdf/110021p.pdf>
4. Navy Guidance: OPNAVINST 5380.1C, Acceptance and Use of Voluntary Services in the Navy, Jan. 7, 2013.
<http://doni.documentservices.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-300%20Manpower%20Personnel%20Support/5380.1C.pdf>

IX. DONATIONS OF FREQUENT FLYER MILES, CREDITS, AND TICKETS

- A. 10 U.S.C. § 2613 authorizes the Secretary of Defense to accept the donation of travel benefits (frequent flier miles, credit for tickets, or tickets issued by a carrier that serves the public):
 1. Eligible purposes:
 - a. To facilitate travel of a member of the armed forces who:
 - (1) Is deployed on active duty outside of the United States away from the permanent duty station of the member in support of a contingency operation; and
 - (2) Is granted leave during such deployment, or

- (3) If the member is recuperating from an injury or illness incurred in line of duty during such a deployment, facilitating the travel of family members of the member to be reunited with the member.

X. GIFTS TO INJURED OR WOUNDED SOLDIERS

- A. 10 U.S.C. § 2601a, “Direct acceptance of gifts by members of the armed forces and Department of Defense and Coast Guard Employees and their families.” Permits covered members of the Armed Forces and covered employees of the DoD (and their family members and survivors) who have incurred combat-related and similar injuries and illnesses to accept gifts from nonprofit organizations, private parties, and other sources outside the DoD under specified circumstances. Covers injuries or illnesses incurred under “other circumstances” warranting analogous treatment such as the Ft. Hood and Washington Navy Yard shootings.
- B. Implemented by DoD 7000.14-R, Volume 12, Chapter 34, “Direct Acceptance of Gifts by Members of the Armed Forces, Department of Defense Employees and Their Families and Survivors,” This addition to the DoD Financial Management Regulation replaces DTM 14-004 and guidance in JER Chapter 3, Section 4.

1. Covered members of the Armed Forces (“covered members”) and covered employees of DoD (“covered employees”), their family members, and their survivors may accept gifts directly from nonprofit organizations, private parties, and other sources outside the DoD when, while performing military duties or performing duties as a civilian employee on or after September 11, 2001, they incur an injury or illness:

- a. As a direct result of armed conflict; while engaged in hazardous service; in the performance of duty under conditions simulating war; or through an instrumentality of war;
- b. In an operation or area designated as a combat operation or combat zone by the Secretary of Defense; or
- c. Under other circumstances determined by the Secretary concerned to warrant treatment similar to members covered by the first criterion of this section. “Other circumstances” would include, but not be limited to, events that result in injury or illness of covered members or employees such as the shootings attacks at Fort Hood in 2009 and the Washington Navy Yard in 2013.

2. The authority in section 2601a is in addition to, and in no way limits, any other statutory or regulatory authority of covered members or employees, their family members, and their survivors to accept gifts from non-federal entities.

3. The authority in section 2601a does **not** apply to gifts from foreign governments or international organizations or their representatives, nor does it apply to gifts that:

- a. Are accepted in return for being influenced in the performance of an official act;
- b. Are solicited or coerced;
- c. Are accepted in violation of any other statute or regulations, including sections 201 and 209 of Title 18, United States Code and Parts 2635 and 3601 of Title 5, Code of Federal Regulations; or
- d. Will reflect adversely on the DoD.

4. The Secretary concerned determines whether an event occurring within his or her jurisdiction meets the criterion of “other circumstances.”

5. The designated agency ethics official shall ensure that an ethics counselor reviews and, when appropriate, approves the acceptance of a gift under this authority. That review and approval includes a determination that:

- a. The gift is not offered in a manner that specifically discriminates among covered members or employees on the basis of type of official responsibility or favors those of higher rank or pay;
- b. The donor does not have interests that may be affected substantially by the performance or nonperformance of the covered member’s or employee’s official duties;
- c. Acceptance would not cause a reasonable person with knowledge of the relevant facts to question the integrity of DoD programs or operations.

6. Definitions:

- a. covered employee. A civilian DoD employee who, while an employee on or after September 11, 2001, incurred an illness or an injury under the criteria in the regulation.
- b. covered member. A Service member who, while performing active duty, full-time National Guard duty, or inactive-duty training on or after September 11, 2001, incurred an injury or illness under the criteria in the regulation.
- c. family members. Parents, siblings, spouse, biological and adopted children, and dependent relatives of covered members or employees.
- d. Secretary concerned. The Secretary of a Military Department who has jurisdiction over the military reservation, installation, ship, aircraft, or facility where an event occurs that meets the criterion of the regulation. The Secretary of Defense, if the event meeting the criterion of the regulation occurs at a DoD location that is not a military reservation, installation, or facility, or where more than one Secretary has jurisdiction.
- e. Survivors. Living family members of a covered member or employee who is killed.

XI. FREQUENT FLYER MILES

- A. National Defense Authorization Act for FY 2002, P.L. 107-107, Section 1116, Dec. 28, 2001. Repealed Section 6008 of the Federal Acquisition Streamlining Act of 1994 (5 U.S.C. § 5702).
- B. Federal employees (military and civilian) who receive promotional items (including frequent flyer miles, upgrades, or access to carrier club or facilities) as a result of using travel or transportation services obtained at Federal Government expense or accepted under 31 U.S.C. § 1353 may retain the promotional items for personal use provided the promotional items are obtained under the same terms as those offered to the general public and at no additional cost to the Federal Government. JTR, Chapter 1, Part D, para. 1300B; see also NDAA FY 2002, P.L. 107-107, Section 1116. Section 1116 applies to promotional items received before, on, or after the effective date of P.L. 107-107.

XII. UPGRADES ON OFFICIAL TRAVEL -- WHEN YOU MAY ACCEPT THEM AS A GIFT

- A. An employee may accept an upgrade to first class (or business class) on official travel in any of the following circumstances.
1. It is an on-the-spot upgrade that is generally available to the public (or at least to all Federal employees or all military members). Examples include an upgrade to a first class airline seat to remedy overcrowding in coach class, and an upgrade to a larger rental car due to a shortage of smaller cars or for customer relations purposes. *See generally*, 5 C.F.R. § 2635.203(b)(4).
 2. The upgrade results from a promotional offer that is realistically available to the general public (or to all Federal employees or all military members). For example: an upgrade to first class that is offered to anyone who opens a frequent flyer account. *See generally*, 5 C.F.R. § 2635.203(b)(4). This includes vouchers or upgrade stickers, which are sometimes provided through the Government contract travel office.
 3. The upgrade is offered to anyone who accumulates enough frequent flyer miles to belong to a club or group (such as the Gold Card Club), even if some or all of the miles are from official travel. *See XIV (A)* below. For example, an employee who flies 50,000 miles or more in a year on an airline can be a member of the airline's Gold Card Club. If the airline gives all of its Gold Card Club members a free upgrade to first class and the employee earns a membership in the Club as a result of 50,000 miles of official travel, the employee may keep the first class upgrade. The upgrade is the property of the employee, who can do with it whatever he or she wants (e.g., use it for official travel, use it for personal travel, give it to his or her spouse, sell it, or donate it to charity). NDAA FY 2002, P.L. 107-107, Section 1116.
- B. However, no upgrade may be accepted if it is provided on the basis of the employee's grade or position. 5 C.F.R. § 2635.202.

XIII. UPGRADES ON OFFICIAL TRAVEL -- BUYING THEM WITH YOUR PERSONAL FUNDS OR PERSONAL FREQUENT FLYER MILES

- A. Upgrades with personal funds. Federal employees may use their personal funds to upgrade to first class or business class while on official travel. See note 1 to 41 CFR § 301-10.123, Upgrades with personal frequent flyer miles. Federal employees may use their personal frequent flyer bonuses to upgrade to first class or business class while on official travel. See note 1 to 41 CFR § 301-10.123. Note: Air Force Instruction 24-101, Passenger Movement, Oct. 19, 2012, para. 3.30, states in relevant part: “Air Force personnel when using their frequent flyer miles to upgrade to business or first class shall not wear a uniform or allow a rank or grade to be associated with an upgrade.” Therefore, if the Air Force member is unable to change into civilian clothes before boarding the aircraft, (s)he should not upgrade.
- B. SECARMY Travel Policy (Army Directive 2007-01), Jan. 25, 2007, section 4.C., allows for wear of uniform in this circumstance.

XIV. THE INVOLUNTARILY BUMP

- A. If a Federal employee is involuntarily bumped from an overbooked flight on official travel, any compensation the employee receives (such as a check or a complimentary ticket) belongs to the Government as liquidated damages. JTR Chapter 1, Part D, para. 1300C.2; Matter of Charles E. Armer, 59 Comp. Gen. 203, 205 (1980); Matter of John B. Currier, 59 Comp. Gen. 95, 96-97 (1979); Matter of Tyrone Brown, Comp. Gen. Dec. B-192841, Feb. 5, 1979; Matter of Chester Sipkin, Comp. Gen. Dec. B-148879, Jul. 20, 1970, affirmed by Comp. Gen. Dec. B-148879, Aug. 28, 1970; 41 Comp. Gen. 806, 807 (1962).
- B. Depositing the check. If a Federal employee is involuntarily bumped from an overbooked flight on official travel and is given a check or cash, the money belongs to the Government. In the absence of a statutory provision that authorizes the money to be deposited to a specific appropriation, the money should be deposited into the miscellaneous receipts account. 41 Comp. Gen. 806, 807 (1962).

XV. VOLUNTEERING TO GIVE UP YOUR SEAT ON AN OVERBOOKED FLIGHT (THE VOLUNTARY BUMP)

- A. If an employee is on official travel, the flight is overbooked, and the airline asks for volunteers to give up their seat and take a later flight, the employee may volunteer, as long as doing so would not interfere with the mission.

- B. The employee may keep any benefits or compensation earned as a result of voluntarily relinquishing his or her seat on an overbooked flight, as long as taking the later flight does not result in any additional cost to the Government, and the delay will not detract from the performance of official business. JTR Chapter 1, Part D, para. 1300C.1; Matter of Charles E. Armer, 59 Comp. Gen. 203, 206 (1980); Matter of Edmundo Rede, Jr., Comp. Gen. Dec. B-196145, Jan. 14, 1980. For example, the employee may not claim extra per diem for the extra time spent away from home because the employee took the later flight. Also, if the employee volunteers to take the later flight, the employee is responsible for any additional travel expenses he or she may incur (extra night in the hotel, additional meals, etc.).

- C. Reporting the compensation. If the employee is required to file either a Public Financial Disclosure Report (OGE Form 278e) or an OGE Form 450 (Confidential Financial Disclosure Report), and if the compensation has a value greater than \$200.00, the employee must report the compensation. The compensation is not a “gift,” since the employee received it in exchange for a service provided, i.e., taking the later flight. Thus, the compensation should be reported as income.

XVI. GIFTS OF TRAVEL IN CONTRACTOR AIRCRAFT AND VEHICLES

- A. If the transportation is duty related (i.e., received in connection with official duty and having the effect of reducing Government expenditures), it is a gift to the agency, not to the individual. The Government generally should not accept such travel unless: (1) it is permitted in the terms of a contract, (2) the Government has agreed to reimburse the contractor, or (3) acceptance was approved in advance under statutory gift authority. However, if the contractor offers travel after working hours, it would generally be a gift to the individual and could potentially be accepted under the \$20/\$50 rule. Office of Government Ethics (OGE) Informal Advisory Letter 98 X 8, Jun. 25, 1998.
[https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/0676C43D9E0052D385257E96005FBE5C/\\$FILE/16505a617d13464ab674e17693ecd0153.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All%20Advisories%20by%20Year/0676C43D9E0052D385257E96005FBE5C/$FILE/16505a617d13464ab674e17693ecd0153.pdf?open)
- B. See Information Paper Travel Alternatives When Visiting Contractor Facilities, November 2003 on the website of the DoD Standards of Conduct Office at:
http://www.dod.mil/dodgc/defense_ethics/dod_oge/travel_contractor_facilities.pdf

CHAPTER I: TRAVEL AND TRANSPORTATION

I. REFERENCES

A. Government/Executive Branch

1. 31 U.S.C. § 1344, Passenger carrier use.
2. 31 U.S.C. § 1349, Adverse personnel actions [for fiscal impropriety or misuse of Government transportation].
3. 10 U.S.C. § 2632, Transportation to and from certain places of employment and on military installations.
4. 10 U.S.C. § 2637, Transportation in certain areas outside the United States.
5. 18 U.S.C. § 641, Public money, property or records.
6. 41 C.F.R. Part 102-5, Home-To-Work Transportation.
7. Federal Acquisition Regulation¹
8. 41 C.F.R. Part 102-34 (Motor Vehicle Management)
9. Office of Management and Budget (OMB) Circular² A-126, Revised, "Improving the Management and Use of Government Aircraft," May 22, 1992.

¹ The FAR is available at <https://www.acquisition.gov/far/>

² OMB Circulars are available in html format at <http://www.whitehouse.gov/OMB/circulars>.

B. Department of Defense³ (and Higher Executive Agencies)

1. DoD Directive 4500.09E, Transportation and Traffic Management, September 11, 2007.
2. DoD Directive 4500.36, Management, Acquisition, and Use of Motor Vehicles, December 11 2012 (incorporating Change 1, October 25, 2013).
3. DoD 4500.36-R, Management, Acquisition, and Use of Motor Vehicles, March 16, 2007.
4. DoD Directive 4500.56, DoD Policy on the Use of Government Aircraft and Air Travel, 14 April 2009.
5. DoD 4515.13-R, Air Transportation Eligibility, November 1994, (w/c3, 9 April 1998). (See also DTM-06-006, 3 February 2006.)
6. DoD Instruction 1015.15, Establishment, Management, and Control of Nonappropriated Fund Instrumentalities and Financial Management of Supporting Resources, 31 October 2007, (w/Administrative c1, 20 March 2008).
7. Administrative Instruction 109, Use of Motor Transportation and Scheduled DoD Shuttle Service in the Pentagon Area, March 31, 2011.

C. Joint Publications

The Joint Travel Regulations (JTR) (Department of Defense Civilian Personnel).⁴
NOTE: Effective 1 October 2014, the Joint Federal Travel Regulations, Vol. 1 and Joint Travel Regulations, Vol. 2 have been consolidated into one volume titled the Joint Travel Regulations.

³ DoD Directives, Instructions, and Regulations can be found at <http://www.dtic.mil/whs/directives/>.

⁴ These publications are available at <http://www.defensetravel.dod.mil/site/travelreg.cfm>.

D. Department of the Army⁵

1. Army Directive 2017-05, Secretary of the Army Policy for Travel by Department of the Army Senior Officials, 18 January 7, 2017, [hereinafter “SecArmy Policy”].
2. AR 58-1, Management, Acquisition, and Use of Administrative Use Motor Vehicles (12 June 2014).
3. AR 95-1, Flight Regulations (1 September 1997) (supersedes and incorporates AR 95-3).
4. AR 360-1, The Army Public Affairs Program, Ch. 10, Public Affairs Travel (25 May 2011).
5. AR 600-8-105, Military Orders (28 October 1994) (authority to issue travel orders).

E. Department of the Air Force

1. AFPD 24-1, Personnel Movement (9 August 2012).
2. AFPD 24-3, Management, Operations, and Use of Transportation Vehicles (9 October 2013).
3. AFI 24-101, Passenger Movement (19 October 2012).
4. AFI 24-301, Vehicle Operations (1 November 2008).

F. Department of the Navy

1. OPNAVINST 4610.8F Transportation and Traffic Management (8 Sep 2009) (implementing DoDD 4500.9E).

⁵ All listed Army regulations are available at <http://www.apd.army.mil/>.

2. OPNAVINST 4630.25D Government Air Transportation Eligibility (20 Jun 2012) (implementing DoD 4515.13-R).
3. OPNAVINST 4650.15B Navy Passenger Travel (15 Dec 2011).

II. APPLYING ETHICAL PRINCIPLES TO TRAVEL

A. Applicable General Principles (Executive Order 12731, 55 FR 42547).

1. *Principle #7:* Public office may not be used for private gain.
2. *Principle #8:* Government employees shall act impartially and shall not give preferential treatment to anyone.
3. *Principle #9:* Employees shall protect and conserve Federal property and shall use it only for authorized activities.
4. *Principle #10:* Employees shall not engage in outside activities that conflict with official Government duties and responsibilities.
5. *Principle #14:* Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards.

B. Travel Applications

It is essential that managers and commanders at all levels prevent misuse of transportation resources as well as the perception of their misuse.

-- DoDD 4500.56

1. Passenger Carriers may only be used for official purposes.

Funds available to a Federal agency, by appropriation or otherwise, may be expended by the Federal agency for the maintenance, operation, or

repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes.

-- 31 U.S.C. § 1344

DoD-owned or -controlled transportation resources shall be used for official purposes only.

-- DoDD 4500.9E

2. Only persons whose transportation benefits the Government should use Government owned or funded transportation assets. Exceptions for other travelers should be granted only when there is no impact on the Government's cost or mission.
3. Government transportation should be scheduled and arranged to be the most cost-effective for the Government, not to maximize the personal convenience of the traveler.

[T]ransportation resources shall be used during peacetime as efficiently as possible. . .

-- DoDD 4500.9E

4. Government transportation rules must be applied uniformly and not to selectively benefit someone solely because of rank or position.

Travel status, distinguished visitor (DV) code or status, grade, or rank alone is not sufficient to justify the use of government aircraft. . .

-- DoDD 4500.56

Transportation by a DoD motor vehicle shall not be provided when the justification is based solely on reasons of rank, position, prestige, or personal convenience.

-- DoD 4500.36-R

5. The Government will use commercial transportation assets to the maximum extent possible/practicable.

DoD transportation requirements shall be met by using the most cost effective commercial transportation resources to the maximum extent practicable unless there is a documented negative critical mission impact.

-- DoDD 4500.9E

III. AIR TRAVEL: GOVERNMENT AIRCRAFT

- A. Travel Categories OMB Circular A-126 establishes 3 categories of travel on Government aircraft.

1. Required Use Travel. Para. E3.2, DoDD 4500.56; Para. 5d., OMB Cir. A126.

- a. Designated travelers who are required to use military aircraft because of one or more of the following:

- (1) their continuous requirement for secure communications;

- (2) for security; or

- (3) for responsive transportation to satisfy exceptional scheduling requirements dictated by frequent short-notice travel, which makes commercial transportation unacceptable.

- b. The following officials are “required use” passengers for both official and unofficial travel:

- (1) Secretary of Defense

- (2) Deputy Secretary of Defense

- (3) Chairman, Joint Chiefs of Staff

- (4) Vice Chairman of the Joint Chiefs of Staff (unofficial travel authorized only when when acting as the Chairman)
 - c. The following officials are “required use” passengers *only for official travel*.
 - (1) The Secretaries of the Military Departments;
 - (2) Chiefs of the Military Services;
 - (3) Commander, International Security Assistance Force – Afghanistan (US Only);
 - (4) Commander, United States Forces Korea ;
 - (5) Commanders of the Combatant Commands;
 - (6) Under Secretary of Defense for Acquisition, Technology, and Logistics;
 - (7) Under Secretary of Defense for Intelligence;
 - (10) Under Secretary of Defense for Policy.
 - d. Within the Army, required use is restricted to only the Secretary of the Army and the Chief of Staff, Army (this is a change from the 2007 SecArmy Travel Policy that made all active four-star general officers “required users”).
2. Other Official Travel. Para. E3.3, DoDD 4500.56; Para. 5c., OMB Cir. 126.
- a. Other official travel is for the conduct of DoD official business.
 - b. Official travel may include travel to give speeches, attend conferences or meetings, make site visits to facilities, and permanent change of station moves.

- c. Commercial air (including charter) is normally used when it is “reasonably available” to effectively fulfill the mission requirement and is able to meet the traveler’s departure and arrival requirements in a 24-hour period.

- d. MilAir may be authorized when:
 - (1) The cost of using MilAir is more cost effective than the cost of commercial air service.

 - (2) Highly unusual circumstances present a clear and present danger or other emergency exists.

 - (3) Other compelling operational considerations make commercial transportation unacceptable.

- e. Determine if the actual cost of using a Government aircraft is the same or less than the cost of using commercial airline or aircraft (including charter) service. Para. 8a., OMB Cir. A-126.
 - (1) Cost Analysis. Para. E3.3.c., DoDD 4500.56.
 - (a) Use flying hour (including any positioning or repositioning flying hours) cost data.

 - (b) Compare it to the total cost for the party to use commercial air travel at available coach fare rates.

 - (c) In determining the commercial costs, the cost of rental cars, the cost of lodging and meals if the party must remain overnight and other such appropriate factors may be considered.

 - (d) By combining separate MilAir requests to fully utilize aircraft, MilAir costs for separate travel requests can be lowered and may compare more favorably with costs associated with commercial air travel. Authorizing officials may provisionally approve a request on the basis that, if consolidated with another request(s), it is determined to be cost-effective.

- (2) When an aircraft has been scheduled to satisfy a mission requirement, secondary use of that aircraft for other official travel does not require a cost comparison.

3. Unofficial Travel. Para. E3.4., DoDD 4500.56.

- a. Travel by family member, non-DoD civilian or non-Federal traveler.
- b. **MUST** be accompanying a senior DoD or other Federal official who is traveling on MilAir on official business.
- c. Must not displace official travelers or require a larger aircraft.
- d. Note that this is **NOT** the same as Space-A travel as addressed in DoD 4515.13-R, Ch. 6.
- e. Travel is reimbursable at the full coach fare (i.e., a coach fare available to the general public between the day that the travel was planned and the day the travel occurred, including restricted fares, provided the traveler would otherwise be able to satisfy the restrictions associated with the particular fare if traveling by commercial air).
- f. Travel must be approved in advance, in writing, on a case-by-case basis. Para. E3.4.a., DoDD 4500.56.

B. Check for Special Rules.

1. Rotary-wing Aircraft. Para. 4.k., DoDD 4500.56. Policy applies to all officers and employees of the Department of Defense. This form of transportation may be used only when the use of ground transportation would have a significant adverse impact on the ability of the senior official to effectively accomplish the purpose of the travel.

IV. AIR TRAVEL: SPOUSE

- A. **GENERAL RULE:** a family member may not accompany his or her DoD sponsor who is traveling on Government aircraft on official business without reimbursing the government for such travel. Para. E5, DoDD 4500.56.

B. EXCEPTIONS:

1. *Funded Travel*: A family member's travel may be approved:

- a. If the spouse's travel is justified on a basis that is *independent* from their status as a spouse. *See* JTR, Appendix E, Part 1.A. When the spouse is approved for travel on an independent basis, he/she is entitled to per diem, as well as travel expenses:

(1) Examples of independent bases:

- (a) The spouse will attend a service-endorsed training course and provide subsequent volunteer services. *See* 71 COMP. GEN. 6 (1991). (Ex. – Pre-command Course, Brigadier General Training Course, anti-terrorist training course). For other courses, the JTR requires approval through the “Secretarial process.” For the Army, process requests through command channels and the DCSOPS to the Administrative Assistant to the Secretary.
- (b) The spouse will confer with DoD officials on official matters, as a subject matter expert (does not include mere attendance at a meeting or conference, even if hosted by DoD).

(2) ARMY POLICY: It is Army policy that spouses travelling to participate in Army Family Programs and/or Quality of Life conferences *shall* travel in an accompanying spouse status (per diem NOT authorized), unless travel is as a delegate to an “**excepted program**” in which case, if the following conditions apply, *invitational travel* (with per diem) is authorized.

- (a) The conference is sponsored by an activity commanded by a major general or above;
- (b) There is a substantive agenda aimed at affording the Army leadership guidance and advice on family, education, health care, and retention policies;

- (c) The objective is to create a discernable substantive product such as an action plan;
 - (d) The agenda requires full-time delegate participation;
 - (e) The process for selecting delegates conforms to regulation and the sponsor approves the slate.
- b. to attend an unquestionably official function in which the spouse is actually to participate in an official capacity; **or**
 - c. if such travel is deemed in the national interest because of diplomatic or public relations benefit to the United States. Para. E5., DoDD 4500.56; JTR, Appendix E, Part 1.A.
2. *Unofficial Travel/Non-interference Travel* on MilAir. Para. E3.4.c, DoDD 4500.56; Para. 8b. & 9c., OMB Circular A-126. Spouses may accompany their sponsors on official business in a Government aircraft on a space-available basis⁶ only when:
- a. the aircraft is already scheduled for an official purpose;
 - b. the noninterference use does not require a larger or additional aircraft than needed for the official purpose;
 - c. official travelers are not displaced;
 - d. it results in negligible additional cost to the Government;
 - e. and the Government is reimbursed at the **full coach fare**
- (1) The senior DoD official shall attach to his or her travel voucher a personal check made payable to the Treasurer of the United States.

⁶ This category of travel differs from the space available privilege in DoD 4515.13-R, Chapter 6. For this travel, the non-Federal traveler **MUST** be accompanied by the person on official travel.

- (2) He shall also include a travel office printout that reflects the full coach fare.

C. Conditions on Travel:

1. Travel is allowed on a mission noninterference basis only, and must be approved in advance, in writing.
 2. Normally the spouse is only reimbursed for transportation costs, not including per diem. Spouses may only receive per diem in the following very narrow circumstances (Para. E3.5., DoDD 4500.56 and JTR, Appendix E, Part 1.A.2.m).
 - a. The authorizing official determines that there is an “unquestionable official function in which the spouse is to participate in an official capacity” or the spouse's travel is "essential to accomplishing the mission and there is a benefit for DOD beyond fulfilling a representational role."
 - b. Spouse travel is justified on a basis independent from their status as a spouse.
 3. Funded family members shall travel in the company of their DoD sponsor on Government aircraft UNLESS justified by unusual circumstances. Para. E3.5., DoDD 4500.56; DoD 4515.13-R. Under these unusual circumstances, the spouse must travel in the most cost-effective manner, which may include Government aircraft. Unusual circumstances include, but are not limited to:
 - a. Unplanned or unanticipated schedule changes or compelling requirements of the sponsor (e.g. deployment), or
 - b. Due to other official business requirements, it is more economical for the sponsor to meet the spouse at the destination and/or depart the destination directly for other official business while the spouse returns home.
- D. Spousal Air Travel Approval Authorities (requests routed through command channels). See JTR, Appendix E, Part 1.A.2.m(4) and (5).

V. AIR TRAVEL: CONTRACTOR RULES

- A. Contractors can no longer be issued ITAs. *See* JTR, Appendix E, Part 3; and FAR § 31.205-46
1. Travel costs of Government contractors and contractor employees are governed by the rules in the Federal Acquisition Regulations as a contract expense.
 2. Government contractors and contractor employees are not Government employees and are not eligible under any circumstances for city pair airfares.
 3. Generally, travel related items restricted to Government employees may not be given to contractors. Some travel service providers voluntarily give special rates, however. *See* JTR, Appendix E, Part 3.
 - a. Discount Rail Service.
 - (1) AMTRAK voluntarily offers discounts to Federal travelers on official business.
 - (2) These discounted rates may be extended to eligible contractors traveling on official Government business.
 - b. Discount Hotel/Motel Practices.
 - (1) Several thousand lodging providers extend discount-lodging rates to Federal travelers.
 - (2) Many currently extend their discount rates to eligible contractors traveling on official Government business.

c. DoD Car Rental Practices.

- (1) DoD negotiates special rate agreements with car rental companies available to all Government employees while traveling on official Government business.
- (2) Some car rental companies offer these discount rates to eligible Government contractors at the vendor's option, with appropriate identification from the contracting DoD component.

4. Vendor requirements.

- a. The entity providing the service may require that the Government contractor furnish a letter of identification signed by the authorizing DoD component's contracting officer.
- b. A letter of identification might look like this:

OFFICIAL AGENCY LETTERHEAD
TO: Participating Vendor
SUBJECT: Official Travel of Government Contractor
<p>(FULL NAME OF TRAVELER), the bearer of this letter, is an employee of (COMPANY NAME) which has a contract with this agency under Government contract (CONTRACT NUMBER). During the period of the contract (GIVE DATES), AND ONLY IF THE VENDOR PERMITS, the named bearer is eligible and authorized to use available travel discount rates in accordance with Government contracts and/or agreements. Government Contract City Pair fares are not available to Contractors.</p>
SIGNATURE, <small>Title and telephone number of Contracting Officer</small>

5. DoD Component Responsibilities.

- a. Know which hotels and car rental companies offer Government discount rates to Government contractors.

b. Ensure that authorized contractors know how to obtain this information, which is provided to and published by commercial publications including:

(1) The Official Airline Guides Official Traveler (800) DIAL-OAG,

(2) Innovata (800) 846-6742, and

(3) National Telecommunications (201) 928-1900.

(4) In addition, GSA contract Travel Management Centers (TMCs) and DoD's Commercial Travel Offices (CTOs) have this information.

B. Contractors may sometimes fly on MILAIR.

1. CETS personnel (contract field services personnel and field service representatives only). DoD 4515.13-R, Chapter 2, ¶ C2.2.9.

a. Personal Emergencies.

(1) Stationed overseas, and

(2) Travel from the CONUS, Alaska, or Hawaii to the overseas duty assignment was at DoD expense

(3) Under conditions similar to the circumstances for which emergency leave could be granted a Military Service member

(4) **Traveler-funded**,⁷ space-required, round-trip travel aboard DoD aircraft is authorized from overseas areas to the CONUS, and between overseas areas.

⁷ Transportation costs shall be reimbursed by the traveler at the non-U.S. Government tariff.

(5) **This does not include travel in the CONUS.**⁸

b. Approved Official Travel

- (1) Engaged in official activities for the Department of Defense.
- (2) Requiring air travel or when air travel is essential to accomplish a DoD mission.
- (3) The contract provides, or a responsible authority specifies, that transportation shall be furnished at DoD expense.
- (4) Travel authorization shall indicate the contract provisions that apply or the responsible authority that approved the travel, and shall include the DoD appropriation chargeable.

c. Contractor Reimbursable Travel.

- (1) Engaged in official activities for the Department of Defense.
- (2) Requiring air travel or when air travel is essential to accomplish a DoD mission.
- (3) When the contract provides, or a responsible authority specifies, that transportation shall be furnished at the contractor's expense.
- (4) Transportation is reimbursable at the non-U.S. Government tariff. Travel authorization must contain a statement that commercial transportation is not available, readily obtainable, or satisfactorily capable of meeting the travel requirements and that the non-U.S. Government tariff applies. The travel authorization must include the name and address of the contractor's Agency responsible for reimbursement.

⁸ Individuals traveling to or from an overseas location may travel on any CONUS leg segment (i.e., on a flight with enroute stops) when no change of aircraft or mission number is involved.

2. Other Contractors as an Exception to Policy may be Approved by:
 - a. Senior Officials. DoD 4515.13-R, Chapter 10.
 - (1) The Military Department Secretaries.⁹
 - (2) The Chairman of The Joint Chiefs Of Staff.
 - (3) The Chiefs of Staff of the Army and the Air Force, the Chief of Naval Operations, and the Commandant of the Marine Corps.
 - (4) When:
 - (a) Circumstance is not specifically withheld to the Secretary of Defense.
 - (b) The transportation is primarily of official interest to the DoD Component concerned.
 - b. Senior Commanders with Delegated Authority
 - (1) Approval authority. May be delegated, but not lower than:
 - (a) **Army.** Commanders, and heads of activities in the grade of major general, or above.
 - (b) **Navy.** Type Commanders as designated by the Chief of Naval Operations.
 - (c) **Air Force.** Major Commanders.

⁹ Within the Army Secretariat, this authority is delegated to the Under Secretary of the Army.

- (d) **Marine Corps.** Authority remains with the commandant, unless specifically delegated to individual commanders in the grade of brigadier general, or above.
- (2) **CONUS** commanders identified above, may approve the following categories of passengers for travel **in the CONUS** when such travel is in direct support of the approving command.
 - (a) Foreign military personnel who possess proper base or installation visitation authorization.
 - (b) Foreign civilians assigned to a NATO Headquarters and who possess a base or installation visitation authorization. (Requests from non-DoD sources and those concerning non-NATO foreign civilians must be approved by SecDef).
 - (c) U.S. citizens, **except** for the following:
 - (i) Spouses of Government Personnel.
 - (ii) Non-DoD Federal officials.
 - (iii) Members of Congress and their staffs.

VI. AIR TRAVEL: COMMERCIAL

A. Accommodations on Commercial Aircraft Generally.

1. It is the policy of the Government that employees and/or dependents that use commercial air carriers for domestic and international travel on official business shall use coach-class airline accommodations.
 - a. *ARMY POLICY:* Members may not travel in any premium class (first class or business class) while in uniform, even if they pay for the upgrade with personal frequent flyer miles.

2. Employees shall ascertain their travel requirements in sufficient time to book coach-class accommodations.

B. Authorization/Approval for Use of First-Class Accommodations.

1. Authorization for the use of first-class air accommodations shall be made in advance of the actual travel unless extenuating circumstances or emergency situations make advance authorization impossible. If advance authorization cannot be obtained, the employee shall obtain written approval from the appropriate authority at the earliest possible time.
2. JTR limits authority for authorizing/approving the use of first-class air accommodations.
 - a. ARMY POLICY: Only the Secretary of the Army can approve first-class travel.
3. Requirements
 - a. Employee Responsibility and Documentation.
 - (1) The employee shall certify on the travel voucher the reasons for the use of first-class air accommodations.
 - (2) Specific authorization/approval shall be attached to, or stated on, the travel voucher and retained for the record.
 - (3) In the absence of specific authorization/approval, the employee shall be responsible for all additional costs resulting from the use of first-class air accommodations.
 - b. Circumstances Justifying The Use Of First-Class Air Accommodations
 - (1) When regularly scheduled flights between the authorized origin and destination points (including connection points) provide only first-class

accommodations, and the employee certifies this circumstance on the travel voucher.¹⁰

- (2) Lower class airline accommodations are not reasonably available.
 - (a) "Reasonably available" means a class of accommodations other than first-class airline accommodations available on an airline scheduled to leave within 24 hours before the employee's proposed departure time, or scheduled to arrive up to 24 hours before the employee's proposed arrival time.
 - (b) "Reasonably available" doesn't include any accommodations with a scheduled arrival time later than the employee's required reporting time at the duty site, or with a scheduled departure time earlier than the time the employee is scheduled to complete the duty.
- (3) Business-class transportation is not available, and premium class is necessary because the employee/dependent is so disabled or otherwise physically impaired that other accommodations cannot be used, and competent medical authority substantiates such condition.
- (4) Business-class transportation is not available, and premium class is required by the mission. This criterion is exclusively for use in connection with Federal advisory committees, special high-level invited guests, and U.S. defense attachés accompanying ministers of foreign governments traveling to the United States to consult with members of the Federal Government. The approval authority is the Director, Administration and Management, Office of the Secretary of Defense, or as delegated by the Director.
- (5) Exceptional security circumstances require such travel. This includes, but is not limited to travel by:
 - (a) A traveler whose use of other than first-class accommodations would entail danger to the employee's life or Government property;

¹⁰ This is the only instance where first-class accommodations may be used without prior approval.

- (b) Agents of protective details accompanying individuals authorized to use first-class accommodations; and
- (c) Couriers and control officers accompanying controlled pouches or packages and business-class airline accommodations are not available.

C. Circumstances Justifying the Use Of Business-Class Air Accommodations

1. Authorization for the use of business-class airline accommodations shall be made in advance of the actual travel unless extenuating circumstances or emergency situations make advance authorization impossible. If advance authorization cannot be obtained, the employee shall obtain written approval from the appropriate authority at the earliest possible time.
2. JTR limits authority for authorizing/approving the use of business-class air accommodations.
3. Army: Sec Army and the Chief of Staff, Army, or their designees, are the approval authorities for premium-class travel for officials within the Secretariat and Army Staff, respectively. All other requests are processed through the normal orders approving chain. 3 & 4-Star MACOM Commanders may approve for their subordinates. They may delegate to their 3 & 2-Star Deputy Commanders/Chiefs of Staff
4. Circumstances justifying use of business-class airline accommodations are limited to:
 - a. Regularly scheduled flights between the authorized origin and destination points (including connection points) provide only business-class airline accommodations, and the employee certifies this circumstance on the travel voucher.
 - b. Space is not available in coach-class airline accommodations on any scheduled flight in time to accomplish the purpose of the official travel, which is so urgent it cannot be postponed.

- c. Necessary to accommodate an employee's disability or other physical impairment (substantiated in writing by competent medical authority).
- d. Required for security purposes or because exceptional circumstances make their use essential to the successful performance of the DoD component's mission.¹¹
- e. Premium-class is required by the mission. This criterion is exclusively for use in connection with Federal advisory committees, special high-level invited guests, and U.S. defense attachés accompanying ministers of foreign governments traveling to the United States to consult with members of the Federal Government. The approval authority is the Director, Administration and Management, Office of the Secretary of Defense, or as delegated by the Director.
- f. Coach-class airline accommodations on foreign carriers don't provide adequate sanitation or health standards, and the use of foreign flag air carrier service is approved.
- g. Results in an overall saving to the Government based on economic considerations, such as the avoidance of additional subsistence costs, overtime, or lost productive time that would be incurred while awaiting availability of coach-class.
- h. Obtained as an accommodation upgrade through the redemption of frequent traveler benefits. (see JTR and Service specific policy).
- i. The employee's transportation is paid in full through the DoD component's acceptance of payment from a non-Federal source.
- j. Lengthy Flight
 - (1) Travel is direct between authorized origin and destination points separated by several time zones,

¹¹ As determined by the local transportation officer, or other appropriate authority, in conjunction with the order-approving authority.

- (2) Either the origin or destination point is outside CONUS,
- (3) TDY purpose/mission is so urgent it cannot be delayed or postponed, and
- (4) The scheduled flight time (including stopovers) is in excess of 14 hours.
 - (a) Scheduled flight time is the time between the scheduled airline departure from the PDS/TDY point until the scheduled airline arrival at the TDY point.
 - (b) Passenger is not afforded an adequate rest period before commencing duties.

VII. BUS AND GROUP TRANSPORTATION

(SEE SECTION X OF THIS OUTLINE, "MOTOR VEHICLES: HOME-TO-WORK TRANSPORTATION" FOR INFORMATION CONCERNING THE USE OF PASSENGER CARRIERS TO TRANSPORT EMPLOYEES BETWEEN THEIR PLACE OF EMPLOYMENT AND A MASS TRANSIT FACILITY)

A. Generally. (10 U.S.C. § 2632, DOD 4500.36-R, CHAP. 5)

- 1. Primarily Three Types of Service: Group Transportation, Shuttle Bus Service, and Mass Transit.
- 2. Generally, a reasonable fare must be charged. 10 U.S.C. § 2632(a)(3).
 - a. Fares must be accounted for and deposited as miscellaneous receipts. DoD 4500.36-R, ¶¶ C.5.4.7; C.5.5.3.
 - b. The fare system will be structured to recover all costs of providing the group transportation service, including capital investment, salaries, operations, and maintenance.

- (1) If the transportation vehicle is used for both operational (mission) and fare-based transportation, only the costs directly related to the fare-based transportation must be recovered. DoD 4500.36-R, ¶¶ C.5.4.8; C.5.5.3.
- (2) Since these vehicles are acquired in direct support of the defense mission, acquisition costs will not be recovered through the fare system.
- (3) In overseas areas, the fee should be not more than what would be charged if the service were available through local commercial transportation. *See* DoD 4500.36-R, ¶ C.5.5.3.

c. Exceptions to the requirement of a fare.

- (1) Shuttle bus or mass transit transportation that is incident to the performance of duty. 10 U.S.C. § 2632 (b)(3).
- (2) Mass transit services where the Secretary determines that the area of the installation is not adequately served by “regularly scheduled and timely commercial municipal services.”
 - (a) The Secretary of the Army has authorized MACOM commanders to establish such fare-free bus service if the following specific, objective criteria are met ((AR 58-1, ¶ 5-4g). This authority may not be further delegated. AR 58-1, ¶ 5-4i):
 - (i) The sending location does not have adequate medical, dental, commissary, or Post Exchange facilities and/or, the rider's place of work is located on the receiving installation and/or the use of privately owned vehicles is restricted in the area served.
 - (ii) The receiving installation is more than one mile from the sending installation.
 - (iii) Fare charged per DOD Regulation 4500.36-R EXCEEDS \$1.00 per passenger per round trip.

3. The Service Secretary must determine that the service is needed for the effective conduct of affairs within that service. 10 U.S.C. § 2632(a)(1).

4. Transportation services provided must be reviewed locally on an annual basis.
 - a. **Air Force** requires this review at MAJCOM or FOA level for group transportation. AFI 24-301, ¶ 3.51..
 - b. **Air Force** requires Mass Transit to be reviewed every 6 months and records of review kept for 3 years. AFI 24-301, ¶ 3.52.

B. Group Transportation - 10 U.S.C. § 2632(a)(2)(B)

1. Uses & Limits.

- a. Normally be limited to those situations where there is a need to move personnel from domicile-to-duty, from other than Government installations, and subinstallations, when considered necessary for the effective conduct of the affairs of the Department.
- b. The vehicle used must have a seating capacity of 12 or more persons.

2. Approval

- a. To authorize the establishment of such systems, the Secretary must determine that the effective conduct of affairs requires “assured and adequate transportation” and:
 - (1) Other transportation options are inadequate and cannot be made adequate;
 - (2) A reasonable, but unsuccessful, effort has been made to induce operators of private companies to provide the necessary transportation; and
 - (3) The services to be furnished will make proper use of and provide the most efficient transportation.
- b. In exercising the authority to provide group transportation service to and from places of employment, Military Departments shall consider the following conditions as a basis for approval of such services: (DoD 4500.36-R, ¶ C.5.4.)

- (1) Where an installation or other DoD activity is so located with respect to personal residential areas that some form of Government assistance is necessary to ensure adequate transportation.
 - (2) In overseas commands where, due to the absence of adequate public or private transportation, local political situations, security, personal safety, or the geographical location of the duty stations, such transportation is considered essential to the effective conduct of the Department's business.
- c. The **Army** has delegated authority to approve group transportation as follows: (AR 58-1, ¶ 5-3e.)
- (1) MACOM commanders.
 - (2) Superintendent, USMA.
 - (3) Ballistic Missile Defense Program Manager.
 - (4) Chief of Engineers.
 - (5) Chief, National Guard Bureau.
 - (6) Chief, Army Reserve.
 - (7) One individual, head of a staff element or office, as appropriate, so designated by each of the chiefs of the headquarters or elements shown above.

C. Shuttle Bus Service - 10 U.S.C. § 2632(a)(2)(A)

1. Uses & Limits.

- a. The capability to transport groups of individuals on official business between offices on installations **or** between nearby installations is a recognized requirement and is essential to mission support.

- (1) Shuttle busses may only operate in duty areas for the Army. AR 58-1, ¶ 5-1b.
- b. Shuttle bus service may be provided on or between installations for the transportation of:
- (1) Military personnel and DoD employees between offices and work areas of the installation(s) or activity during designated hours when justified by the ridership.
 - (a) *Air Force Guidance:* Routes will service offices and work centers only. Unauthorized stops include base housing areas (to include Government leased housing) and any recreational or shopping areas unless these areas are reasonably unavoidable. AFI 24-301, ¶ 3.58.
 - (2) Enlisted personnel between troop billets and work areas.
 - (a) There is an exception for Korea where OSD has approved the use of fare-free shuttle bus service from BOQ/BEQ to work site and return by officers and senior enlisted personnel in Korea. AR 58-1, ¶ 5-2b.(2).
 - (b) *Air Force Guidance:* Do not provide this service when other forms of transportation such as mass transit, privately-owned conveyance, or car or van pools are adequate to meet the needs of the member. The installation commander makes these determinations. AFI 24-301, ¶ 3.58.3..
 - (3) DoD contractor personnel conducting official defense business.
 - (4) Employees of non-DoD Federal Agencies on official business. Such transportation will only be provided over routes established for primary support of the defense mission.
- c. In isolated sites with limited support facilities where DoD personnel and dependents need additional life support (medical, commissary, and religious) which directly affects health, morale and welfare of the family, shuttle bus service may be provided.

- d. *Space-available transportation* on existing, scheduled shuttle buses may be provided to the following categories of passengers:
 - (1) Off-duty military personnel or DoD civilian employees.
 - (2) Reserve and National Guard members.
 - (3) Dependents of active duty personnel.
 - (4) Retirees.
 - (5) Visitors to the base (intra-installation only).
 - (6) In overseas areas, volunteers of Type 2 – Affiliated Private Organization.

 - e. ***Air Force Only: Shuttle Bus Service in Support of TDY Personnel and Transient Air Crews.*** AFI 24-301, ¶ 3.58.3. Establish special shuttle bus services at installations to accommodate large numbers of TDY personnel and transient aircrews when the service would be the most cost effective and efficient support. The following guidelines apply:
 - (1) Transportation Squadron Commander must approve the service.
 - (2) Limit designated stops to those specified in the Federal Travel regulations (JTR¶ U3200).
 - (3) Analyze this service semiannually.
2. Approval. The following instructions apply in establishing and maintaining shuttle bus routes:
- a. Established routes and schedules must be based on a validated need to transport authorized passengers.

- b. Shuttle bus routes (see 5-6.b. (2), above) will not be used to provide domicile-to-duty travel, except when supporting enlisted personnel between troop billets and work areas.
- c. The conveyance used must be no larger than the most economical available to accommodate “duty” passengers.
- d. Surveys must be conducted at least annually to ensure that need for the service remains valid.

D. Mass Transit Services - 10 U.S.C. § 2632(a)(2)(C)

1. Uses & Limits

- a. Designed to fulfill requirements beyond the scope of shuttle bus service.
- b. May be used to provide other “non-duty” types of transportation within a military installation or between subinstallations on a fare basis.
 - (1) The mass transportation may be used to provide domicile-to-duty transportation on military installations or between subinstallations in reasonable proximity.
 - (2) The service may also be used to provide transportation:
 - (a) To and from places of duty and employment on a military installation.
 - (b) To and from a military installation in a remote area determined by the Secretary of the Military Department not to be adequately served by regularly scheduled commercial mass transit.
 - (c) Between places of employment for persons attached to, and employed in, a private plant that is manufacturing material for the Department, ***but only during war or national emergency declared by Congress.***

- c. May be provided to military personnel, DoD civilians, contractors, and their dependents.
2. Approval. To authorize the establishment of such systems, the Secretary must determine that:
- a. There exists a potential for saving energy and for reducing air pollution;
 - b. A reasonable, but unsuccessful, effort has been made to induce operators of private companies to provide the necessary transportation; and
 - c. The services to be furnished will make proper use of and provide the most efficient transportation.
3. *Army-specific Guidance.* AR 58-1, ¶ 5-4a. – n.
- a. The Secretary of the Army has determined that the effective conduct of the affairs of the Army may warrant mass transportation support for military personnel, DOD civilians, contractors, and their dependents, who are assigned, employed, or residing at isolated installations **if**:
 - (1) There is no regularly scheduled mass transportation twice a day, five times a week between the sending or receiving installations that picks up and drops off passengers within 1/2 mile of the installations, provides pick-up from the sending installation not later than 0800 hours and provides last departure from the receiving location not later than 1900 and is licensed and operates in accordance with reasonable maintenance and safety standards.
 - (2) Other mass transportation providers are unable or have declined to provide adequate transportation facilities or service after a reasonable effort has been made to induce them to do so.
 - (3) The service will save unproductive person-hours.
 - (4) The service will enhance the rider's quality of life.

- b. MACOM commanders may implement mass transportation service if the objective criteria in the AR are met.
 - c. Vehicles used will hold 12 or more riders and operate at 50 percent of capacity on a monthly basis. For example, service scheduled for three times a week using a 16 pax bus would require a minimum monthly ridership of 96 (8x3x4) passengers to justify use.
 - d. Annual cost of the bus service provided as calculated in Chapter 12 will not exceed \$100,000. For USAREUR based units, the ceiling is waived. For EUSA, the ceiling is \$250,000.
 - e. The service to be furnished will pick up and drop off at centralized collection points and otherwise make proper use of transportation facilities to supply the most efficient transportation to eligible passengers.
4. *Air Force Specific Guidance.* AFI 24-301, Chapter 3.
- a. Approval for Mass Transport is at the MAJCOM level.
 - b. Isolated Areas: (*See ¶ 1.b(2)(b) above.*)
 - (1) This service provides no-fare bus transportation to military members, DoD civilians, contractors, and their dependents (12 passenger or more) for locations designated as an isolated area.
 - (2) Isolated areas are those locations not adequately serviced by regularly scheduled commercial or municipal transit services.
 - (a) Consider CONUS locations as isolated areas only under unique circumstances. Forward requests for CONUS locations through command transportation channels to HQ USAF/ILT for approval.
 - (b) For overseas commands, forward requests to the MAJCOM LGT for approval.

E. Other Bus Services

1. *MWR Support Services.* Bus service in support of DoD–authorized MWR programs, family service center programs, or private organizations may be provided when such transportation can be made available without detriment to the DoD mission.
 - a. This service is limited to full support of Category A activities, substantial support of Category B, some support of Category C. See paragraph 6.2, DoDI 1015.15, October 31, 2007 (Incorporating Administrative Change 1, March 20, 2008), *Establishment, Management, and Control of Nonappropriated Fund Instrumentalities and Financial Management of Supporting Resources*.
 - b. Since group travel vehicles may not be acquired or leased with appropriated funds solely or partially to support MWR, activities, family support programs, or private organizations, no portion of the acquisition cost of the vehicle shall be considered in determining the reimbursable expenses to be charged or in the determination of motor vehicle authorizations.
 - c. Approval for this transportation service can be delegated to the installation commander who must consider the potential of competition with commercial transportation sources in the decision process.
 - (1) The *Army* has delegated this authority to the “MACOM Commanders, or their delegates.” AR 58-1, ¶ 5-5b.
 - (2) The Air Force provides that installation commanders approve this type of service. AFI 24-301, ¶ 3.10.
 - d. Such services cannot be provided for domicile-to-duty transport.
 - e. Transportation may be provided on a *nonreimbursable basis* for the following categories:
 - (1) In support of the Chaplain’s program (not domicile-to–duty).
 - (2) MWR functional staffs engaged in routine direct administrative support of Categories A, B, and C activities.

- (3) Teams composed of personnel officially representing the installation in scheduled competitive events.
 - (4) DoD personnel or dependent spectators attending local events in which a command or installation–sponsored team is participating.
 - (5) Entertainers, guests, supplies, and/or equipment essential to the MWR programs.
 - (6) MWR sponsored activities (Categories A, B, and C) including recreational tours and trips when fees are not levied upon the passengers (except fees made to cover the cost of the driver when required) and when approved by the installation commander.
 - (7) Civilian groups transported to military installations in the interest of community relations when officially invited by the installation commander or other competent authority.
- f. Assets may be used in support of MWR only after mission requirements have been met.
2. *Emergency Bus Service.* Transportation between domicile and place of employment may be provided for military personnel and civilian employees during public transportation strikes and transportation stoppages.
- a. This service must be limited to only those employees who are actively engaged in projects, or in the support of projects, the delay of which would adversely affect national defense.
 - b. A fare that recovers the operational costs shall be charged for such service and accounted for as with other fare-based service.
 - c. Routine works such as construction, repair, or overhaul of aircraft, ships, or material peculiar to the Military Departments shall not qualify under this policy.

- d. When transit strikes, or other work stoppages, are imminent or in progress, Heads of installations or activities who determine that transportation between domicile and place of employment is essential, shall request approval for necessary transportation to the Secretary.
 - (1) The Secretary of the Army has delegated this authority to the same levels as for approval of group transportation. *See* ¶ VII.B.2.c above.
- 3. Transportation may be provided for *special activities* such as scouting programs and private organizations (in compliance with the limits imposed by the JER). Such service shall be accomplished on a reimbursable basis covering all operations and maintenance costs of providing the service.
 - a. Other specific authority may authorize support for certain non-Federal entity (NFE) events: (See AR 58-1, ¶ 5-2d.)
 - (1) One annual conference/convention of national military associations approved by the Assistant Secretary of Defense for Public Affairs (10 U.S.C. § 2558).
 - (2) Overseas Support for Boy/Girl Scouts (10 U.S.C. § 2606 and DoD Instruction 1015.9.)
 - (3) World and National Boy Scout Jamboree Support (10 U.S.C. § 2554).
 - (4) International Transportation Support for Girl Scout Events (10 U.S.C. § 2555).
 - (5) Financial Institutions on DOD Installations (DoD Directive 1000.11 and AR 210-135).
 - (6) American National Red Cross (DoD Directive 1330.5 and AR 930-1).
 - (7) United Service Organization, Inc. (DoD Directive 1330.12 and AR 930-1).
 - (8) United Seaman's Service (DoD Directive 1330.16 and AR 930-1).

- (9) Annual DoD Authorization Acts and DoD Appropriations Acts frequently contain special authority. Most changes contained in special authority are incorporated in the U.S. Code, but some, which are one-time events, are not.

VIII. MOTOR VEHICLES: OFFICIAL USE

A. Fundamental Principles:

1. The use of Government-owned or leased motor vehicles is restricted to official purposes only. DoD 4500.36-R, para. C2.5, 31 U.S.C. § 1344.
2. Transportation “shall not be provided” based solely on rank, position, prestige, or personal convenience. DoD 4500.36-R, para. C.2.5.10.

B. Definitions are important in this area.

1. Limits on GSA Rule. The following motor vehicles are *not* covered: (41 C.F.R. § 102-34.15)
 - a. Those designed or used for military field training, combat, or tactical purposes; or
 - b. Those used principally within the confines of a regularly established military post, camp, or depot.
2. Motor Vehicle: A vehicle designed and operated principally for highway transportation of property or passengers, but does not include a vehicle designed or used for military field training, combat, or tactical purposes. DoD 4500.36-R, App. 4, ¶ AP4.37.
3. Military Design Vehicles. Motor vehicles (excluding general purpose commercial design) designed in accordance with military specifications to meet transportation requirements for the direct support of combat or tactical operations, or for training of troops for such operations. DoD 4500.36-R, App. 4, ¶ AP4.36.

4. Nontactical Vehicle (NTV). A motor vehicle or trailer of commercial design acquired for administrative, direct mission, or operational support of military functions. All DoD sedans, station wagons, carryalls, vans, and buses are considered “nontactical.” DoD 4500.36-R, App. 4, ¶ AP4.1.42.
5. What is “Official Use?”
 - a. CONGRESS: "Uses that would further the mission of the agency. Providing a Government vehicle solely or even principally to enhance the comfort or convenience of a Government officer or employee is not permissible." H.R. Rep. No. 451, 99th Cong., 2d Sess. 6 (1986).
 - b. GSA: “using a motor vehicle to perform your agency's mission(s), as authorized by your agency.” 41 C.F.R. § 102-34.220.
 - c. DoD: “Official Purposes. Any application of a motor vehicle in support of authorized DoD functions, activities, or operations.” DoD 4500.36-R, App. 4, ¶ AP4.1.43.
 - d. DoD: May further limit use of transportation services based on geographic area. For the National Capital Region, DoD determined that public and commercial transportation to air terminals is adequate and prohibits the use of DoD motor vehicles for such transportation except under unusual circumstances (emergencies, security). AI 109.

C. Using Vehicles for Official Purposes

1. Determination of Officiality. DoD 4500.36-R, para. C2.5.
 - a. The use of all DoD motor vehicles, *including those leased* using DoD funds, from other Government agencies or commercial sources, shall be restricted to official purposes only.
 - b. When *questions* arise about the official use of a motor vehicle, they shall be *resolved in favor of strict compliance* with statutory provisions and DoD policy.

- c. Whether a use is for an official purpose is a matter of *administrative discretion*. Commanders or their designated representatives will determine the official use of motor vehicles. All factors will be considered including whether the transportation is:
 - (1) essential to the successful completion of a DoD function, activity, or operation, and
 - (2) consistent with the purpose for which the vehicle was acquired.

- d. Activities that generally ARE considered official use.
 - (1) Transportation of certain groups (athletic teams, MWR, Chapel programs, etc.) when it is determined that failure to provide transportation will have an adverse effect on morale. DoD 4500.36-R, para. C2.5.5.
 - (2) Transportation provided to those “officially participating in public ceremonies, military field demonstrations, and parades directly related to official activities.” DoD 4500.36-R, para. C2.5.6. (*See also* ¶ XI below).
 - (3) “Incidental use” may be authorized IAW Service regulations for non-official business only when such use is clearly in the interest of DoD (e.g., to obtain a commercial driver’s license required for employment). DoD 4500.36-R, para. C2.11; *see also* DoD 4500.36-R, para. C9.5.2..
 - (4) *Army*
 - (a) Mandatory appointments made by the Army. Transportation to or from an appointment scheduled by the Army that requires a soldier's attendance (as opposed to a doctor's appointment made by the soldier).
 - (i) For example, records checks, physical, dental or hospital outpatient appointments, are considered official use for active duty military personnel, cadets, and for DoD civilian personnel when directed by competent authority and as a condition for employment. See AR 58-1, ¶ 2-3d.

(ii) If possible, regularly scheduled shuttle bus service or public mass transportation should be used.

(5) *Air Force:*

- (a) Official use for active duty personnel includes transportation to or from Air Force scheduled appointments, i.e., records checks, dental appointments, hospital outpatient appointments, etc. AFI 24-301, ¶ 3.6.
- (b) Personnel conducting official off-base duties are authorized to stop at off-base eating establishments in the immediate vicinity of the off-base work site. AFI 24-301, ¶ 3.6.1.
 - (i) This authority does not include eating or stopping at private quarters.
 - (ii) Personnel are not authorized to stop at shopping or dining facilities on, or in the close proximity of, the installation while in route to off-base locations.
- (c) The installation commander may approve alert aircrews and Intercontinental Ballistic Missile (ICBM) personnel the use of Government vehicles to and from on-base facilities. AFI 24-301, ¶ 3.6.2.
 - (i) The commander must identify these facilities.
 - (ii) Alert crews and ICBM personnel may not drive Government vehicles to private quarters, for domicile-to-duty purposes, or to conduct personal business.
- (d) Operations Group Commanders (OG/CCs) driving to on-base quarters incident to the performance of their duties in connection with on-going flight operations. AFI 24-301, ¶ 3.10.

(e) When guidance does not specifically fit a request for transportation support, commanders will use the following factors: AFI 24-301, ¶ 3.63.

(i) Is the purpose of the trip official?

(ii) Does the request have the potential to create a perception that will reflect unfavorably on the Air Force or cause public criticism?

(iii) Will the request impact on mission requirements?

(iv) Is commercial or DoD scheduled transportation available? (It is important to note that the Air Force does not provide transportation support that competes with commercial services.)

e. Activities that are expressly NOT official use

(1) Transportation to and from place of residence unless “Home-to-Work” transportation is approved. *See Section X of this outline, “Motor Vehicles: Home-to-Work Transportation” for information concerning the use of passenger carriers to transport employees between their place of employment and a mass transit facility.*

(2) Government vehicles may not be used for transportation to, from, or between any location for the purpose of *conducting personal business* or other personal activities by military or civilian personnel, their family members, or others. DoD 4500.36-R, para. C2.5.3.

(3) Public and commercial transportation to commercial terminals in the Pentagon area is adequate and therefore use of official vehicles for transportation to the airport is not authorized. AI 109 defines the NCR as the District of Columbia, Montgomery and Prince George’s Counties in Maryland, and Arlington, Fairfax, Loudoun and Prince William Counties in Virginia, and all cities and towns included within the outer boundaries of the foregoing counties.

(4) *Army*: (SecArmy Policy, ¶ 14; AR 58-1, ¶ 2-4e.)

- (a) transportation to unofficial private social functions;
- (b) personal errands or side trips for unofficial purposes;
- (c) attendance at official ceremonies in personal capacity.
- (d) transporting Army personnel and their family members to, from, or between U. S. Government facilities or commercial establishments for the purpose of conducting personal business or engaging in other activities of a personal nature.
- (e) using NTVs to transport personnel or to pickup or deliver items or supplies that are required for any unofficial functions or activities such as office coffee funds, office luncheons, etc. *Id.*

f. *Other Army-Specific Guidance*

(1) *Official After-Hours Functions*: (SecArmy Policy, ¶ 14c; AR 58-1, ¶ 2-3c.)

- (a) Treated as an exception to policy for which prior approval is required.
- (b) The transportation **MUST** begin and end at the place of duty. It may **NOT** begin or end at home.

(2) *Emergency Leave*. Transportation of Army personnel and family members on emergency leave to the nearest commercial transportation terminal to ensure arrival at an embarkation point prior to departure of the first available flight, bus, or train is official. AR 58-1, ¶ 2-3f.

- (a) Prior to approval, the commander will make a determination whether commercial transportation is adequate.

- (b) Nontactical vehicles normally will not be provided on return trips to the unit of assignment.
- (3) *Transportation between an employee's home and an airport or other common carrier terminal in conjunction with official travel.* AR 58-1, ¶ 2-3i.(1). (See also 70 COMP. GEN. 196 (1991)). Nontactical vehicles may be used for trips between domiciles or places of employment and commercial or military terminals only when at least one of the following conditions is met:
- (a) Used to transport official non-DoD visitors invited to participate in DoD activities, provided that the use does not impede other mission activities.
 - (b) Used by individuals authorized domicile-to-duty transportation, for example: Secretary of the Army or the Chief of Staff, Army.
 - (c) Necessary because of emergency situations or to meet security requirements.
 - (d) Terminals are located where other means of transportation are not available or cannot meet mission requirements in a responsive manner.
 - (e) Authorized in the National Capital Region by Administrative Instruction 109.
2. Modes of Transportation. Once use of a Government vehicle is determined to be essential to the performance of official business, the following modes of transportation shall be considered in the following order, to the extent it is available and capable of meeting mission requirements (DoD 4500.36-R, para. C2.8; AR 58-1, ¶; AFI 24-301, ¶):
- a. Scheduled DoD bus service;
 - b. Scheduled public transportation;
 - c. DoD motor vehicles;

- d. Voluntary use of privately owned vehicle (POV) (reimbursable);
- e. Taxi (reimbursable).

3. Ridership.

- a. *Government contractors* may use Government motor vehicles when authorized under applicable procedures and the following conditions. (41 C.F.R. § 102-34.230)

- (1) Motor vehicles are used for official purposes only and solely in the performance of the contract.

- (2) Motor vehicles cannot be used for transportation between residence and place of employment, unless authorized in accordance with 31 U.S.C. § 1344 and 41 C.F.R. § 101-6.4.

- (3) Contractors must:

- (a) Establish and enforce suitable penalties against employees who use, or authorize the use of, such motor vehicles for unofficial purposes or for purposes other than in the performance of the contract; and

- (b) Pay any expenses or cost, without Government reimbursement, for using such motor vehicles other than in the performance of the contract.

- b. The *spouse of a Government employee* may be transported in a DoD motor vehicle only when: (DoD 4500.56-R, ¶ C2.5.7.

- (1) Accompanying the military member or civilian employee in the Government vehicle, the use of which has already been authorized to accomplish official business, and there is space available.

- (a) Such transportation can be provided only at no additional cost to the Government.

- (b) The size of the vehicle authorized must be no larger than that required for the performance of the official business.
- (2) Proceeding independently to or from an official function when
 - (a) The spouse's presence at the function is in the best interest of the Government and
 - (b) Circumstances have made it impractical or impossible for the official to accompany the spouse en route.
 - (c) **This authority applies only to the spouse of an employee who is authorized to receive domicile-to-duty transportation.**
- (3) Such transportation is required for reasons of security. Spouses are not considered representatives of the United States.
- (4) Transportation may be provided to support DoD Family Advocacy Programs in accordance with instructions established by the DoD Components. DoD 4500.56-R, ¶ C2.5.8.

IX. MOTOR VEHICLES: TDY USE

- A. Use of Government vehicles is always limited to official purposes and shall always be predicated on need, distance, and other conditions that justify their use. DoD 4500.36-R, ¶ C2.5; AR 58-1, ¶ 2-3i.; AFI 24-301, Chapter 3, ¶3.6...
 - 1. The temporary duty status of an individual does not necessarily justify the use of a DoD motor vehicle.
 - 2. Use of the vehicle will always be predicated on need, distance involved, and other conditions that justify its use.
- B. When an adequate DoD or commercial bus system is available, the use of any individual motor vehicle or commercial rental car is prohibited. DoD 4500.36-R, para. C2.5.4.1; AFI 24-301, ¶3.6.1. .

- C. Official use while on TDY includes: (JTR, para. U3200; JTR; DoD 4500.36-R, para. C2.5.4.2.)
1. Transportation between places where the member's presence is required for official business and between such places and temporary lodging.
 2. When public transportation is unavailable or its use is impractical, travel to restaurants, drugstores, place of worship, barbershops, cleaning establishments, and similar places required for the subsistence, comfort, or health of the member is authorized.
 - a. *Army Says:* A NTV may be operated between places of business or lodging and eating establishments, drugstores, barber shops, places of worship, and similar places required for the comfort or health of the member, and which foster the continued efficient performance of Army business. Using a NTV to travel to or from *commercial* entertainment facilities, (i.e. professional sports, concerts, etc.) is not authorized. AR 58-1, ¶ 2-3i.(3).
 - b. *Air Force Says:* Transportation is OK between places of business or lodging and installation bowling centers, officer and non-commissioned officer clubs, gymnasiums or any on-base non-appropriated fund activity (i.e., golf courses, rod & gun clubs, etc.) facilities required for the comfort or health of the member. AFI 24-301, ¶ 2.6.1.3.
 - (1) Use of motor vehicles for transportation to or from any other entertainment or recreational facilities is prohibited.
 - (2) Vehicle use off-base is restricted to reputable eating establishments in reasonable proximity to the installation.
- D. Using a DoD-owned or leased vehicle for transportation to or from entertainment or recreational facilities is prohibited. DoD 4500.36-R, para. C2.5.4.2. *But see*, Comp. Gen. B-254296 (1993) (authorizing limited exception for transportation to recreation necessary to the “health and welfare” of the employees at a remote FAA installation in Alaska).
- E. Trains (AMTRAK).

1. As a general rule, coach class is the only class of travel authorized for rail transportation.
2. However, travel by extra-fare trains may be authorized/approved when its use is advantageous to the Government. The Travel Regulations make it clear that use of the AMTRAK *Acela* or *Metroliner* is considered advantageous to the Government when approved/authorized, even though the lowest class of service available on those trains is business class – no further agency approval is needed for use of these trains. However, if the lowest class available on the specific train chosen is first class (because business class is sold out), then rules for approval of premium class travel will have to be followed. *See, JTR paragraph 3620.*

F. Rental Vehicles.

1. Vehicles rented by Government employees using their Government travel cards are not "Government leased" vehicles and therefore are not subject to the sanctions of 31 USC 1349(b). *Chufu v. Department of Interior*, 45 F.3d 419 (Fed. Cir. 1995).
2. Employees and service members may be reimbursed only for costs associated with the official use of rental vehicles.

X. MOTOR VEHICLES: HOME-TO-WORK TRANSPORTATION.

- A. General Rule: Using Government vehicles to transport individuals between their residences and places of work is not transportation for an official purpose and is prohibited. 31 U.S.C. § 1344(a)(1) (*see also*, DoD 4500.36-R, Chapter 4; AR 58-1, Chapter 4; AFI 24-301, ¶ 2.8.).
1. Prohibition includes any part of route between home and place of employment except as otherwise authorized. DoD 4500.36-R, ¶ C2.5.2; AR 58-1, para. 2-4d.
- B. 31 U.S.C. § 1344 permits the use of passenger carriers to transport federal employees between their place of employment and mass transit facilities. 31 U.S.C. § 1344(g) On December 18, 2006, the Deputy Secretary of Defense issued a memorandum implementing this amendment for the Department of Defense. *OSD 18687-06*. Note that there are very strict approval authorities, findings, and procedures necessary before this permission may be implemented locally. See paragraph C5.2, DoD 4500.36-R, "Management, Acquisition and Use of Motor Vehicles."

- C. Exceptions: 31 U.S.C. § 1344 defines home-to-work transportation as an official purpose in the following situations:
1. When an employee is engaged in field work -- official work performed by employees whose jobs require their presence at various locations that are at a distance from their place of employment (itinerant-type travel with multiple stops in the local commuting area, or use outside that area) or at a remote location that is accessible only by Government-provided transportation.
 - a. Examples include, but are not limited to, mine inspectors, meat inspectors, quality assurance inspectors, construction inspectors, recruiters, compliance investigators, personnel background investigators, and certain other law enforcement officers, whose jobs require travel to several locations during the course of a workday.
 - (1) The assignment of an employee to such a position **does not**, of itself, entitle an employee to receive daily home-to-work transportation.
 - (2) When authorized, such transportation should be provided:
 - (a) only on days when the employee actually performs field work, and
 - (b) only to the extent that such transportation will substantially increase the efficiency and economy of the Government.
 - b. This authorization is not applicable when:
 - (1) The individual's workday begins at an official duty station; **or**
 - (2) The individual normally commuted to a fixed location, however far removed from the official duty station. (for example, auditors or investigators assigned to a defense contractor plant).
 2. When the transportation is essential for the safe and efficient performance of intelligence, counterintelligence, protective services, or criminal law enforcement duties.

3. Designated positions – includes, among others, Secretaries of the Military Departments; Chief of Staff, Army; Chief of Staff, Air Force; Chief of Naval Operations; and Commandant of the Marine Corps.
- D. Service Secretaries may authorize home-to-work transportation when they make a determination in writing, on a nondelegable basis, that one of the following situations exists: (31 U.S.C. § 1344; DoD 4500.36-R, ¶ C4.2.7.)
1. *Clear and Present Danger* -- highly unusual circumstances present a threat to the physical safety of an employee's person or property and public/private transportation cannot be used.
 - a. The danger must be:
 - (1) Real, not imaginative, and
 - (2) Immediate or imminent, not merely potential.
 - b. Requester must make a showing that the use of a Government passenger carrier would provide protection not otherwise available.
 2. *Emergency* -- an immediate, unforeseeable, temporary need to provide home-to-work transportation for employees who are necessary to the uninterrupted performance of the agency's mission. An emergency may occur where:
 - a. There is a major disruption of available means of transportation to or from a work site,
 - b. An essential Government service must be provided, and
 - c. There is no other way to transport the employees performing that service to the work site.
 3. *Compelling Operational Considerations* -- circumstances in which the provision of home-to-work transportation is essential to the conduct of official business or would substantially increase the agency's efficiency and economy.

- a. Transportation may be justifiable if other available alternatives involve substantial additional costs to the Government or expenditures of employee time.
 - b. These circumstances need not be limited to emergency life or death situations.
 - c. *Cost-Effectiveness.* Situations may arise where it is more cost-effective for the Government to provide an employee a vehicle for home-to-work transportation rather than have the employee travel a long distance to pick up a vehicle and then drive back toward or beyond his/her residence to perform his/her job.
 - (1) First, consider basing the vehicle at a Government facility located near the employee's job site.
 - (2) If such a solution is not feasible, an agency must then decide if the use of the vehicle should be approved under the "compelling operational considerations" definition.
 - (3) Home-to-work transportation in these cases may be approved only if other available alternatives would involve substantial cost to the Government or expenditure of substantial employee time.
4. *Special Overseas Authority.* The Secretary of Defense has given overseas combatant commanders authority to approve home-to-work transportation using Government owned or leased vehicles for certain personnel. 10 U.S.C. § 2637; DoD 4500.36-R, ¶ C4.2.8.
- a. Qualified Personnel.
 - (1) Members of the Uniformed Services
 - (2) Federal civilian employees under the jurisdiction of that commander, and
 - (3) Dependents of such members and employees

- b. Approval. The commander must determine that public or private transportation in such area is unsafe or not available (e.g., terrorist activity, natural disasters, strikes, etc.). Determinations must be in writing.
 - c. Policy.
 - (1) The initial transportation authorization will not exceed 90 days. If the conditions for the transportation authorization persist, the combatant commanders may extend the authorization for vehicle use for additional specific time periods not to exceed 90 days per authorization.
 - (2) The following methods for providing this transportation shall be considered in the order shown, to the extent they are available and capable of meeting transportation requirements:
 - (a) DoD – Scheduled bus service.
 - (b) DoD - Specially scheduled leased or owned bus service.
 - (c) Van pools.
 - (d) DoD motor vehicle centrally dispatched “taxicab” operation.
 - (e) DoD motor vehicles individually dispatched to a licensed uniformed service member or Federal employee.
 - (f) Spouses and dependents are not permitted to operate the vehicles listed in this section.
5. *Special Air Force Authority*: The installation commander may authorize Operations Group Commanders (OG/CCs) to drive their vehicles to on-base quarters incident to the performance of their duties in connection with on-going flight operations. AFI 24-301, ¶ 3.10..
- a. This should not be interpreted as having Command and Control Vehicle (CACV) authority.

- b. The intent of the policy is to allow OG/CCs to go home to eat during ongoing flight operations without having to transfer to a POV.
- c. Vehicles will not be driven to quarters and parked overnight.

6. Approval

- a. Determination must be in writing and include traveler's name, title, reason for exception, and expected duration.
 - (1) Each Federal agency shall consider the location of the employee's residence prior to authorizing home-to-work transportation.
 - (2) Home-to-work transportation shall be authorized only within the usual commuting area for the locale of the employee's place of employment. *Id*; DoD 4500.36-R, ¶ C4.2.4.
 - (3) The head of each Federal agency shall authorize the use of home-to-work transportation only to the extent that such transportation will substantially increase the efficiency and economy of the Government/DoD. DoD 4500.36-R, ¶ C4.2.6.
- b. *Field work determinations.*
 - (1) Agency head may elect to designate positions rather than individual names, especially in positions where rapid turnover occurs.
 - (2) The determination should contain sufficient information, such as the job title, number, and operational level where the work is to be performed (i.e., five recruiter personnel or positions at the Detroit Army Recruiting Battalion) to satisfy an audit, if necessary.
- c. In some situations, notification must be submitted to Congress. See DoD 4500.36-R, ¶ C4.3.4.

E. Policy Guidance

1. *Transporting Visitors*. “Official non-DoD visitors invited to participate in DoD activities may be provided fare-free transportation between commercial transportation terminals or residence and visitation point.” DoD 4500.36-R, para. C2.5.3.1.

2. *“Space Available” Passengers*. Personnel authorized home-to-work transportation may share the vehicle with others on a space-available basis provided the vehicle does not travel additional distances as a result. DoD 4500.36-R, para. C4.2.4.
 - a. When an agency establishes a space sharing policy, it should consider the effects of its potential liability for and to individuals riding “Space-A.”

 - b. **Spouses** (and other friends & relatives). If an employee is authorized transportation between his/her residence and an official duty site, the space available privilege **does not** extend to his/her spouse, other relatives, or friends **unless--**
 - (1) It is consistent with the agency's policy,

 - (2) They are with the employee when he/she is picked up, and

 - (3) They are transported to the same place or event.

3. The comfort and convenience of an employee shall not be considered sufficient justification for an agency to authorize home-to-work transportation. DoD 4500.36-R, ¶ C4.2.3.

XI. MOTOR VEHICLES: NON-TACTICAL GOVERNMENT VEHICLE (NTV)

- A. Generally, transportation may be provided for military and civilian personnel officially participating in public ceremonies, military field demonstrations, and parades directly related to official activities. DoD 4500.36-R, ¶ C2.5.6.

- B. Army Guidelines. SecArmy Policy, ¶ 14e; AR 58-1, ¶ 2-3a.
 - a. Official Use Only. The Army parallels DOD 4500.36-R as stated in para. A above; transportation may be provided for official participation in public ceremonies,

military field demonstrations, and parades directly related to official activities. In addition, the Army reserves the right to make certain provisions of NTV use more restrictive than the current DOD policy.

b. Changes of command, promotions, retirements, unit activations/deactivations are considered official business internal to the Army community. As such, attendance by the Army community is encouraged, and personnel need not be personally participating in the event to attend. Prudent use of transportation is required (use a 15 passenger bus instead of 10 sedans to attend the function).

c. Commanders or principal staff will determine whether an event is of significantly high public interest, as to warrant the use of official Government transportation for general attendance.

d. All requests for general transportation to any ceremony or event will be reviewed by both the senior public affairs and legal officials prior to review by the commander.

e. For general attendance, commanders will normally use mass transportation, not individual transportation.

1. *After hours functions.* All transportation to official after-hours functions will begin and end at the individual's normal place of duty, not at a residence. See ¶ VIII.C.1.f(1) above.
2. *Spouses* accompanying their sponsor. See ¶ VIII.C.3.b. above.

C. Air Force Guidelines. AFI 24-301, Chapter 2.

1. Units may provide transportation to military and civilian personnel *officially taking part* in public ceremonies, parades, and military field demonstrations. AFI 24-301, ¶ 3.33 and 3.8..
2. This is not to be interpreted as authority to transport a member's relatives or personal friends invited to attend activities such as retirements, promotions, awards ceremonies, dedications, funerals, or any other similar type functions.

XII. PENALTIES FOR MISUSE OF GOVERNMENT VEHICLES/AIRCRAFT.

- A. 18 U.S.C. § 641. Employees who steal public property or convert it to their own use may be prosecuted under Federal law.

- B. 31 U.S.C. § 1349(b)
 - 1. An Officer/employee who *willfully* uses or authorizes the use of a Government vehicle/aircraft, for other than an official purpose,
 - a. Standard: Did official know use was unofficial or have "reckless disregard" for whether official? See, e.g., Felton V. EEOC, 820 F. 2d 391 (Fed. Cir. 1987).
 - b. Exception: If Government vehicle was used primarily to further agency business, a charge of willful use may not be sustained for "minor personal use." See, e.g., Madrid v. Dept. of Interior, 37 M.S.P.R. 418 (1988).
 - 2. Or, violates any other provision of 31 U.S.C. § 1344 ("willful" violation not required),
 - 3. Shall be suspended without pay for at least one month by the head of the agency, and
 - 4. When circumstances warrant, may be summarily removed from office.

- C. Military personnel who willfully use or authorize the use of a Government vehicle for other than an official purpose, or otherwise violate 31 U.S.C. § 1344, can be disciplined under provisions of the UCMJ or other administrative procedures deemed appropriate. (DoD 4500.36-R, ¶ C1.3.1.2). For example:
 - 1. Article 92 – Failure to obey order or regulation.
 - 2. Article 121 – Larceny and wrongful appropriation.

D. Examples of Violations of Official Use Prohibition

1. *Mattos v. Department of Army*, No. 93-3203 (Fed. Cir. Oct. 8, 1993). 30-day suspension for using Government vehicle to stop at McDonalds when returning from meeting when employee knew such use was unauthorized.
2. *Devine v. Nutt*, 718 F.2d 1048 (Fed. Cir. 1983). 30-day suspension for using Government vehicle while on patrol to drive by residence to pick up beer and deliver to command center.
3. *Madrid v. Dept. of Interior*, 37 M.S.P.R. 418 (1988). 30-day suspension for giving employee's loan officer a ride to lawyer's residence to sign loan papers. Deviation was only several blocks off employee's normal route, but he transported unauthorized individual for personal business.

E. Examples of No Violation of Official Use Prohibition.

1. *Kimm v. Department of Treasury*, 61 F.3d 888 (Fed. Cir. 1995). An ATF agent on 24-hour call who was authorized to use Government vehicle for home-to-work travel transported his child to day care on his way to work for one week period while his wife was bedridden. Circuit court overturned suspension finding that it was reasonable for agent to assume the use was essential to completion of the mission.
2. *Felton v. EEOC*, 820 F.2d 391 (Fed. Cir. 1987). Overturned 30-day suspension of supervisor who authorized office's only typist to take a Government vehicle to secure her POV which had broken down on the way to work. Circuit court found no evidence of willful element since supervisor reasonably determined that the use would promote the successful operation of the agency.

XIII. PAYING FOR TRAVEL

A. Paying for Travel – The Government Travel Card

1. GSA Final Rule published January 19, 2000. 41 C.F.R. Parts 301-51, 52, 54, 70, 71, and 76.

2. DoD Implementation. Under Secretary of Defense (Comptroller) Memos dated 18 Feb 2000 and 19 July 2002. See, also, DoD Financial Management Regulation (FMR) Volume 9, Chapter 3.
3. Key Issues:
 - a. Use of Card is mandatory for all travelers unless they have an exemption.
 - b. Key Exemptions – Classes of Personnel:
 - (1) Employees with a card application pending.
 - (2) Individuals travelling on ITAs.
 - (3) ROTC Cadets and members undergoing IET prior to reporting to their first PDS.
 - (4) Members denied a card or whose card is cancelled or suspended.
 - (5) Members of DoD approved by the Secretary during war, declared national emergency, mobilization, deployment, or contingency.
 - (6) Personnel travelling to places where infrastructure does not support use.
 - (7) National Security/Law Enforcement Risk.
 - (8) “Infrequent Travelers”.
 - c. Key Exemptions – Classes of Expense
 - (1) Vendors do not accept card.
 - (2) Laundry/Dry Cleaning, Parking, & Local Transport Fares

(3) All expenses covered by the meals and incidentals portion of per diem.

4. Timely Reimbursement

a. Reimbursement must occur within 30 days.

b. If payment is late, traveler is entitled to a late payment fee based on the Prompt Payment Act, so long as the payment is at least \$1.

5. When an exemption is granted, payment may be made via personal funds, travel advances, or Government Transportation Request (GTR). A GTR is an accountable Government document used to procure common carrier transportation services. The document obligates the Government to pay for transportation services provided.

XIV. CONCLUSION

CHAPTER J: POST-GOVERNMENT SERVICE EMPLOYMENT RESTRICTIONS (INCLUDING THE PROCUREMENT INTEGRITY ACT)

*“Always do right. This will gratify some people and astonish the rest.”
Mark Twain*

I. REFERENCES

A. Statutes.

1. 18 U.S.C. § 208, Acts affecting a personal financial interest.
2. 41 U.S.C. §§ 2101-2107, formerly known as the Procurement Integrity Act.
3. 18 U.S.C. § 207, Restrictions on former officers, employers, and elected officials of the executive and legislative branches.

B. Regulations.

1. 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.
2. 5 C.F.R. Part 2637, Regulations Concerning Post Employment Conflict of Interests. These regulations only apply to employees who left Federal service before 1 January 1991. The Office of Government Ethics, however, continues to rely on them for issuing guidance for employees who left Federal service after 1 January 1991. Regulations providing guidance concerning 18 U.S.C. 207 to these employees was last published in the 2008 edition of title 5 of the Code of Federal Regulations, revised as of January 1, 2008.
3. 5 C.F.R. Part 2641, Post-Employment Conflict of Interest Restrictions (JER 9-200).
4. 5 C.F.R. Part 2640, Interpretations, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208 (Acts Affecting a Personal Financial Interest).
5. GENERAL SERVS. ADMIN. (GSA), FEDERAL ACQUISITION REGULATIONS SYSTEM. 48 C.F.R. (referred to in the outline as 48 C.F.R. or as FAR) Part 3 (Improper Business Practices and Personal Conflicts of Interest).
6. DEFENSE ACQUISITION REGULATIONS SYSTEM, DEPARTMENT OF DEFENSE. 48 C.F.R. Part 203 (Improper Business Practices and Personal Conflicts of Interest).

7. National Defense Authorization Act for Fiscal Year 2004 (PL 108-136), section 1125.
- C. Department of Defense Directive 5500.07-R, JOINT ETHICS REGULATION (JER) (August 30, 1993).
- D. Miscellaneous:
1. Summary of Post-Employment Restrictions of 18 U.S.C. 207, <http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2199>
 2. Memorandum for Amy Comstock, Director, Office of Government Ethics from U.S. Department of Justice, Office of Legal Counsel, dated January 19, 2001. (<http://www.justice.gov/sites/default/files/olc/opinions/2001/01/31/op-olc-v025-p0059.pdf>) (a one man corporation is providing survey results to his former agency through others and his corporation—this could constitute a “communication” violating 207)
 3. Post-Government Service Advice. See Publications and Handouts in the Ethics Resource Library at the DoD SOCO Web site. (http://www.dod.mil/dodgc/defense_ethics/resource_library/pubhandout.htm)
 - a. Seeking Employment Restrictions (Rules When You Are Looking For a New Job)
 - b. Post-Government Employment Restrictions (Rules Affecting Your New Job After DoD) for Military Personnel E-1 through O-6 and Civilian Personnel Paid at less than 86.5% of the rate for Executive Schedule Level II (Non-Senior Employees)
 - c. Post-Government Employment Restrictions (Rules Affecting Your New Job After DoD) for Civilian Personnel Paid at or above 86.5% of the rate for Executive Schedule Level II and Flag and General Officers (Senior Employees)
 - d. Post-Government Employment Disqualification Statements
 - e. Procurement Integrity Act Restrictions (Rules When You Are Looking For a New Job & Rules Affecting Your New Job After Leaving DoD)

4. 5 C.F.R. 2641, App. B , Department of Defense separate component designations for 207(c) purposes: Department of the Army, Department of the Navy, Department of the Air Force, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Threat Reduction Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, and the National Security Agency. *Id.*
5. Office of Personnel Management Notice of 18 U.S.C. 207(c) restrictions, 5 CFR 730.104.
6. Office of Government Ethics DAEOgram DO-04-029: Seeking Employment. (<http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2188>)
7. DoD components shall provide guidance on relevant Federal and DoD Post-Government service restrictions as part of out-processing. Section 9-402 of the Joint Ethics Regulation, DoD 5500.07-R (JER). Annual certification required to be signed by all public financial disclosure filers. Section 8-400 of the JER. Post Employment is included in annual ethics training pursuant to section 11-301 (d) of the JER. (http://www.dod.mil/dodgc/defense_ethics/resource_library/post_emp_cert.pdf)
8. (S.1, P.L. 110-81). SOCO advisory Number 08-03, April 28, 2008. (http://www.dod.mil/dodgc/defense_ethics/advisories/2008_advisories/adv_0803.htm)
9. OGE Post-employment regulation, final rule. (<http://edocket.access.gpo.gov/2008/pdf/E8-13394.pdf>)
10. National Emergency Extension. (<https://www.gpo.gov/fdsys/pkg/FR-2016-09-01/pdf/2016-21284.pdf>)
11. January 21, 2009 Executive Order and Pledge and OGE interpretation. <http://edocket.access.gpo.gov/2009/pdf/E9-1719.pdf>. (outlines Executive Order)
[https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories/F6ADD3FD4680834485257E96005FBB86/\\$FILE/33590074f4d64b8e9ad3f908a81087542.pdf?open](https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories/F6ADD3FD4680834485257E96005FBB86/$FILE/33590074f4d64b8e9ad3f908a81087542.pdf?open) (signing of the Pledge)

[https://www.oge.gov/Web/OGE.nsf/All%20Documents/932CE93AEBEE302785257E96005FBB84/\\$FILE/029ce5b77e7d42928f551da8a94d21492.pdf?open](https://www.oge.gov/Web/OGE.nsf/All%20Documents/932CE93AEBEE302785257E96005FBB84/$FILE/029ce5b77e7d42928f551da8a94d21492.pdf?open) (who must sign the Pledge)

[https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories/1231E7FF31E2E54985257E96005FBB7E/\\$FILE/DO-09-011.pdf?open](https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories/1231E7FF31E2E54985257E96005FBB7E/$FILE/DO-09-011.pdf?open) (ban coming into government under Pledge)

[https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories/FAB59D2DFEA696AC85257E96005FBB80/\\$FILE/DO-09-020.pdf?open](https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories/FAB59D2DFEA696AC85257E96005FBB80/$FILE/DO-09-020.pdf?open) (speeches under the Pledge)

[https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories/EABD72EF2D57E6D185257E96005FBEA5/\\$FILE/19b0e5ba52e14741b80195e5c34aeb594.pdf?open](https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories/EABD72EF2D57E6D185257E96005FBEA5/$FILE/19b0e5ba52e14741b80195e5c34aeb594.pdf?open) (post employment restrictions under the Pledge)

12. Change in the Simplified Acquisition Threshold, 75 FR 53129-53135 (Aug. 30, 2010) effective October 1, 2010.

(<http://edocket.access.gpo.gov/2010/pdf/2010-21025.pdf>)

13. Change in the “minimal value,” 79 FR 18477 (April 2, 2014) effective January 1, 2014. (<http://www.gpo.gov/fdsys/pkg/FR-2014-04-02/pdf/2014-07369.pdf>.)

14. Seeking Employment Regulation amendment per STOCK ACT, <https://www.gpo.gov/fdsys/pkg/FR-2016-07-26/pdf/2016-17553.pdf> effective August 25, 2016

II. INTRODUCTION

- A. The conflict of interest prohibitions of 18 U.S.C. § 208 as they apply to government personnel who are seeking outside employment.
- B. The coverage of what was formerly referred to as the Procurement Integrity Act.
- C. The procurement-related restrictions on seeking and accepting employment when leaving government service.
- D. The post-government service employment restrictions of 18 U.S.C. § 207

III. ROAD MAP

- A. Purpose of Restrictions
- B. Seeking Employment
- C. Federal Employment Restrictions
- D. Private Employment Restrictions
- E. Foreign Employment Restrictions

IV. PURPOSE OF RESTRICTIONS

- A. Prevent Conflicts of Interest
- B. Promote Economy in Federal Government
- C. Expand Employment Opportunities in the Federal System
- D. Preserve the Public’s Confidence in Government Integrity

V. RENDERING COMPETENT ADVICE

- A. Need Full Disclosure (Client Questionnaire)
- B. Who is the Client? (JER section 9-500)
- C. Effect of Advice?
- D. OGE will audit whether counseling is provided, records are kept, and the advice is accurate.

VI. FINANCIAL CONFLICTS OF INTEREST.

18 U.S.C. § 208; 5 C.F.R. § 2640.103. Prohibits an employee from participating **personally and substantially** in his or her official capacity in any **particular matter** in which he or she has a **financial interest**, if the particular matter will have a **direct and predictable effect** on that interest.

- A. Specifically, an employee may not work on an assignment that will affect the financial interest of someone with whom the employee either has an arrangement for employment or is negotiating for employment.
- B. Definition of key terms.
 - 1. Financial Interests. Defined as a potential for gain or loss on interests such as stocks, bonds, leasehold interests, mineral and property rights, deeds of trust, liens, options, or commodity futures. 5 C.F.R. § 2635.403(c); 5 C.F.R. § 2640.103(b). The financial interest of a person with whom the employee is negotiating for employment or has an arrangement concerning prospective employment (5 C.F.R. § 2635.402(b)(2)(v); 5 C.F.R. § 2640.103(c)) is imputed to the employee.
 - 2. Personally. Defined as direct participation, or direct and active supervision of a subordinate. 5 C.F.R. § 2635.402(b)(4); 5 C.F.R. § 2640.103(a)(2).
 - 3. Substantially. Defined as an employee's involvement that is significant to the matter. 5 C.F.R. § 2635.402(b)(4); 5 C.F.R. § 2640.103(a)(2).
 - 4. Particular Matter. Defined as a matter involving deliberation, decision, or action focused on the interests of specific persons, or an identifiable class of persons. However, matters of broad agency policy are not particular matters. 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.103(a)(1).

5. Direct and Predictable Effect. Defined as a close, causal link between the official decision or action and its effect on the financial interest. 5 C.F.R. § 2635.402(b)(1); 5 C.F.R. § 2640.103(a)(3).

C This statute does not apply to enlisted members, but the JER subjects enlisted members to similar regulatory prohibitions. See JER, para. 5-301 (which also includes members of the National Guard). Regulatory implementation of 18 U.S.C. § 208 is found in the JER, Chapters 2 and 5.

D. Options for employees with conflicting financial interests.

1. Disqualification. With the approval of his or her supervisor, the employee may disqualify to eliminate any contact or actions affecting the company with whom the employee is negotiating employment or has an arrangement concerning prospective employment. 5 C.F.R. § 2635.402(c); 5 C.F.R. § 2640.103(d). JER section 2-204(c) requires that the disqualification be in writing.
2. Waiver. An employee otherwise disqualified by 18 U.S.C. § 208(a) may be permitted to participate personally and substantially in a particular matter on a case-by-case basis after the employee fully discloses the financial interest to the agency and receives a written waiver. The criterion is whether the employee's conflicting financial interest is not so substantial as to affect the integrity of his or her service to the agency. 5 C.F.R. § 2635.402(d)(2)(ii); 5 C.F.R. § 2640.301(a).

(Practice Note: Since most employees derive a substantial portion of their income from their employment, it is rare that a 208(b)(1) waiver will apply under these circumstances.)

E. Negotiating for employment. The term “negotiating” is interpreted broadly. United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).

1. Any discussion, however tentative, is negotiating for employment.

Something as simple as going to lunch to discuss future prospects could be the basis for a conflict of interest. If the company does not do business with the Department, then that person may negotiate for employment with that company. No special action is required.

2. Conflicts of interest are always analyzed in the present tense. If an employee interviews for a position and decides not to work for that company, then he or she is free to later work on matters affecting that company.
8. Disqualification and Waiver.

- a. With the approval of his or her supervisor, the employee must disqualify or change duties to eliminate any contact or actions with the prospective employer. 5 C.F.R. § 604(a)-(b). Written notice of the disqualification is required. JER § 2-204(c).
 - b. An employee may participate personally and substantially in a particular matter having a direct and predictable impact on the financial interests of the prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. § 208(b)(1) or (b)(3). The waivers are described in 5 C.F.R. § 2635.402(d) and 5 C.F.R. Part 2640 and generally cannot be waived because an “employment” interest is a rather substantial financial interest.
 - c. Disqualification. Please note that the STOCK Act, Pub. L. 112-105, section 17, 2012, as amended, requires that the employee who files a public financial disclosure report file a notice of negotiation within three (3) days of negotiating a salary with a private sector entity regardless of whether the employer has interests that could be affected by performance or nonperformance of the employee’s duties.
- F. Violating 18 U.S.C. § 208 may result in imprisonment up to one year, or, if willful, five years. 18 U.S.C. § 216. In addition, a fine of \$50,000 to \$250,000 is possible. See 18 U.S.C. § 3571.

G. Seeking Employment

1. The Office of Government Ethics (OGE) regulations contain additional requirements for disqualification of employees who are “seeking employment.” 5 C.F.R. §§ 2635.601 - 2635.606. “Seeking employment” is a term broader than “negotiating for employment” found in 18 U.S.C. § 208.

An employee begins “seeking employment” if he or she has directly or indirectly:

- a. Engaged in employment negotiations with any person. “Negotiations” means discussing or communicating with another person, or that person’s agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment. This term is not limited to discussing specific terms and conditions of employment to a specific position. 5 C.F.R. § 2635.603(b)(1)(i).
- b. Made an unsolicited communication to any person or that person’s agent or intermediary about possible employment. 5 C.F.R. § 2635.603(b)(1)(ii).

- c. Made a response other than rejection to an unsolicited communication from any person or that person’s agent or intermediary regarding possible employment. 5 C.F.R. § 2635.603(b)(1)(iii).
- 2. An employee has not begun “seeking employment” if he or she makes an unsolicited communication for the following reason:
 - For the sole purpose of requesting a job application. 5 C.F.R. § 2635.603(b)(1)(ii).
- 3. An employee is no longer “seeking employment” under the following circumstances:
 - a. The employee rejects the possibility of employment and all discussions have terminated. 5 C.F.R. § 2635.603(b)(2)(i). However, a statement by the employee that merely defers discussions until the foreseeable future does not reject or close employment discussions. 5 C.F.R. § 2635.603(b)(3).
 - b. Two months have lapsed after the employee has submitted an unsolicited résumé or employment proposal with no response from the prospective employer. 5 C.F.R. § 2635.603(b)(2)(ii).
- 4. While seeking employment, the employee must disqualify or change duties to eliminate any contact or actions with the prospective employer. 5 C.F.R. § 604(a)-(b). Written notice of the disqualification is required. JER § 2-204(c).

VII. THE PROCUREMENT INTEGRITY ACT

On January 4, 2011, the Procurement Integrity Act (PIA) was codified for the first time at 41 U.S.C. 2101-2107. The codified statute does not have a name but will be referred to in this deskbook as “the Procurement Integrity Act.” Prior to January 4, 2011, the PIA was found at Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-665 (1996). Section 27, Office of Federal Procurement Policy Act (OFPPA) amendments of 1988, 41 U.S.C. § 423. Codification did not make any changes to the old PIA passed effective 1997.

A. Background Information about the former PIA.

- 1. Effective date: January 1, 1997 (this has not changed as a result of the codification).
- 2. The basic provisions of the statute are set forth in FAR 3.104-3.
 - a. Prohibitions on disclosing and obtaining procurement information apply beginning January 1, 1997, to:
 - (1) Every competitive federal procurement for supplies or services,

- (2) From non-federal sources,
 - (3) Using appropriated funds.
 - b. Requirement to report employment contacts applies beginning January 1, 1997, to competitive federal procurements above the simplified acquisition threshold (\$150,000).
 - c. Post-employment restrictions apply to former officials for services provided or decisions made on or after January 1, 1997.
 - d. Former officials who left government service before January 1, 1997, are subject to the restrictions of the Procurement Integrity Act as it existed prior to its amendment.
- 3 Coverage. Applies to “persons,” “agency officials,” and former officials” as defined in the PIA.
- 4 Department of Defense Guidance Regarding Procurement Integrity Law. Updated Guidance on the Application of the Procurement Integrity Act (PIA) and Regulations, dated July 12, 2011.
http://www.dod.mil/dodgc/defense_ethics/resource_library/updated_guidance_procurement_integrity_act.pdf
- B. Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information.
 - 1. Restrictions on Disclosure of Information. 41 U.S.C. § 2102(a)(3). The following persons are forbidden from knowingly disclosing contractor bid or proposal information or source selection information before the award of a contract:
 - a. Present or former federal officials;
 - b. Persons (such as contractor employees) who are currently advising the Federal Government with respect to a procurement;
 - c. Persons (such as contractor employees) who have advised the Federal Government with respect to a procurement, but are no longer doing so; and
 - d. Persons who have or had access to such information by virtue of their office, employment, or relationship.

2. Restrictions on Obtaining Information. 41 U.S.C. § 2101(b). Persons (other than as provided by law) are forbidden from obtaining contractor bid or proposal information or source selection information before the award of a contract.
3. Contractor Bid or Proposal Information. 41 U.S.C. § 2101(2). Defined as any of the following:
 - a. Cost or pricing data;
 - b. Indirect costs or labor rates;
 - c. Proprietary information marked in accordance with applicable law or regulation; and
 - d. Information marked by the contractor as such in accordance with applicable law or regulation. If the contracting officer disagrees, he or she must give the contractor notice and an opportunity to respond prior to release of marked information. FAR 3.104-4(d). See Chrysler Corp. v. Brown, 441 U.S. 281 (1979); CNA Finance Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), cert. den. 485 U.S. 917 (1988).
4. Source Selection Information. 41 U.S.C. § 2101(7). Defined as any of the following:
 - a. Bid prices before bid opening;
 - b. Proposed costs or prices in negotiated procurement;
 - c. Source selection plans;
 - d. Technical evaluation plans;
 - e. Technical evaluations of proposals;
 - f. Cost or price evaluations of proposals;
 - g. Competitive range determinations;
 - h. Rankings of bids, proposals, or competitors;
 - i. Reports and evaluations of source selection panels, boards, or advisory councils; and
 - j. Other information marked as source selection information if release would jeopardize the integrity of the competition.

C. Reporting Non-Federal Employment Contacts.

1. Mandatory Reporting Requirement. 41 U.S.C. § 2103(a). An agency official who is **participating personally and substantially** in an acquisition over the simplified acquisition threshold must report employment contacts with bidders or offerors. Reporting may be required even if the contact is through an agent or intermediary. FAR 3.104-5(a).
 - a. Report must be in writing. 41 U.S.C. § 2103(a)(1).
 - b. Report must be made to supervisor and designated agency ethics official. 41 U.S.C. § 2103(a)(1).
 - (1) Designated agency ethics official in accordance with 5 C.F.R. § 2638.201.
 - (2) Deputy agency ethics officials in accordance with 5 C.F.R. § 2638.204 if authorized to give ethics advisory opinions.
 - (3) Alternate designated agency ethics officials in accordance with 5 C.F.R. § 2638.202(b). See FAR 3.104-3 as defined at 3.104-1.
 - c. Additional Requirements. The agency official **must**:
 - (1) Promptly reject employment, 41 U.S.C. § 2103(a)(2)(A); or
 - (2) Disqualify him/herself from the procurement until authorized to resume participation in accordance with 18 U.S.C. § 208. 41 U.S.C. § 2103(a)(2)(B).
 - (a) Disqualification notice. Employees who disqualify themselves must submit a disqualification notice to the head of the contracting activity (HCA) or designee, with copies to the contracting officer, source selection authority, and immediate supervisor. FAR 3.104-5(b).

(b) Note: 18 U.S.C. § 208 requires employee disqualification from participation in a particular matter if the employee has certain financial interests in addition to those which arise from employment contacts. Also, an official who refuses to cease employment discussions is subject to administrative actions in accordance with 5 C.F.R. § 2635.604(d) (annual leave, leave without pay, or other appropriate administrative action) if the disqualification interferes substantially with the official's ability to perform his or her assigned duties. FAR 3.104-8. See Smith v. Dep't of Interior, 6 M.S.P.R. 84 (1981) (employee who violated conflict of interest regulations by acting in official capacity in matters affecting his financial interests is subject to removal).

2. Both officials and bidders or offerors who engage in prohibited employment contacts are subject to criminal and civil penalties and administrative actions.
3. Participating personally and substantially means active and significant involvement in:
 - a. Drafting, reviewing, or approving a statement of work;
 - b. Preparing or developing the solicitation;
 - c. Evaluating bids or proposals, or selecting a source;
 - d. Negotiating price or terms and conditions of the contract; or
 - e. Reviewing and approving the award of the contract. FAR 3.104-1.
4. The following activities are generally considered **not** to constitute personal and substantial participation:
 - a. Certain agency-level boards, panels, or advisory committees that make recommendations regarding approaches for satisfying broad agency-level missions or objectives;
 - b. General, technical, engineering, or scientific effort of broad applicability and not directly associated with a particular procurement;
 - c. Clerical functions in support of a particular procurement; and
 - d. Below listed activities for OMB Circular A-76 cost comparisons:

- (1) Participating in management studies;
- (2) Preparing in-house cost estimates;
- (3) Preparing “most efficient organization” (MEO) analyses; and
- (4) Furnishing data or technical support **to be used by others** in the development of performance standards, statements of work, or specifications. FAR 3.104-1.

(Note that 18 U.S.C. § 208 may preclude participation even if the FAR would appear to allow it. Both have to be considered before making a determination. See 48 C.F.R. § 3.104-3(c)(4) (FAR 3.104-3(c)(4)).

D. Post-Government Employment Restrictions.

1. A one-year ban prohibits certain persons from accepting compensation from the awardee. “Compensation” means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Indirect compensation is compensation paid to another entity specifically for services rendered by the individual. FAR 3.104-1. The ban applies to both competitively awarded and non-competitively awarded procurements. FAR 3.104-3(d).
2. The one-year ban applies to persons who serve in any of the following seven positions on a contract **in excess of \$10 million**:
 - a. Procuring Contracting Officer (PCO);
 - b. Source Selection Authority (SSA);
 - c. Members of the Source Selection Evaluation Board (SSEB);
 - d. Chief of a financial or technical evaluation team;
 - e. Program Manager;
 - f. Deputy Program Manager; and
 - g. Administrative Contracting Officer (ACO).
3. The one-year ban also applies to anyone who “personally makes” any of the following seven types of decisions:
 - a. The decision to award a contract **in excess of \$10 million**;
 - b. The decision to award a subcontract **in excess of \$10 million**;

- c. The decision to award a modification of a contract or subcontract **in excess of \$10 million;**
 - d. The decision to award a task order or delivery order **in excess of \$10 million;**
 - e. The decision to establish overhead or other rates valued **in excess of \$10 million;**
 - f. The decision to approve issuing a payment or payments **in excess of \$10 million;** and
 - g. The decision to pay or settle a claim **in excess of \$10 million.**
4. The Ban Period.
- a. If the former official was in a specified position (source selection type) on the date of contractor selection, but not on the date of award, the ban begins on the date of selection.
 - b. If the former official was in a specified position (source selection type) on the date of award, the ban begins on the date of award.
 - c. If the former official was in specified position (program manager, deputy program manager, administrative contracting officer), the ban begins on the last date of service in that position.
 - d. If the former official personally made certain decisions (award, establish overhead rates, approve payment, settle claim), the ban begins on date of decision. FAR 3.104-4(d)(2).
5. In “excess of \$10 million” means:
- a. The value or estimated value of the contract including options;
 - b. The total estimated value of all orders under an indefinite-delivery, indefinite-quantity contract, or a requirements contract;
 - c. Any multiple award schedule contract, unless the contracting officer documents a lower estimate;
 - d. The value of a delivery order, task order, or order under a basic ordering agreement;
 - e. The amount paid, or to be paid, in a settlement of a claim; or

- f. The estimated monetary value of negotiated overhead or other rates when applied to the government portion of the applicable allocation base. See FAR 3.104-3.
 - 6. The one-year ban does not prohibit an employee from working for any division or affiliate that does not produce the same or similar product or services.
 - 7. Ethics Advisory Opinion. Agency officials and former agency officials may request an advisory opinion as to whether he or she would be precluded from accepting compensation from a particular contractor. FAR 3.104-6(a).
- E. Penalties and Sanctions.
- 1. Criminal Penalties. Violating the prohibition on disclosing or obtaining procurement information may result in confinement for up to five years and a fine if done in exchange for something of value, or to obtain or give a competitive advantage. 41 U.S.C. § 2105(a).
 - 2. Civil Penalties.
 - a. The Attorney General may take civil action for wrongfully disclosing or obtaining procurement information, failing to report employment contacts, or accepting prohibited employment. 41 U.S.C. § 2105(b).
 - b. Civil penalty is up to \$50,000 (individuals) and up to \$500,000 (organizations) plus twice the amount of compensation received or offered.
 - 3. If violations occur, the agency shall consider cancellation of the procurement, rescission of the contract, suspension or debarment, adverse personnel action, and recovery of amounts expended by the agency under the contract. A new contract clause advises contractors of the potential for cancellation or rescission of a contract, recovery of any penalty prescribed by law, and recovery of any amount expended under the contract. 48 C.F.R. § 52.203-8. Another clause advises the contractor that the Government may reduce contract payments by the amount of profit or fee for violations. 48 C.F.R. § 52.203-10.

4. A contracting officer may disqualify a bidder from competition whose actions fall short of a statutory violation, but call into question the integrity of the contracting process. See Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd on recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435; Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992) (contracting officer has discretion to disqualify from competition a bidder who obtained proprietary information through industrial espionage not amounting to a violation of the Procurement Integrity Act); see also NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed.Cir. 1986) (contracting officer has authority to disqualify a bidder based solely on appearance of impropriety when done to protect the integrity of the contracting process).
5. Limitation on Protests. 41 U.S.C. § 2106. No person may file a protest, and GAO may not consider a protest, alleging a PIA violation unless the protester first reported the alleged violation to the agency within 14 days of its discovery of the possible violation. FAR 33.102(f).
6. Contracting Officer's Duty to Take Action on Possible Violations.
 - a. Determine impact of violation on award or source selection.
 - b. If no impact, forward information to individual designated by agency. Proceed with procurement, subject to contrary instructions.
 - c. If impact on procurement, forward information to the HCA or designee. Take further action in accordance with HCA's instructions. FAR 3.104-7.
- F. Private Employment Restrictions. 41 U.S.C. § 423 repealed 10 U.S.C. §§ 2397 and 281, and 37 U.S.C. § 801. DD Form 1787, a form completed by private employers about former employees and sent to DoD is no longer required. (41 U.S.C. § 423 was replaced by 41 U.S.C. §§ 2101-07).

VIII. GIFTS FROM PROSPECTIVE EMPLOYERS AND DISQUALIFICATION WHEN SEEKING EMPLOYMENT

Travel, meals, and reimbursements for job interviews. Government employees may accept travel expenses to attend job interviews if such expenses are customarily paid to all similarly-situated job applicants. 5 C.F.R. §§ 2635.602(b) and 2635.204(e)(3). Personnel who file financial disclosure reports (OGE Form 278 and OGE Form 450) must report such payments on their financial disclosure report.

IX. TERMINAL LEAVE

- A. May work while on terminal leave.

- B. Financial disclosure form filers (OGE Form 450/278) must obtain agency designee approval if employer will be prohibited source.
1. Active duty officers may not accept outside employment that will interfere with duty performance or require separation from service. 10 U.S.C. § 973(a).
- C. Including a current government employee's resume in a solicitation by a contractor to an agency may be permissible where the employee had no responsibility for the subject procurement, never had responsibility for the contractor, did not have any role in preparing the contractor's proposal, does not work for the procuring agency, and has brought to the attention of his superior and the agency ethics official his intentions regarding use of the resume. OGE opinion 98 x 5.
([https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories/BF75AE9C37B3EB7685257E96005FBE56/\\$FILE/c1079da4fada454e9f2038a61aaaf01b3.pdf?open](https://www.oge.gov/Web/OGE.nsf/Legal%20Advisories/BF75AE9C37B3EB7685257E96005FBE56/$FILE/c1079da4fada454e9f2038a61aaaf01b3.pdf?open))
- D. Cannot hold a civil office during terminal leave.
1. Civil office statute: 10 U.S.C. § 973.
 2. Active Duty Military Officers may not hold Civil Office
 - a. Federal/State/Local
 - b. Exercise Sovereign Power
 - c. USA/DA/City Attorney/County Clerk
 - d. Note that DoD Directive 1344.10, section 4.2.4.1, states as follows:
"Any enlisted member on active duty may seek, hold, and exercise the functions of a nonpartisan civil office as a notary public or member of a school board, neighborhood planning commission, or similar local agency, provided that the office is held in a non-military capacity and there is no interference with the performance of military duties."
- E. A military officer may not accept "civil office" with a state or local government, nor may an officer perform the duties of such civil office while on terminal leave. 10 U.S.C. § 973(b). A "civil office" is a position in which some portion of a state's sovereign power is exercised. For example, a county clerk position is considered a "civil office." In the Matter of Major Robert C. Crisp, USAF, 56 Comp. Gen. 855 (1977). By regulation, DoD Directive 1344.10, this prohibition applies to enlisted personnel, but does not apply to civilian personnel.
- F. If not a "civil office"
1. May receive pay for Federal position and military pay and allowances during terminal leave. 5 U.S.C. § 5534a; DoD Directive 1344.10.

- G. Cannot act as an agent for another before any federal agency. 18 U.S.C. §§ 203/205. Military officers working on terminal leave (like all federal employees) are prohibited by 18 U.S.C. §§ 203 and 205 from representing their new employer to the Government. This makes problematic the increasingly common practice of contractor personnel physically working in government offices or meeting with government personnel in the contractor's office. Being present in government offices on behalf of a contractor, or meeting government officials in a contractor's workplace is inherently a representation. Of course, military officers on terminal leave may begin work with the contractor, but only "behind the scenes" at a contractor office or otherwise away from the government workplace or from Government officials. Enlisted members are not subject to 18 U.S.C. §§ 203 or 205.

X. DUAL COMPENSATION LAWS

- A. Section 651 of the NDAA for FY 2000 (P.L. 106-65) repealed 5 U.S.C. § 5532 in its entirety.
- B. No reduction in retired or retainer pay for retired members of the Armed Forces who are employed in federal civilian positions.

XI. SIX-MONTH COOLING OFF PERIOD

- A. No civilian employment within DoD for six (6) months after leaving military service. 5 U.S.C. § 3326.
- B. Applies to all retired military members
- C. Waivers available from Secretary of hiring component
- D. Limitation lifted during national emergency. Note: Presidential Proclamation Declaring Emergency for one year starting from September 14, 2016. See Federal Register citation at beginning

XII. REPRESENTATIONAL PROHIBITIONS

- A. 18 U.S.C. § 207 and its implementing regulations bar certain acts by former employees which may reasonably give the appearance of making unfair use of their prior employment and affiliations.
 - 1. A former employee involved in a particular matter while working for the Government must not "switch sides" after leaving government service to represent another person on that matter.

2. 18 U.S.C. § 207 does not bar a former employee from working for any public or private employer after government service. The statute is not designed to discourage government employees from moving to and from private positions. Rather, such a “flow of skills” promotes efficiency and communication between the Government and the private sector and is essential to the success of many government programs. The statute bars only certain acts detrimental to public confidence.
- B. 18 U.S.C. § 207 applies to all former officers and civilian employees whether or not retired, but **does not apply to enlisted personnel** because they are not included in the definition of “officer or employee” in 18 U.S.C. § 202. Note: Employees on terminal leave must also heed the representation restrictions of 18 U.S.C. §§ 203/205, which apply to current government employees.
- C. 18 U.S.C. § 207(a)(1) imposes a **lifetime prohibition** on the former employee against communicating or appearing before any agency of the Government, with the intent to influence, regarding a particular matter, on behalf of anyone other than the Government, when:
1. The Government is a party, or has a direct and substantial interest in the matter;
 2. The former officer or employee participated personally and substantially in the matter while in his official capacity; and
 3. At the time of the participation, specific parties other than the Government were involved. 5 C.F.R. § 2641.201(a).
 4. Note that when the term “lifetime” is used, it refers to the lifetime of the particular matter. To the extent that the particular matter is of limited duration, so is the coverage of the statute. Further, it is important to distinguish among particular matters. The statute does not apply to a broad category of programs when the specific elements may be treated as severable.
 5. An appearance may include a mere physical presence. 5 C.F.R. § 2641.201(d)(2) and (e)(4).
 6. Communication is defined at 5 C.F.R. § 2641.201(d)(1) (not necessary that any employee of the United States actually recognize the former employee as the source of the information).
 7. Behind the scenes assistance is defined at 5 C.F.R. § 2641.201(d)(3) (assistance does not involve a communication to or an appearance before an employee of the United States).

8. Intent to influence does not include: making a routine request not involving a potential controversy such as requesting publicly available documents; making factual statements in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action, such as conveying factual information regarding matters that are not potentially controversial during the regular course of performing a contract; signing a tax return of another as a preparer; signing an assurance that the former employee will be the principal investigator for the direction and conduct of the research; filing a Securities and Exchange Form 10-K; making a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract or grant, during a routine Government site visit to premises owned or occupied by a person other than the United States where the work is performed or would be performed, in the ordinary course of evaluation, administration, or performance of an actual or proposed contract or grant; or purely social contacts. 5 C.F.R. § 2641.201(e)(2).
 9. For a discussion as to when a particular matter begins, note 5 C.F.R. § 2641.201(h)(4).
 10. For determining if the particular matter involving specific parties is the same matter, note 5 C.F.R. § 2641.201(h)(5).
 11. Personally (means direct) and substantially (means of significance to the matter) 5 C.F.R. § 2641.201(i)(2) and (3).
 12. Speaking before the Department —note that under the post-employment regulation, former personnel subject to § 207(a)(1) may speak before Federal personnel at a public gathering or conference, seminar, or similar forum on behalf of another when: the event is not sponsored or co-sponsored by the former employee's agency; an independent agency in the Executive, Legislative or Judicial branch; Federal court, or court-martial; the event is attended by a large number of attendees; and a significant portion of the attendees are not employees of the United States. 5 C.F.R. § 2641.201(f)(3) (Note: a former employee may engage in exchanges with any other speaker or with any member of the audience.)
- D. 18 U.S.C. § 207(a)(2) prohibits, for **two years** after leaving federal service, a former employee from communicating or appearing before any agency of the Government, with the intent to influence, regarding a particular matter, on behalf of anyone other than the Government, when:
1. The Government is a party, or has a direct and substantial interest in the matter;
 2. The former officer or employee knew or should have known that the matter was pending under his official responsibility during the one year period prior to leaving federal service; and

3. At the time of the participation, specific parties other than the Government were involved. 5 C.F.R. § 2641.202(a).
- E. 18 U.S.C. § 207(b) prohibits former officers and employees, for one year after leaving federal service, from knowingly representing, aiding or advising an employer or any entity regarding ongoing trade or treaty negotiations based on information that they had access to and that is exempt from disclosure under the Freedom of Information Act. This restriction begins upon separating or retiring from government service and, unlike the restrictions of provisions of 18 U.S.C. § 207(a)(1) or (2) discussed above, **prohibits former officials from providing “behind-the-scenes” assistance on the basis of the covered information to any person or entity.** This restriction applies only if the former official was personally and substantially involved in ongoing trade or treaty negotiations within the last year of his government service. It is not necessary that the former official have had contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation. The treaty negotiations covered by this section are those that result in international agreements that require the advice and consent of the Senate. 18 U.S.C. § 207(b)(2)(B). The trade negotiations covered are those that the President undertakes under section 1102 of the Omnibus Trade and Competitiveness Act of 1988. 18 U.S.C. § 207(b)(2)(A). A negotiation becomes “ongoing” at the point when both: (1) the determination has been made by competent authority that the outcome of the negotiation will be a treaty or trade agreement, and (2) discussions with a foreign government have begun on a treaty. 5 C.F.R. § 2641.203(a).
- F. 18 U.S.C. § 207(c) prohibits, for **one year** after service in a “senior position” (military personnel 0-7 and above, and civilian personnel whose rate of basic pay equals or exceeds 86.5 percent of the annual rate of basic pay for level II of the Executive Schedule (EL II) (\$160,111.50 in 2016) terminates, from communicating to or appearing before the employee’s former agency, with the intent to influence, regarding a particular matter, on behalf of anyone other than the Government, when:
1. The communication or appearance involves the department or agency the officer or employee served within the one year period prior to his termination from a senior position;
 2. The communication or appearance is on behalf of any other person (other than the Government). 5 C.F.R. § 2641.204(a).

3. 18 U.S.C. § 207(h) permits DoD to be divided into separate components for purposes of the restrictions imposed by § 207(c). DoD separate components are listed in Appendix B to 5 C.F.R. § 2641. At present, the DoD separate components are: Air Force; Army; Navy; Defense Information Systems Agency; Defense Intelligence Agency; Defense Logistics Agency; National Geospatial-Intelligence Agency; Defense Threat Reduction Agency; National Security Agency; and the National Reconnaissance Office. Note: Civilian Political Appointees confirmed by the Senate are not eligible to benefit from the separate component designations. 5 C.F.R. § 2641.302(b).
4. Generals and Admirals who retire from agencies other than their respective military services are considered to have been detailed to those agencies and they are prohibited by § 207(c) from communicating back to both their agency and military service. (See 18 U.S.C. § 207(h)).

Thus, a Navy Admiral in a Navy billet is prohibited from communicating, as an official action, back to the Department of the Navy. However, the officer may communicate before the other Services and OSD provided OSD is not the agency to which the Admiral was detailed.

5. 18 U.S.C. § 207(d), specifically bans the Secretary of Defense (a “very senior employee”) from communicating or appearing, for two years, before: (a) any officer or employee of any DoD department or agency and (b) all employees listed by position on the Executive Schedule in all agencies of the Executive Branch. (18 U.S.C. § 207(d)); 5 C.F.R. § 2641.205(a).
 6. Speaking before the Department during the one-year “cooling off”—note that under the post-employment regulation, former personnel subject to § 207(c) may speak before personnel from their former department at a public gathering or conference, seminar, or similar forum when: the event is not sponsored or co-sponsored by the former senior employees’ former agency; the event is attended by a large number of attendees; and a significant portion of the attendees are not employees of the former senior employees’ former agency. 5 C.F.R. § 2641.204(g)(4). (Note: a former employee may engage in exchanges with any other speaker or with any member of the audience.)
- G. 18 U.S.C. § 207 **does not** prohibit an employee from working for any entity, but it does restrict how a former employee may work for the entity.

With the exception of §§ 207(b) and (f), the statute does not bar behind the scenes involvement. However, there is a January 19, 2001, opinion from the Department of Justice suggesting that a former employee who is the sole proprietor of a business “working behind the scenes” may constitute “communication with the intent to influence” government decisions. (http://www.justice.gov/sites/default/files/olc/opinions/2001/01/31/op-olc-v025-p0059_0.pdf) 2. .

- H. 18 U.S.C. § 207(f) prohibits former senior employees (Admirals, Generals, and personnel whose rate of basic pay equals or exceeds 86.5 percent of the annual rate of basic pay for level II of the Executive Schedule (EL II) (\$160,111.50 in 2015)) for a period of one year after leaving their senior employee position from:
1. Representing foreign entities before any official of the Government with the intent to influence that official regarding his or her official duties, or
 2. Aiding or advising a foreign entity with the intent to influence a government official regarding his or her official duties. This type of behind the scenes participation is not permitted. A “foreign entity” includes foreign governments, foreign political parties, and groups exercising de facto political jurisdiction over a country. Foreign commercial corporations are generally not considered “foreign entities” unless they exercise the functions of a sovereign. 5 C.F.R. § 2641.206(a).

NOTE: The Office of Government Ethics issued DAEOgram DO-04-031 on October 5, 2004, attaching an Office of Legal Counsel opinion dated June 22, 2004, concerning the question of whether 18 U.S.C. § 207(f) covers post-employment contacts with members of Congress. (<http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2197>) The OLC opinion concludes that section 207(f) does cover representational contacts with members of Congress.

- I. State and Local Governments and Institutions, Hospitals, and Organizations.
1. The restriction in 18 U.S.C. §§ 207(c) and (d) does not apply to appearances, communications, and representations by a former senior employee or very senior employee when carrying out official duties as an employee of a state or local government, an employee of certain accredited degree-granting institutions of higher education, or an employee of a nonprofit, tax-exempt hospital or a medical research institution if the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization. 18 U.S.C. § 207(j)(2); 5 C.F.R. § 2641.301(c).

- J. Special Knowledge. This exception provides that the restriction in sections 207(c) and (d) does not apply to a former senior employee or very senior employee who makes a statement, which is based on his own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received. 18 U.S.C. § 207(j)(4); 5 C.F.R. § 2641.301(d).
- K. Scientific or Technological Information. Section 207 provides an exception from its provisions for communications made solely for the purpose of furnishing scientific or technological information. The exception does not apply to trade and treaty negotiations and on restrictions on former senior employees representing aiding and advising foreign entities. 18 U.S.C. § 207(j)(5); 5 C.F.R. § 2641.301(e). Procedures for using this exception include obtaining a certificate of exception after consulting with the Office of Government Ethics and publication in the Federal Register. *Id.* At DoD, the procedures are set forth in 9-300 of DoD Directive 5500.07-R, which does not require publication in the Federal Register.
- L. Testimony. A former employee may give testimony under oath or make a statement required to be made under penalty of perjury. Former personnel may give expert opinion testimony, however, only if given pursuant to a court order or if not otherwise subject to the lifetime bar (18 U.S.C. § 207(a)) as it relates to the subject matter of the testimony. 18 U.S.C. § 207(j)(6); 5 C.F.R. § 2641.301(f).
- M. Contract advice by former details. Personnel from a private organization assigned to an agency under the Information Technology Exchange Program, 5 U.S.C. § 3701, cannot, within one year after the end of that assignment, knowingly represent or aid, counsel or assist in representing any other person (except the United States) in connection with any contract with that agency.
- N. Executive Order 13490 (January 21, 2009) and the Obama Ethics Pledge

WHO: Applies to Full time non-career Presidential Appointees, non-career Senior Executive Service (SES) appointees, and non-career appointees excepted from the competitive service by reason of being of a confidential or policymaking character (e.g., Schedule C, politically appointed term SES or equivalent)

WHAT: Once leaving Federal service, an appointee who is a *senior official* may not represent another (communicate to or appear) before his or her former agency for two (2) years.

- “Senior official” is any appointee referred to in “who” above whose base pay is at or above 86.5% of the annual rate of basic pay for Executive Schedule Level II (\$160,111.50 in 2016).
- This restriction applies only to the official’s former DoD component; it does not apply to the entire DoD or other Executive Branch agencies. For example, a former senior OSD official would be prohibited from

representing his or her new employer back to OSD, which includes all subcomponents, including the COCOMS and many defense agencies, for two (2) years after leaving government service. But the official, as long as he or she is not a civilian presidential appointee confirmed by the Senate (PAS), could communicate and represent his or her new employer back to any of the separate DoD components. See listing of separate DoD components in Section XIII.F.3.

- This restriction does not apply to “behind-the-scenes” assistance.

- For all political appointees, once leaving federal service, they may not *lobby* (act as a registered lobbyist) back to any Flag/General officer or political appointee in the Federal Government for the duration of President Obama’s Administration.

XIII. FOREIGN GOVERNMENT EMPLOYMENT (U.S. CONSTITUTION)

A. Since retired military personnel are subject to recall, they are prohibited by the Emoluments Clause of the Constitution (Art. 1, § 9, Clause 8) from being employed by foreign governments without the consent of Congress. Congress has given consent.

http://www.dod.mil/dodgc/defense_ethics/resource_library/emoluments_clause_applications.pdf

1. 37 U.S.C. § 908 allows foreign government employment with approval of the Service Secretary and Secretary of State. Note that these waivers often take three or four months to be approved, so plan accordingly.
 - a. U.S. Army Human Resources Command
ATTN: AHRC-PDR
1600 Spearhead Division Avenue
Department #420
Fort Knox, KY 40122-5402
Telephone 502-613-8980
 - b. Guidance for Air Force Personnel on this subject is found in Air Force Instruction 36-2913, *Request for Approval of Foreign Employment of AF Personnel* (19 Nov 03). The responsible office is: AFPC/DPFFF, 550 C Street West, Joint Base San Antonio-Randolph, Texas 78150-4713. Telephone number is COM 210-565-2273 or DSN 665-2273.
 - c. For the Navy, submit written request to Navy Personnel Command, Office of Legal Counsel (Pers-OOL), Naval Support Facility Arlington, 701 South Courthouse Road, Room 4T035, Arlington, VA 22204. Telephone number is 703-604-0443.

- d. For the Marines, a retired Marine Corps member should write the Judge Advocate Division (JAR), Headquarters, U.S. Marine Corps, 3000 Marine Corps Pentagon, Washington, DC 20350-3000. Telephone number is 703-614-2510.
 2. This Constitutional requirement applies to employment by corporations owned or controlled by foreign governments, but does not apply to independent foreign companies.
 3. When seeking employment outside of the DoD contractor community, a military retiree should always ask, “Is this company owned or controlled by a foreign government?” See “Applicability of the Emoluments Clause to Non-Government Members of ACUS,” 17 Op. O.L.C. 114 (October 28, 1993).
- B. Retired officers who represent a foreign government or foreign entity may be required to register as a foreign agent. 22 U.S.C. § 611; 28 CFR § 5.2. The Registration Unit, Criminal Division, Department of Justice, Washington, D.C. 20530, (202) 233-0776, can provide further information.
- C. Note that a military member may be able to work for a “newly democratic nation” but must comply with 10 U.S.C. § 1060. Otherwise, note the potential of losing citizenship if a retired member decides to work for a foreign government not under § 1060. 8 U.S.C. § 1481(a)(3)(B). The DoD Financial Management Regulation also addresses employment by a foreign government, in Vol. 7B, Ch 5. Vol. 7B, Ch. 6, addresses loss of citizenship after retirement if working for a foreign government. Suspension of pay due to employment by a foreign government is addressed in Vol. 7B, Ch. 13.
http://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/Volume_07b.pdf

XIV. MISCELLANEOUS PROVISIONS

- A. Use of Title. Retired military members (not on active duty) may use military titles in connection with commercial enterprises as long as their retired status is clearly indicated, no appearance of DoD endorsement is created, and DoD is not otherwise discredited by the use. JER 2-304.
- B. Wearing the Uniform. Retirees may only wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social, or ceremonial occasions. AR 670-1, para. 29-4; Air Force Instruction 36-2903, Dress and Personal Appearance of Air Force Personnel, June 8, 1998, Chapter 6 and Table 6.1; and Navy Uniform Regulations, Chapter Six, Section 10: Reserve/Retired.
- C. OGE Form 278e. Termination Public Financial Disclosure Reports must be filed within 30 days of leaving a covered 278 position (date of retirement for Flag and General Officers).

- D. Non-public Information. All former officers and employees must protect non-public information such as trade secrets, classified information, and procurement sensitive information after leaving federal service. 18 U.S.C. §§ 794 and 1905.
- E. Gifts from Foreign Governments. Military retirees and their immediate families may not retain gifts of more than \$375 in value from foreign governments. 5 U.S.C. § 7342.
- G. JER 11-301 requires post employment and disqualification issues to be included in annual ethics training.

JER 8-400 requires that all public financial disclosure filers certify annually that they are aware of the post-government service restrictions and the PIA post-government service restriction. See the 2015 Annual Post-Employment Certification.

http://www.dod.mil/dodgc/defense_ethics/resource_library/post_emp_cert.pdf

JER 9-402 requires that ethics officials provide post-government service employment guidance during out processing.

- H. Reserve Officers. Reserve officers are subject to the post-government employment law. While every situation can never be included in a summary, the SOCO web site has a quick-reference table that summarizes restrictions applicable to Reserve Officers in various situations. The table is styled as the Reserve Officer Post-Government Employment Matrix and can be found at:
http://www.dod.mil/dodgc/defense_ethics/resource_library/reserve_matrix.pdf
- I. OPM Notice. The Office of Personnel Management requires that Departments notify all public filers subject to 18 U.S.C. § 207(c) what the restrictions are, restrictions regarding 18 U.S.C. § 207(f), and the penalties for violating 18 U.S.C. § 207. 5 C.F.R. Part 730. The post-government employment handouts on the SOCO web site customized to your agency, along with the ethics official's name, address and phone number, should be given to your personnel office so that it can include this information in its notice.

XV. The National Defense Authorization Act for Fiscal Year 2008, Section 847 and AGEAR

The National Defense Authorization Act of 2008, Public Law 110-181, section 847, requires that “covered Department of Defense officials” must request, and the ethics officials must provide, a post-government employment opinion. For purposes of section 847, a “covered DoD official” is a current or former DoD official who, within two years after leaving DoD service, expects to receive compensation from a defense contractor, and who, **within the two year period prior to his or her departure from DoD** participated personally and substantially in an acquisition in excess of \$10M while serving in an Executive Schedule position; in an Senior Executive Service position; or in a general or flag officer position compensated at the rate of pay for grade 0-7 or above; or who served as a program manager, deputy program manager, procuring contracting officer, source selection authority, member of the source selection

evaluation board, or a chief of a financial or technical evaluation team for a contract in excess of \$10M. These opinions must be rendered within 30 days after receiving a complete request **DOD** must maintain a central database of the Section 847 post-government service requests and opinions for not less than five years. The Inspector General shall conduct periodic reviews to ensure opinions are provided and retained.

The central database is the After Government Employment Advisory Repository (AGEAR). DoD employees meeting the 847

criteria, and seeking a post-government employment opinion, must enter information (no CAC required) into DD Form 2945 at: <https://www.fdm.army.mil/AGEAR>. Ethics counselors access AGEAR at: <https://www.fdm.army.mil/AGEAREO>.

All 847 opinions must be done through AGEAR.

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XVI. SAMPLE DOCUMENTS

- A. DISQUALIFICATION MEMORANDUM.
- B. STOCK ACT NOTICE AND DISQUALIFICATION SAMPLE FOR PUBLIC FILERS
- C. POST EMPLOYMENT QUESTIONNAIRE
- D. TEMPLATE FOR POST GOVERNMENT EMPLOYMENT ADVICE.
- E. POST GOVERNMENT EMPLOYMENT ADVICE SAMPLES.

MEMORANDUM

[insert date]

MEMORANDUM FOR [insert supervisor title]

SUBJECT: Disqualification Statement (Seeking Employment)

I anticipate commencing employment discussions with the companies listed below. In accordance with section 208 of title 18 of the United States Code, a criminal statute, and section 2635.604 of title 5 of the Code of Federal Regulations, I am disqualified from participating personally and substantially as a Government officer or employee in any particular matter that would have a direct and predictable effect on the financial interests of them, their parent companies, subsidiaries, affiliates, and joint ventures (covered parties).

I am taking the following steps to ensure that I do not participate in any particular matter affecting the covered parties:

- (1) I am instructing my [military/administrative] assistants to screen all matters directed to my attention that involve any persons or organizations outside the Federal Government, and to determine whether such matters involve the covered parties. I have directed my military assistants to consult an ethics counselor if there is any uncertainty as to whether I am disqualified from participating.
- (2) If my [military/administrative] assistant determines that a matter directly or indirectly involves a covered party, the matter will be referred to the [Name and Title of person with authority to act on behalf of Employee] for action or assignment, without my knowledge or involvement.
- (3) I will advise my immediate subordinates of this disqualification, and also instruct them to direct all inquiries regarding matters directly or indirectly involving the covered parties to [Name and Title of person with authority to act on behalf of Employee], without my knowledge or involvement.

Covered Parties:

[insert name of company(ies)]

This disqualification remains in effect until further notice. In the event of changed circumstances, such as rejecting the possibility of employment with one of the covered parties or the passage of a 2 month period during which I have received no indication of interest in employment discussions from one of the covered parties, I will consult an ethics counselor, update this memorandum and notify everyone concerned.

[insert name]

cc: JAG or OGC
(Room)
[Screener's Name]
[Name and Title of person with authority to act on behalf of Employee]
[Additional supervisors or subordinates, as appropriate]

STOCK ACT NOTICE AND DISQUALIFICATION SAMPLE FOR PUBLIC FILERS

MEMORANDUM FOR [insert supervisor title]

SUBJECT: Disqualification Statement (Seeking Employment)

In my current position, I am required to file a Public Financial Disclosure Report (OGE Form 278). Therefore, in accordance with 18 U.S.C. § 208 (a criminal statute), 5 C.F.R. §§ 2635.604 and 606, and § 17 of the Stop Trading on Congressional Knowledge Act of 2012 (“STOCK Act”), I am notifying you that I am seeking post-government employment with the following non-Federal entities:

[insert name of entity(ies)]

I am disqualifying myself from participating personally and substantially in any particular matter that would have a direct and predictable effect on the financial interests of the listed entities. I am also taking the following steps to ensure that I do not participate in any particular matter affecting these parties:

- (1) I am instructing my [military/administrative] assistant to screen all matters directed to my attention that involve any persons or organizations outside the Federal Government, and to determine whether such matters involve one of the entities listed above. I have directed my [military/administrative] assistant to consult an ethics counselor if there is any uncertainty as to whether I am disqualified from participating.
- (2) If my [military/administrative] assistant determines that a matter directly or indirectly involves an entity listed above, the matter will be referred to the [Name and Title of person with authority to act on behalf of Employee] for action or assignment, without my knowledge or involvement.
- (3) I will advise my immediate subordinates of this disqualification, and also instruct them to direct all inquiries regarding matters involving a listed entity to [Name and Title of person with authority to act on behalf of Employee], without my knowledge or involvement.

This disqualification remains in effect until further notice. In the event circumstances change, such as if I reject the possibility of employment with one of the listed entities, or if I receive no response two months after submitting my resume, I will consult an ethics counselor, update this memorandum, and notify all relevant parties.

Signature

Date

Printed Name

cc: JAG or OGC

POST-GOVERNMENT SERVICE ETHICS QUESTIONNAIRE

DD Form 2945.).

<http://www.dtic.mil/whs/directives/forms/eforms/dd2945.pdf>

Template Post-Government Employment Letter

Dear **Client**:

Describe attorney client relationship to begin:

This responds to your request for a written opinion regarding the ethics restrictions that apply to you after your departure from government service. In providing this advice, I am acting on behalf of the United States and not as your personal representative. Neither the information you have provided nor this letter creates an attorney-client relationship. Additionally, my advice below is based on the information you have provided about your roles and responsibilities while in service at the Department of Defense. To the extent that this memorandum does not accurately reflect relevant facts, or to the extent that the facts change, this advice may need to be revisited.

Explain who they are (what title they held in the last year), and what their responsibilities were in that role.

Explain what they anticipate to be their role in their new duties.

Address the Criminal representation bans:

There are statutory restrictions that affect your employment activities after your government service. 18 U.S.C. § 207, a *criminal* statute that applies to all former government employees, has four parts that potentially pertain to you and your post-government activities. Generally, these are “representational” restrictions, meaning that they limit your ability to represent another individual, organization, or company back to the Federal Government, not just the Department of Defense (to avoid the appearance of the so-called “revolving door”). Importantly, these representational restrictions do not limit your ability to accept employment with any domestic organization or company, and generally allow you to work “behind the scenes” for your new employer on matters that you worked on while you were a government employee as long as you do not communicate with or appear before an employee of the United States in violation of these statutes.

Lifetime Ban (18 U.S.C. § 207(a)(1)):

You may not knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States, on behalf of another person or entity ***in connection with a particular matter involving a specific party or parties, in which you***

participated personally and substantially while you were a government employee and in which the United States is a party or has a direct and substantial interest. A “particular matter involving specific parties” includes a specific, discrete proceeding affecting the legal rights of the parties or an isolatable transaction between identified parties such as a specific government contract, grant, license, product approval, enforcement action, administrative adjudication, or court case. Generally, one of the parties to the matter must be a person or entity outside of the Government. Furthermore, a particular matter involving specific parties is not, with some narrow exceptions, a broad policy matter or internal agency program.

“Personal and substantial participation” is defined as follows: “personal” means directly, either individually or in combination with other persons or through direct and active supervision of the participation of any person that you supervised; “substantial” means that your involvement was of significance to the matter; and “participation” may be substantial even though it is not determinative of the outcome of a particular matter, however, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Reviewing budgetary procedures or scheduling meetings is not substantial. Participating in the substantive merits of a matter may be substantial even though your role in the matter was minor in relation to the matter as a whole. Good examples of particular matters involving specific parties that you were personally and substantially involved in under this section of the law was the up side down contract you worked on for the Source Selection Board or when you signed off on the right side up contract.

This ban lasts for the “lifetime” of the particular matter (e.g., until contract performance has been completed and the contract matter is closed). Furthermore, please be advised that while it is generally true that participation or involvement in DoD policy development does not qualify as a “particular matter involving specific parties,” to the extent that a policy is narrowly focused on the interests of a discrete and identifiable group of parties or organizations outside the Federal Government, the lifetime ban may apply (e.g., if you helped set standards or developed a DoD policy that affected a narrow, niche segment of government contractors). Again, if you have any question about an action or initiative that you worked on and whether it qualifies as a particular matter involving specific parties, do not hesitate to contact my office for advice and clarification either before you leave or at any time afterwards.

Furthermore, as this is a criminal prohibition, in the event that a future employer asks you to represent its interests back to the Government on a matter in which there is some question as to whether you participated personally and substantially, I recommend that you consult legal counsel for your new employer. He or she will be in the best position to evaluate the efficacy of

and risk associated with your representing the company's interests back to the Government on a matter in which you may have participated personally and substantially while in DoD.

Here you could illustrate some types of lifetime matters such as a particular grant or MOU customizing this letter to the individual.

If neither the two-year restriction on matters pending under your supervision nor the one-year cooling off apply, then state so here, citing the statutes but not quoting them:

Two-Year Ban (18 U.S.C. § 207(a)(2)):

For two years after the termination of your employment with the United States, you may not knowingly, with the intent to influence, make any communication to or appearance before an employee of the executive or judicial branches of the U.S. Government, on behalf of another person or entity ***in connection with a particular matter involving a specific party or parties***, in which the United States is a party or has a direct and substantial interest, ***and which you know or reasonably should know was actually pending under your official responsibility within your last year of Government service***. “Under your official responsibility” includes any direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct government actions, assigned by statute, regulation, executive order, job description, or delegation of authority. For this provision, it is irrelevant whether you participated in the matter personally and substantially; the key is whether the matter was pending under your official responsibility. Thus, this provision would apply both to matters assigned to you, but on which you took no action, and matters assigned to your subordinates. To the extent that particular matters involving specific parties were undertaken by DoD employees who were under your supervision during your last year of federal employment, the two-year representational ban under the law will apply to you. Again, this provision does not bar you from working on such matters for your new employer, in-house, “behind the scenes.” You advise that you worked primarily on policy matters within the last year, and are not aware of participation by your subordinates in any particular matters involving specific parties that are currently pending under your supervision during your last year here.

One-Year Cooling Off (18 U.S.C. § 207(c)):

As a senior official you are subject to this restriction. ***The law states that you are prohibited, for a period of one year after your service in your “senior” position terminates, from communicating with or appearing before, on behalf of another with the intent to influence, officers and employees of the Department of Defense on any matter on which official action is sought.*** This one-year “cooling off” period is designed to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former

senior position. It is irrelevant for purposes of 18 U.S.C. § 207(c) that you did not work on the matter while in Government service. Importantly, this restriction limits your appearances before and communications with personnel of your military department, the Army. However, you can appear before Air Force, Navy, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Logistics Agency, National Geospatial Agency, National Reconnaissance Agency, Defense Threat Reduction Agency, the National Security Agency, and the Office of the Secretary of Defense provided that you do not appear before members of your department, e.g. the Army. Furthermore, this ban does not bar your communications with personnel of any non-DoD Federal agency. The cooling-off provision does not prohibit you from providing “behind the scenes” assistance to your new employer or other entity. In interpreting these restrictions, the Office of Government Ethics (OGE) advises that the prohibition against representational activities before your former agency includes written or oral communications aimed at influencing the Government, but does not prohibit you from giving assistance concerning such matters to your new employer. See 5 C.F.R. § 2637.201(b)(6). OGE also advises that these restrictions do not apply to an appearance or communication to request publicly available documents or purely factual information, or to provide such information. Furthermore, the one-year cooling-off restriction does not prohibit purely social contacts with your former colleagues or appearing before the Government representing yourself. If you are covered by the Obama Pledge, your “cooling off” restriction is extended to two years from your departure, rather than one. (Civilian Presidential appointees subject to Senate confirmation may not take advantage of the separate components 18 U.S.C. §207(h)(2)) This advice is detailed in the post-government employment handout that you have already received.

If the client had procurement responsibilities:

The Procurement Integrity Restriction (41 U.S.C. §§ 2101-07):

The Office of Federal Procurement Policy Act, formerly known as the Procurement Integrity Act (PIA), now codified at 41 U.S.C. §§ 2101-07, prohibits former officials of Federal agencies from accepting compensation from the concerned contractor for one year if the former official served in one of several key acquisition roles¹ or performed designated acquisition services² on a procurement in excess of \$10M that the contractor was awarded either competitively or noncompetitively. Based on the answers to the questions in your Post-

1 Designated key acquisition roles are: contracting officer; source selection authority; technical or financial evaluation team chief; program manager; deputy program manager; and administrative contracting officer.

2 Designated acquisition services are: awarded a contract or subcontract, a modification, task order, or delivery order in excess of \$10M; established overhead rates in excess of \$10M; or approved issuance of a contract payment in excess of \$10M within the last year.

Government Employment Questionnaire dated March 21, and submitted for an opinion on July 10, and on your post-Government employment briefing, you participated on two contracts that exceeded \$10 M. The last activity you performed on either contract was in the last year. Therefore, the employment restrictions under this law would prohibit you from working with up side down.

I remind you that after leaving government service, you remain subject to the terms of the PIA, which prohibit you as a former government official from knowingly disclosing to any person not authorized to receive it, contractor bid or proposal information, trade secret, or source selection information that you had access to while in government service.

Section 847 of the National Defense Authorization Act for Fiscal Year 2008 is related to the former PIA. Under this law, certain current or former senior DoD officials must request and receive a written opinion regarding the applicability of post-government restrictions to their prospective employment before receiving pay from their new employer if the following conditions are met: you participated personally and substantially in an acquisition with a value in excess of \$10M while serving in: (1) an executive schedule position; (2) a senior executive service position; (3) a general or flag officer position; or (4) in the position of program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team. Since you were involved in a \$10M procurement, this statute applies to you. This letter satisfies the 847 requirements. (or alternatively, Since you were not involved in a \$10M procurement, this statute does not apply to you. Nevertheless, this letter satisfies the 847 requirements.)

If a reminder about the representation restriction regarding 207(f) is needed/desired:

One-Year Ban on Assistance to Foreign Governments (18 U.S.C. § 207(f)):

Section 207 of title 18 also contains a one-year restriction on aiding, advising, or representing a foreign government or foreign political party with the intent to influence the U.S. Government. Unlike the other representational bans, this one does *not* permit “behind the scenes” assistance to a foreign government or political party *and* the representation prohibition applies to all branches of the Federal Government. This restriction, like § 207(c), only applies to senior employees as defined as those whose rate of basic pay is equal to or greater than 86.5% of the rate of basic pay for level II of the Executive Schedule, which in 2016 is \$160,111.50. You were a senior official for purposes of this provision of law. Thus, for a period of one year after terminating your government service, you may not knowingly represent a foreign government or foreign political party before an officer or employee of the Federal Government, or aid or advise such a foreign entity with the intent to influence a decision of such officer or employee.

If the Emoluments Clause provision is needed because the client will be retired military:

As to the Emoluments Clause to the Constitution, article I, section 9, clause 8, as interpreted in Comptroller General opinions and by the Department of Justice Office of Legal Counsel, the Emoluments Clause prohibits receipt of consulting fees, gifts, travel expenses, honoraria, or salary by all retired military personnel, officer and enlisted, regular and reserve, from a foreign government *unless Congressional consent is first obtained*. Consent is provided by Congress under 37 U.S.C. § 908, which requires advance approval from the relevant service secretary *and* the Secretary of State before accepting employment, consulting fees, gifts, travel expenses, honoraria, or salary from a foreign government. So if you are ever in a position where you would receive an emolument from a foreign government or from an entity that might be controlled by a foreign government, be sure and seek advance approval.

Please remember that you are responsible for ensuring compliance with the post-government employment rules. Because these statutes carry criminal sanctions, if you have any doubts about the propriety of a particular course of action, you should obtain advice before acting to ensure that you do not unwittingly violate one of these statutes. Please contact me or any ethics counselor in this office at () - if you have further questions.

Sincerely,

March 8, 2008

Office of Command Counsel

Colonel Almost Retired, Jr.
Deputy Director, Aviation Facilities Directorate
Office of the Assistant Chief of Staff for Facility Management
400 Army Pentagon
Washington, DC 20310-0400

Dear Colonel Almost Retired:

This responds to your request for advice regarding job-hunting and post-Government employment restrictions, and is based on the following facts that you provided.

You plan to retire as a colonel by January 1, 2003, perhaps earlier. It is likely that you will take terminal leave. You have been assigned to the Aviation Facilities Directorate, Office of the Assistant Chief of Staff for Facility Management since July 19, 1994, most of the time as the Deputy Director. As such, you have been responsible for the development, integration and promulgation of policies and doctrine pertaining to the planning, programming, budgeting and operation of all Army aviation facilities. Your responsibilities have included aspects of the Aviation Facility Status Report (AFSR); in addition, you have been and are a user of the information generated by the AFSR.

You have been seeking employment with Archie Technical Integrators (ATI). As we discussed, once you send a resume or otherwise make or receive some contact concerning future employment, you are seeking employment. This means that, by law (18 U.S.C. § 208) and regulation (5 C.F.R. § 2635.604), you are disqualified from participating in any official matter that would have a direct and predictable effect on the financial interests of ATI. In your case, you are also required by the *Joint Ethics Regulation* (JER), DOD 5500.07-R, paragraph 2-204c, to issue a written notice of your disqualification, which you did on November 1, 2002.

You should also be aware that you may begin your new employment while on terminal leave. However, because you file a financial disclosure report, you are required by JER 2-206 to obtain the prior approval of your supervisor if this employment is with a prohibited source. **[Add for GOs and SESs:** Your employment agreement, position and income that occurred prior to your retirement date must be reported on your termination Public Financial Disclosure Report

(OGE 278).] Finally, if you are employed during your terminal leave, you are prohibited by 18 U.S.C. § 205 from representing your new employer, or anyone else for that matter, before any department, agency or employee of the Federal Government.

In my opinion, based on the information that you provided, the procurement integrity law, 41 U.S.C. § 2101, does not require any additional notices with respect to your employment contacts with ATI. In addition, the procurement integrity law does not restrict you from receiving compensation from ATI, or any other Department of Defense contractor for that matter.

However, the procurement integrity law does apply to you to the extent that you have had access to any source selection or contractor bid or proposal information, and it continues to protect that information. In addition, 18 U.S.C. §§ 793, 794 and 1905 protect and prohibit the use or disclosure of trade secrets, confidential business information, and classified information. Finally, you have a continuing obligation to the Government not to disclose or misuse any other information that you acquired as part of your official duties and which is not generally available to the public.

A criminal statute, 18 U.S.C. § 207, will restrict your representational activities. It prevents an individual who participated in, or was responsible for, a particular matter while employed by the Government from later "switching sides" and representing someone else in the same matter. [***Add for GOs and SESs (level exceeding 86.5 per cent of the rate for level II of the Executive Schedule (EL II))***]: It also provides additional restrictions for former general officers and senior employees.]

a. Section 207(a)(1) imposes a lifetime bar that prohibits you from knowingly making, with the intent to influence, any communication to or even an appearance before an employee of the United States on behalf of someone else in connection with a particular matter involving a specific party in which you participated personally and substantially as a Government officer and in which the United States has a direct and substantial interest. This does not prohibit "behind-the-scenes" assistance.

"Particular matter" includes any proceeding, application, contract, controversy, investigation, accusation, arrest, or other particular matter that involves a specific party.

"Participate personally and substantially" means to participate directly and significantly by decision, approval, disapproval, recommendation, advice, or investigation. Personal participation includes the participation of a subordinate when actually directed by you.

b. Section 207(a)(2) is nearly identical to the above lifetime restriction except that it (1) lasts for only two years after leaving Government service (rather than life) and (2)

applies only to those matters in which you did not participate personally and substantially, but which were pending under your official responsibility during the one-year period before terminating Government employment. "Official responsibility" is defined as direct administrative or operating authority to approve, disapprove, or otherwise direct government action.

[Add for GOs and SESs (levels where basic pay exceeds 86.5 per cent of the rate for level II of the Executive Schedule (EL II)):

[c. Because you are a general officer, section 207(c)(1) prohibits you for one year after your retirement from contacting any officer or employee of the Department of the Army on behalf of someone else with the intent to influence any official matter.

[d. Further, also because you are a general officer, section 207(f) prohibits you for one year after your retirement from representing or aiding or advising a foreign government or political entity (but not a non-government corporation) to influence a decision of any officer, employee or agency of the United States.]

Your prospective duties with ATI as a Senior Technician would include working on the contract if awarded to them that results from Request for Proposals (RFP) DATT-96-R-0193. It will be an umbrella contract to provide technical support to all parts of the AFSR, including the integration of its parts. The expectation is that you would interact and deal with Army officials on behalf of AFSR concerning contract performance.

a. You advised me that you did not participate at all in the procurement process for any portion of this umbrella technical support requirement, to include the statement of work, specifications, purchase request documents, acquisition strategy discussions, or solicitation preparation and issuance. In that case, in my opinion, you have not participated personally and substantially in the particular matter involving specific parties, *i.e.*, the RFP and the resulting contract.

b. You also advised me that your Directorate had functional responsibility for the fielding of Part I of the AFSR (until May 20, 1996) and for the integration of the various parts of the AFSR (until June 20, 1996). However, this functional responsibility did not include participation in any way in the procurement process for the RFP requirement by those working for you. Those working for you did not help put together the RFP. Accordingly, in my opinion, the particular matter involving specific parties (*i.e.* the RFP and the resulting contract) was not under your official responsibility during your last year of Federal service.

Accordingly, in my opinion, neither 18 U.S.C. § 207(a)(1) nor 18 U.S.C. § 207(a)(2) prevents you from representing ATI before the Army and attempting to influence official action with

respect to the contract resulting from the RFP. However, you must wait until you are actually retired. If you are on terminal leave, 18 U.S.C. § 205 prohibits any officer or employee from representing ATI or any other non-Federal entity back to any part of the Federal Government with the intent to influence official actions.

As a final point, my opinion as an agency ethics official concerning 18 U.S.C. § 207 does not have the same weight as an opinion authorized by statute, such as the procurement integrity law (41 U.S.C. § 2101). The *Standards of Ethical Conduct for Employees of the Executive Branch* makes it clear that, although my opinion should be persuasive concerning statutes like 18 U.S.C. § 207, my opinion on this statute does not bind the Department of Justice.

I hope that this information is helpful to you. This letter, issued under the authority of 41 U.S.C. § 2104(c) and 5 C.F.R. §§ 2635.107 and 602(a)(2), is an advisory opinion of an agency ethics official based on the information that you provided.

Sincerely,

Ethics Attorney

January 15, 2012

General
70 Road
NY, NY 16

Dear Mr.:

This replies to your request for an opinion regarding the legal propriety of undertaking certain post-employment activities. My advice with respect to these matters is advisory only. Neither the information you provided to receive this advice letter, nor the provision of this letter, creates an attorney-client relationship between you and an attorney rendering such advice.

In your Questionnaire dated January 11, 2012, you stated that you are the Director of the DO. In that role, you approved projects with a value of up to \$25 million. You reported your recommendations directly to the Head of the Contracting Activity. You stated in your Questionnaire that you approved contracts in amounts exceeding \$10 million, and your last participation was the award date.

The law, at 41 U.S.C. 2101-2107, formerly known as the Procurement Integrity Act, prohibits Department of Defense (DoD) personnel from accepting compensation from certain employers. By awarding a contract over \$10 million, you are subject to this law. For a period of one year after the award date, you may not accept compensation from the vendors involved in those contracts. Other post employment laws apply regarding these contracts and regarding particular matters you worked on involving specific parties.

Certain current or former DoD officials who, within two years of leaving DoD, expect to receive compensation from a defense contractor must request and receive a written opinion regarding the applicability of post-employment restrictions to activities that official may undertake on behalf of a defense contractor before receiving pay. This requirement is in Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)(Section 847). It applies if you are a current or former DoD official who participated personally and substantially in an acquisition with a value in excess of \$10M while serving in: (1) an Executive

Schedule position; (2) a Senior Executive Service position; (3) a general or flag officer position; or (4) in the position of program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team.

Since you have been involved personally and substantially in an acquisition with a value in excess of \$10 million which serving as the Colonel , you are subject to Section 847, and this letter satisfies the requirements of that section.

In addition, other laws and regulations may apply to your job search and the type of work you may perform for a private employer. They are discussed below.

A criminal statute, section 208 of title 18, United States Code, prohibits a Government employee from participating “personally and substantially” in any “particular Government matter” in which a private entity has a financial interest, if the employee is negotiating employment with the private entity or has an arrangement for future employment with the private entity. This restriction applies to matters in which the employee participates “personally and substantially” through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise. A “particular matter” may be a judicial or administrative proceeding, an application, request for ruling or other determination, contract, claim, controversy, charge or any other particular matter. To participate “personally” means to do so directly and includes directing a subordinate to take action. “Substantial” means that an employee’s involvement was of significance to the matter.

To avoid the broad reach of this conflict of interest statute, while employed by the Federal Government, you must disqualify yourself from taking any Government action with respect to a prospective private employer with whom you are seeking employment or have an arrangement for future employment. Generally, disqualification does not apply if your prospective employer is the Department of Defense or another agency of the Federal Government.

You are considered to be seeking employment if you engage in negotiations with particular prospective employers or send them a resume, until such time as you reject an offer, the prospective employers reject your application, or 60 days pass without a response to your resume. Disqualification is accomplished through not participating in the matter. You should notify, in writing, your supervisor, ethics counselor, immediate subordinates, and prospective employer of your disqualification.

As an exception to the general rule prohibiting the acceptance of gifts from outside sources, you may accept travel benefits, including meals, lodging, and transportation, provided

by a prospective employer, even a DoD contractor, provided the benefits are tendered in connection with bona fide employment negotiations. The only caveat is that you must provide your disqualification notice before accepting these benefits.

Several other statutory restrictions may limit the type or scope of activities in which you may engage after separating. For example, for a period of one year after leaving your position, you may not make any communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of the Department in which you served within one year prior to leaving your position, in connection with any matter on which official action is sought by such individual. (18 U.S.C. 207(c)). You may, however, during that “one year cooling off” communicate with the following DoD entities that you were neither an employee or detailee: Army, Air Force, Navy, DISA, DIA, DLA, NGA, NRO, DTRA and NSA.

You may not, in accordance with 18 U.S.C. 207 (a), communicate with any part of the Executive or Judicial branches of the Government, on behalf of any other person or entity, with the intent to influence the Government on any matter in which you were personally and substantially involved while still in Government service. Further, in accordance with 18 U.S.C. 207(a)(2), for two years after leaving Government service, you may not represent someone else to the Government regarding particular matters that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

Nor may you, for example, engage in a financial transaction using non-public information or allow the improper use of non-public information to further your own private interests or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure. Inside information includes information that is not generally available to the public and obtained by reason of your official duties or position. Specifically, non-public information is "inside information," trade secrets, classified information, and procurement sensitive information. While you can capitalize on your professional skills and knowledge, you cannot use inside information to do so.

These restrictions are complex. They are explained in detail in other materials I have provided to you. If you have any doubts about the propriety of a particular course of action, you should obtain advice before acting to ensure that you do not unwittingly violate one of these statutes. Please contact me at (703) - or by email at you have further questions.

Sincerely,

Deputy Designated Agency Ethics Official

Encl:
Post-employment restrictions Handout
Procurement Integrity Act Restrictions Handout

CHAPTER K: CONTRACTORS IN THE WORKPLACE AND ON DEPLOYMENT

I. REFERENCES

- A. 5 C.F.R. § 2635.102 Definitions
- B. 5 C.F.R. § 2635 Subpart B: Gifts From Outside Sources
- C. 5 C.F.R. § 2635.203: Gift Definitions
- D. 5 C.F.R. § 2635.204: Gift Exceptions
- E. 5 C.F.R. § 2635.808: Fundraising Activities
- F. 5 C.F.R. § 2635.303: Gifts Between Employees Definitions
- G. DoD 1400.25-M: Department of Defense Civilian Personnel Manual (CPM)
- H. DoDI 1015.10: Programs for Military Morale, Welfare, and Recreation (MWR)
- I. 18 U.S.C. § 208: Acts Affecting a Personal Financial Interest
- J. 5 C.F.R. § 2635.401: Conflicting Financial Interests
- K. 5 C.F.R. § 2635.501: Impartiality in Performing Official Duties
- L. 5 C.F.R. § 2635.601: Seeking Other Employment
- M. 5 C.F.R. § 2640: Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208
- N. 48 C.F.R. Ch. 1, Federal Acquisition Regulations (FAR) Subpart 3.6: Contracts with Government Employees or Organizations Owned or Controlled by Them
- O. OMB Circular No. A-76: Performance of Commercial Activities (Revised May 29, 2003)
- P. FAR Subpart 7.5: Inherently Governmental Functions
- Q. FAR Subpart 37: Personal Services Contracts
- R. 41 C.F.R. § 102-74.415: Posting and Distributing Materials
- S. Financial Management Regulation, DoD 7000.14-R
- T. FAR Subpart 16.4: Incentive Contracts
- U. FAR Subpart 45.101: Government Property, Definitions
- V. FAR 45.509-2: Use of Government Property
- W. DoD 4500.36-R: Management, Acquisition, and Use of Motor Vehicles
- X. 31 U.S.C. § 1353: Acceptance of Travel and Related Expenses From Non-Federal Sources
- Y. 5 U.S.C. § 4111: Acceptance of Contributions, Awards, and Other Payments
- Z. 5 C.F.R. § 2635.703: Use of Nonpublic Information
- AA. 5 C.F.R. § 2635.604: Disqualification While Seeking Employment
- BB. DoD 5500.7-R, Joint Ethics Regulation (JER) 2-204(c): Standard for Accomplishing Disqualification
- CC. 5 C.F.R. Part 950: Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations
- DD. 18 U.S.C. § 1905: The Trade Secrets Act
- EE. 41 U.S.C. § 423: Procurement Integrity
- FF. 18 U.S.C. § 203: Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government
- GG. 18 U.S.C. § 205: Activities of Officers and Employees in Claims Against and Other Matters Affecting the Government
- HH. 5 C.F.R. § 2635.801-803: Outside Activities
- II. FAR Subpart 37.114(c): Special Acquisition Requirements

II. GOAL

The goal of this chapter is to provide a quick overview of the ethics issues that commonly arise in dealing with contractor employees in the Federal workplace during deployment into a combat zone. Frequently, the proper use of contractor support are matters for procurement regulations, although the growing use of contractor employees in the Federal workplace increases the frequency and the likelihood that ethics issues will arise. In these circumstances, it is best to use a combination of procurement and ethics guidance.

The following discussion provides guidance on the government-contractor relationship. For specific material, please see the pertinent chapters of this desk book and the Federal Acquisition Regulations.

Please note that the terms, “DOD personnel”, “Government personnel” and “Government employees” include military and civilian personnel. “Contractors,” “Contractor personnel” and “Contractor employees” include personnel employed as prime or sub-contractor under Federal Acquisition Regulations contract, gratuitous services agreement, or theatre-sponsored business program.

III. INTRODUCTION

- A. Contractor employees are not government personnel and are not subject to the same laws and regulations, except in the deployed environment. Theatre General Orders apply to both government and contractor personnel. Government personnel are subject to Federal laws/regulations and DoD regulations. Contractor personnel are subject to Federal criminal laws (such as bribery), Military Extraterritorial Jurisdiction Act, the work rules of their particular employer, and any restrictions imposed by the contract.
- B. The Government establishes a relationship with the contractor, which is defined by the contract. Normally, government personnel do not exercise any of the following functions over contractor employees:
 - 1. Supervise or direct.
 - 2. Approve leave or other absences.
 - 3. Train or approve training. (Normally a contractor is expected to provide a trained workforce that is responsive to and meets the contract obligations.)
 - 4. Conduct performance appraisals or other evaluations.¹
 - 5. Provide or approve awards and recognition.²

¹ Performance standards establish the performance level required by the Government to meet the contract requirements. The standards shall be measurable and structured to permit an assessment of the contractor’s performance. The FAR provides Government authority to evaluate contract performance, but the authority does not extend to the performance of individual contractor employees. (FAR 37.603(a))

² Bonuses and incentive compensation are allowable for personal service contracts provided: (i) Awards are paid or accrued under an agreement entered into in good faith between the contractor and the employees before the services are rendered or pursuant to an established plan or policy followed by the contractor so consistently as to imply, in effect, an agreement to make such payment; and (ii) Basis for the award is supported. (FAR 31.205-6(f))

6. Tell or suggest to a contractor whom to hire or fire.
7. Discipline contractor employees.

C. Contractor employees may not exercise any of the following functions:

1. Supervise government personnel.
2. Supervise employees of other contractors.
3. Administer or supervise government procurement activities.
4. Perform inherently governmental functions.
5. Evaluate, discipline or reward government personnel

IV. INHERENTLY GOVERNMENTAL FUNCTIONS AND PERSONAL SERVICES

An inherently governmental function is one that is so intimately related to the public interest as to mandate performance by government employees. These functions include those activities that require the exercise of discretion in applying government authority, the use of judgment in making decisions for the government, and decisions regarding monetary transactions and entitlements. (OMB Circular No. A-76; FAR 7.5)

- A. It is government policy that contractor employees shall not be used to perform inherently governmental functions.³ FAR 7.5 lists 20 functions considered to be Inherently Governmental. The list is attached to the end of this outline.
- B. Attachment A of OMB Circular No. A-76 provides examples of commercial activities not normally considered inherently governmental.
- C. Unless authorized by statute, the government cannot contract for personal services. (FAR 37.104(b)) A personal services contract is one that, by its terms, or as administered, makes the contractor employees appear to be, in effect, government employees.
 1. If you seek a personal services contract, and are authorized by statute, obtain the review and opinion of legal counsel specializing in government contracts (FAR 37.104 (e)).
 2. Statutory personal services contracts in DoD
 - (a) 10 U.S.C. § 129b
 - (i) Outside United states; or
 - (ii) Direct support of DoD intelligence component; or

³ Agencies shall not award a contract for the performance of an inherently governmental function (see Subpart 7.5 of FAR 37.102(c)). Further, Agency heads have an affirmative duty to ensure specific procedures are in place before contracting for services to ensure that inherently governmental functions are performed only by Government personnel (FAR 37.503(c)).

- (iii) Direct support of special operations command, DoD.
- (b) 10 U.S.C. § 1029. Health care responsibilities in medical treatment facilities.

V. CONFLICTS OF INTEREST

Since Federal conflict of interest rules apply to government personnel, they must take care to avoid actual or apparent conflicts of interest with their official duties. The following provides a description of the differences between government personnel and contractor employees.

- A. Contractor employees are not subject to 18 U.S.C. § 208 and 5 CFR 2635.502, but remain subject to 18 U.S.C. § 201 (Bribery), 41 U.S.C. 423 (Procurement Integrity), and other procurement-related statutes. Contractors are also required to report criminal conduct committed by their employees, under the authority of FAR 3.10. Government personnel are subject to criminal statutes and regulations that restrict their official participation in particular matters that have an effect on their financial interests, and require them to avoid even an appearance of loss of impartiality in performing their official duties. (5 CFR 2635.401 and 501, and 5 CFR 2640)

Example: A contractor employee was a supply technician whose job was to complete requisition and invoice shipping documents to facilitate the award of government freight transportation contracts to freight forwarding companies. The contractor employee accepted from a sales representative of a local freight forwarding company items valued at approximately \$10,000. These included lunches and dinners, concert tickets, NASCAR tickets, weekend accommodations, spa days, alcoholic beverages, and various clothing and jewelry items. The contractor employee pled guilty to conspiracy to receive illegal gratuities (in violation of 18 U.S.C. § 201 and 371).

Practice Tip: It is important for contractor employees to remain within the scope of the contract and not perform personal or inherently governmental functions. At all times, the government should have visibility over the contractor tasks and deliverables. The government should question contractor recommendations that do not make sense or appear inappropriate.

- B. Government standards of ethical conduct rules require that government personnel to be appropriately aware of, and trained on criminal statutes and implementing administrative regulations. Government personnel have a designated ethics official from whom to seek advice and counsel. Contractor employees are required to maintain a program of business ethics, as well as extensive training and reporting programs.
- C. Certain covered Government personnel must annually report their financial interests, liabilities and outside activities. Contractor employees generally have no similar mandated requirement. However, since the Government has an interest in prohibiting anyone from working on official matters in which they have a conflict of interest, the contract may require disclosure and avoidance of potential conflicts. The contract may require disclosure of the financial interests of any contractor employee when disclosure would be required of a Government employee.

Practice Tip: Any documentation supporting financial disclosure should remain with the contractor. Otherwise, the documents will become subject to OMB Paperwork Reduction Act, Privacy Act and possibly Freedom of Information Act.

Example: A contractor employee is responsible for testing products and providing the results of his tests as a deliverable to assist the government technical evaluation board to award a contract. The contractor employee owns stock in one of the companies being evaluated. Statutes and regulations prohibit government personnel from participating in a matter that has a direct and predictable effect on their financial interests. Without a similar disclosure requirement, the government would be unable to discover that a potential contractor had employee conflict of interest.

- D. Government personnel should be particularly vigilant to avoid any actual or apparent conflicts of interests with their official duties.
- E. To avoid any conflict of interest between official duties and personal interests and to avoid the appearance of favoritism or preferential treatment, the government (absent a compelling need determination) may not award a contract to government personnel. Unless the head of the contracting activity makes a compelling need determination, a contracting officer may not award a contract to a government employee or to a business concern or other organization owned or substantially owned or controlled by one or more government employees. (FAR 3.601)

VI. CONTRACTOR BUSINESS ETHICS PROGRAMS

- A. Contractors will have ethics and business gratuity policies and extensive training and reporting programs. FAR 3.10 requires --
 - 1. Contractor code of business ethics and conduct;
 - 2. Training and internal ethics control system that --
 - a. Are suitable to the size of the company and extent of its involvement in government contracting;
 - b. Facilitate timely discovery and disclosure of improper conduct in connection with government contracts; and
 - c. Ensure corrective measures are promptly instituted and carried out.
 - 2. Mandatory disclosure to the government of certain criminal law violations, False Claims Act violations, or evidence of significant overpayments.
- B. Requirements apply to contract and subcontracts greater than \$5.5 Million and performance period greater than 120 days. Small business and commercial items contracts are exempt from ethics training and internal control systems.
- C. Contractor may be suspended or debarred for a knowing violation by a principle to timely disclose to the government credible evidence of --

A violation of federal criminal law involving fraud, conflict of interest, bribery or gratuity violations in Title 18, United States Code, violation of False Claims Act, or significant overpayment occurring in connection with the award, performance, or close out of a government contract performed by a contractor or subcontractor. Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for suspension and/or debarment until 3 years after final payment on a contract.

- D. When the contracting officer is notified of possible contractor violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 USC or a violation of the civil False Claims Act, the contracting officer shall –
1. Coordinate the matter with the agency Office of the Inspector General; or
 2. Take action in accordance with agency procedures.

VII. GIFTS

The gift rules may pose more difficulty in a workplace that emphasizes teamwork between government personnel and contractor employees. Although these groups may work side by side, each has a different set of rules that guides not only their individual behavior, but also official interaction. The government gift rules fall into two categories: (1) gifts from outside sources and (2) gifts between employees. Since contractor employees are not government personnel, gifts from contractors constitute gifts from outside sources, not gifts between employees.

Practice Tip: Government personnel should not, directly or indirectly, solicit or accept a gift from a DoD prohibited source (All DoD contractors and their employees are prohibited sources⁴) or a gift given because of the employee’s official position. (5 CFR 2635 Subpart B); DoD 5500.7-R, Joint Ethics Regulation (JER).

- A. Gifts From contractor employees to government personnel:
1. Some items are excluded from the definition of a gift, so they may be accepted. The most relevant exclusions are modest food and refreshments, greeting cards, and anything for which market value is paid by the government employee. (5 CFR 2635.203)
 2. If the item is not excluded, then government personnel may accept a gift only if it fits an exception. (5 CFR 2635.204)
 - a. \$20/\$50 exception - The most common exception is the \$20/\$50 rule. Government personnel may accept unsolicited gifts if they are not cash and are valued at or under \$20 per source, per occasion. The aggregate limit from a single source is \$50 per calendar year. (5 CFR 2635.204(a))

⁴ The term “prohibited source” is very inclusive and encompasses not only the corporate entity that enters a contract, but also any officer, employee, or agent of the entity. Therefore the term “prohibited source” in the gift definitions includes not only the contracting entity, but also each and every employee of the contractor. (5 C.F.R. 2635.102 and 203)

Practice Tip: The \$50 maximum applies to the contractor and aggregates all gifts from individual contractor employees who are employed by that contractor. Consequently, a government employee or member could not accept three \$20 lunches from three different contractor employees during the year if the three worked for the same contractor at the time of the gifts.

Example: A team made up of contractor employees and government personnel successfully complete a project, marking the delivery and successful completion of the contract. The contractor throws a party to celebrate, inviting the government personnel. May government personnel attend the party? Contract completion does not necessarily end the contractor's status as a prohibited source. If the contractor does business or seeks to continue to do business with the agency, then the contractor remains a prohibited source. Moreover, government personnel may not accept a gift from a contractor (invitations to a party) if the contractor offers the invitation based on the government employee's or member's position. Therefore, government personnel may only attend if the party falls within a gift exception (*e.g.* the \$20/\$50 exception). Even then, government personnel should remain mindful of a possible appearance of impropriety.

Example: Because they live in close proximity to one another, a contractor employee wishes to join a carpool with a government employee. Such an arrangement is allowed if each of the participants bears their fair proportion of the expense involved. A "gift" does not include anything for which market value is paid by the government employee.

- b. Personal relationship exception – Another exception permits government personnel to accept gifts clearly motivated by personal friendship. When using this exception, it must be clear that the motivation for giving the gift is a family or personal relationship, and that the contractor employee, not the contractor, is paying for the gift. Evidence of a qualifying personal relationship includes interactions that extend beyond the workplace over an extended period of time, and evidence of friendships that existed prior to the relationship in the workplace. (5 CFR 2635.204(b))

Practice Tip: Evidence of this relationship must be objective and substantial in order to rebut the presumption that friendships arising from interaction in the workplace do not qualify for this exception. If the relationship did not exist prior to working together and there is little evidence of interaction outside of the workplace it probably does not qualify for the personal relationship exception.

Practice Tip: If a contractor employee invites a government employee to his house, the employee may accept the invitation only if it falls under an exclusion or exception discussed above. While the government rules on gifts between government employees provide an exception for personal hospitality, the rules on gifts from outside sources do not.

3. Disposition of prohibited gifts: If a government employee receives a gift that may not be accepted, the employee must return the gift or pay the offeror its market value. Subsequent reciprocation by the government employee does not constitute payment for the gift. (5 CFR 2635.203(b)) Consequently, accepting lunch from a contractor employee with the intent to "pay next time" is not an acceptable means to eliminate the prohibited gift.

B. Gifts to contractor employees from government personnel:

1. The government gift rules do not apply to contractor employees or to gifts from government personnel to those employees.
 2. Contractors may have adopted corporate ethics rules that determine if the contractor employees may accept such gifts.
- C. Group Gifts: For certain special occasions, such as retirements, marriages, births of children, or funerals:
1. Government personnel may pool their funds for a group gift if the recipient is not an official superior.
 2. Government personnel may pool their funds for a group gift to an official superior as long as the gifts are appropriate to the occasion and the contributions are voluntary. Such gifts are also subject to a \$300 limitation in JER 2-203(a)(2).
 3. Contractor employees may not contribute to a group gift for government personnel. Gifts from outside sources (contractor employees) are governed by 5 CFR 2635, subpart B. Gifts from government personnel are regulated by 5 CFR 2635, subpart C, which authorizes group gifts only from government personnel. Neither of the regulations provides authority to mix the contributions. Since there is no authority for contractor employees and government personnel to commingle donations for a group gift, such a practice is prohibited.

Example: Three different contractor employees who work for a government agency wish to buy a \$45 coffee table book for a departing government employee. Although each of the contractor employees contributes \$15 toward the gift, the government employee may not accept the gift because it is a single \$45 gift.

4. Government personnel may not solicit outside sources (including contractor employees) for contributions to group gifts. (5 CFR 2635.808(c)(1)(i))

Example: A government employee's supervisor is getting married. A lower level government employee takes up an office collection for a wedding gift, suggesting that each employee may voluntarily donate up to \$5.00. The government employee may not ask the contractor employee for \$5.00 – this would be soliciting a gift from a prohibited source. Moreover, the contractor employee could not give an *unsolicited* gift of \$5.00 towards the government employee office gift. However, the contractor employee could give his own gift subject to the \$20 limit from each contracting source.

5. Group gifts to contractor employees:
 - a. There is no government prohibition on government personnel collecting among themselves for a group gift to a contractor employee.
 - b. Contractors may have their own rules of ethics or business practices that guide appropriate behavior. Employees should take these rules into

consideration before offering contractor employees gifts or opportunities that they may not be able to accept. Check with the contracting officer or the contractor supervisor.

VIII. PARTIES AND OTHER UNOFFICIAL OUTINGS

These functions represent a subset of gifts, and therefore the gift rules apply. On occasion, government personnel participate in activities outside the government workplace. Especially during the holiday season, social gatherings are common. Whether for morale and welfare purposes or a simple social gathering, these unofficial endeavors can pose difficulties for contractor employees who may wish to participate. Parties, gift exchanges, and the like are often organized to celebrate the particular event or season. The gift rules apply to these situations as well. Pay particular attention to gift acceptance thresholds and the prohibition on solicitations of prohibited sources.

A. Parties, Open-Houses, and Receptions:

1. Government personnel may attend social events sponsored by non-prohibited sources if no one is charged admission. (*e.g.*, most holiday receptions and open-houses) (5 CFR 2625.204(h)).
2. Widely Attending Gathering - The widely attended gathering exception allows government personnel in their personal capacity to accept free attendance at an event that meets the criteria set out in 5 CFR 2635.204(g)(2) and (3). Widely attended gatherings must be open to a wide audience or represent a range of persons interested in the subject matter. The agency must determine whether there is agency interest or conflict of interest with the offeror. Free attendance is a personal gift to government personnel. 5 CFR 2635.204(g)(1) authorizes government personnel to participate as a speaker, panel member, etc and accept free attendance on the day of their participation. Under this authority, free attendance on the day of participation is not a gift to the agency and is an exception to the general gift acceptance rule for the individual.
3. Government personnel may attend events in which the per-person cost is \$20 or less (and the individual has not exceeded the \$50 limit on gifts from that source for that calendar year.)

B. Parties and gift exchanges that include contractor personnel:

1. Gifts from contractors or their employees, even during the holidays, may not exceed \$20, unless another exception applies. (5 CFR 2635.202)
2. Contributions to cover the cost of the event: Contractor personnel may pay their share of the fee to cover the actual cost of refreshments or may bring food to share if others are doing the same. These are not considered gifts, but rather the cost of their share of an unofficial office function or lunch.
3. Gifts to contractor employees: Check with the contractor, since contractors have codes of ethics that limit the acceptance of gifts.

Example: The office is celebrating the marriage of one of the government employees during the non-duty lunch hour or after work. Each person attending has been asked to pay \$10 to cover refreshments and to bring an entrée or dessert. The contractor employee may attend, pay \$10, and bring food because these contributions are not considered to be gifts, but a fair share contribution to the refreshments. However, the contractor employee should not be on contract time billed to the government.

IX. TIME MANAGEMENT

The contract and contractor supervisor control the time management of the contractor employees. Government personnel may not circumvent the contractor supervisor. Time billed to the government must be in furtherance of and in performance of the contract. Government personnel may not ask contractor employees to work outside the scope or limitations of the contract. May not:

- A. Authorize compensatory time for contractor employees.
- B. Invite contractor employees away from their assigned workplace or otherwise authorize contractor employees to attend activities unrelated to the performance of their contract. (Examples include sports days, team-building exercises, retirement ceremonies, and office social events.)
- C. Grant an early release such as “59 minute” early release.
- D. Unless authorized in the contract, ask for help to set up an office or command event, decorate offices for holiday themes, etc.
- E. Ask contractor employees to volunteer personal time to help set up an office or command event.

X. POLITICAL ACTIVITIES

A. Political Activities in the Workplace:

The Hatch Act and DoD regulations prohibit Government personnel from conducting political activities in the workplace and limit their political activities elsewhere. These restrictions apply only to DoD personnel and do not apply to contractor employees. Therefore, there is no Federal prohibition on contractor employees engaging in political activity, such as displaying signs or actively campaigning, in the Government workplace.

1. To remove this incongruity, components should establish and apply site regulations to restrict political signs. For example, General Services Administration (GSA) Federal Management Regulation (FMR) prohibit posting or affixing materials on bulletin boards or elsewhere on GSA controlled property, except as authorized. This restriction does not apply to public areas. (41 CFR §102-74.415). Moreover, each

service will have restrictions concerning political activity on installation. WHS has restrictions on political activity at the Pentagon Reservation.

2. Another possible solution is to capture political activity restriction in the contract/task order.

Example: A contractor employee is running for local political office as a partisan candidate. May the contractor employee place a campaign poster above his desk in the Federal worksite? May the contractor employee solicit campaign contributions from the government employees? Unless the agency has workplace rules that govern such display activities, the contract prohibits, or is a GSA owned or controlled building no existing government regulations on political activities currently prohibit such activity.

B. Use of Office to Influence an Election or Affect Political Activity:

The Hatch Act at 5 U.S.C. 7323 prohibits a Federal civilian employee from:

- Using “his official authority or influence for the purpose of interfering with or affecting the results of an election.”
- Soliciting or discouraging the participation in any political activity of another person who is seeking certain official actions by that office.

Among other things, this prevents government civilian employees from suggesting to members of the public who call a Federal office that they should vote for a particular candidate or contribute to a particular political party.

Contractor personnel, including those who may be dealing with the public, are not subject to these restrictions. Therefore, contractor personnel may attempt to use their relationship with the government to imply endorsement or approval of their political platform or agenda. Contracts, task orders and Installation policies on political activity should limit political activity by contractor personnel while performing the government contract.

XI. AWARDS

Commonly, government organizations assign teams to solve a particular problem. These teams often represent a mix of government personnel and contractor employees. Upon successful completion of the project, the organization may recognize members of the team. The government may award government personnel using a variety of methods, ranging from certificates of appreciation to time off and a monetary bonus. The government does not have the same authority to recognize contractor employees even if they are members of a team that includes government personnel.

- A. Contractors may have their own awards and bonus programs.
- B. Contracts may include incentives and awards for performance or work performed ahead of schedule (FAR 16.4).

- C. The DoD Civilian Personnel Manual offers very limited authority to recognize contractor employees for contributions that are deemed unrelated and completely outside the contractual relationship and recognition is clearly in the public interest (DOD 1400.25, V451, Enclosure 3, paragraph 11b).
- D. Recognition of a contractor employee may only take the form of a letter or certificate of appreciation signed at the lowest applicable level of the organization
- E. Use of appropriated fund “Commander’s Coins” are only to recognize special achievements of government employees and may not be given to contractor employees. Nor may commanders give contractor employees coins that they have purchased with personal funds.
- F. Before deciding to give a presentation, award, or recognition to a contractor employee, check with the contracting officer and servicing legal office, since any recognition may be used against the government in a dispute involving contract performance.

XII. USE OF GOVERNMENT RESOURCES

- A. Contract: As a matter of policy, contractors are ordinarily required to furnish all property necessary to perform Government contracts. (FAR 45.102)
- B. Government furnished property: If the government determines that property is unique, it is cost effective or otherwise in the government’s best interest, the government may so provide in the contract. The contract must describe the property that will be furnished during performance and establish accountability and return procedures. System of property control must be in writing. When the government provides property and resources, contractor employees may only use the resources for purposes authorized to fulfill the requirements of the contract. (FAR 45.509-2)
- C. Government furnished services: Normally, government organizations include departments that provide services for some or all of its government personnel, including Employee Relations, Equal Employment Opportunity, Arbitration/Mediation, Chaplain, and Legal. Although such services are readily available at the work site, contractor employees may not use these resources unless otherwise provided for in the contract or otherwise qualified. For example, a contractor employee who is a retired military member does have some limited ability to use military-provided legal services. Contractors are responsible for providing employee related services (Employee Relations, EEO, and Mediation) to their employees.
- D. Government furnished training – see training section, *infra*.
- E. Personal use policy: While Agency Designees (supervisors) have the authority to determine appropriate personal use of government resources by government personnel, they do not exercise the same authority and control over contractor employees. Because the contractor employee is fulfilling the obligation of the contract, all use of government property must comply with the Federal Acquisition Regulations. Since the contractor is

responsible for meeting all deadlines and deliverables of the contract, it may further restrict personal use of resources that could have a detrimental impact on the cost, quality, and timeliness of the delivered product or service. The contractor may limit personal use provisions in the contract, but the contractor may not expand them.

- F. Use of Morale, Welfare, and Recreation (MWR)/NonAppropriated Funds Instrumentality (NAFI) programs and facilities: The installation commander has the discretion to allow contractor employees that work full-time on the installation limited use of military MWR activities, such as restaurants, gymnasiums, and golf courses. Commanders may open activities to these patrons based on local demand and capacity. Resale of food, state tax-free beverages, and tobacco products is restricted to amounts consumed on the premises, and to convenience merchandise incidental to daily participation. (DoDI 1015.10, Encl. 4) Reminder: while the Commander may approve participation by contractor employees, contractor employees may not take advantage of MWR/NAFI discounts unless otherwise qualified.

XIII. TRANSPORTATION

The Government provides vehicles and shuttle service to promote efficiency in conducting Government business. Local area commanders have the discretion to determine if use is for official purposes.

- A. Contractor personnel may not be issued Invitational Travel Orders. All travel should be priced and included in the contract. See JTR Appendix E, Part I, D and FAR 31.205-46. Government contractors are not eligible under any circumstances for city pair airfares.
- B. Contractor employees may use government shuttle bus services when conducting official defense business. (DoD Directive 4500.36-R, 5-6)
- C. Government personnel may accept contractor-provided transportation to meetings or similar events for official business as a gift to the Government under 31 U.S.C. § 1353 and 41 C.F.R. § 304-1.2.
1. This authority may not be used to accept the offer of travel from a contractor to attend meetings that carry out the mission of the government employee, such as investigations, inspections, audits and site visits.
 2. This authority may not be used to accept travel to vendor promotional training or other meetings held for the primary purpose of marketing the products or services of a non-Federal entity.
 3. This authority may not be used if acceptance would cause a reasonable person with knowledge of the relevant facts to question the integrity of agency programs or operations.

4. Prior approval is required. Alternatively, a government employee may receive after the fact approval upon return and the travel gift does not exceed the original travel authorization or has not been previously disallowed.

Example: A contractor employee offers to drive a government employee to a professional conference to which they have both been invited that is 250 miles away. This is permissible, with advance approval, because 31 U.S.C. 1353 and 41 C.F.R. § 304-1.2 permit heads of government components to accept travel benefits from a non-Federal source in connection with attendance in an official capacity at a meeting or similar function. Such travel must be approved in advance by the travel acceptance authority and ethics counselor.

XIV. TRAINING

- A. Government-provided and “All Hands” training: When the government contracts for a service, the contractor is responsible for providing fully trained and prepared employees. A contract normally will require the contractor to provide “ready to work” contractor employees, meaning the contractor must ensure that its employees meet all skill, security, and other indoctrination requirements.
 1. Government personnel may not independently require or grant contractor employees the time to attend training. Remember that the contractor supervisor is responsible for time management, and that time away from the workplace puts the contractor at a disadvantage, and may impair the contractor’s ability to meet contract obligations or delivery dates.
 2. The Government may provide training to contractor employees if not required by the contract. If the government and contractor supervisor agree that contractor employee attendance at training is appropriate, and it does not otherwise create a conflict or give the appearance of favoring a contractor, then the government must determine whether the training is a necessary and reasonable expense under their appropriations.

Example: A government supervisor wants his entire division to attend EEO training; he wants to require the contractor employees supporting his division to attend as well. He may not do so unless the government and contractor supervisor have agreed on the training and time management, or the training is otherwise required under the contract.

- B. Contractor-provided training. If a contractor offers training to government personnel that is not required by the contract, the ethics official should analyze it under the gift acceptance rules. Exceptions to allow the acceptance of training from a contractor include:
 1. Government Acceptance Authority - Agencies have statutory authority to accept free attendance for training that is held away from an employee’s official duty station. Training does not have to be open to members throughout a given industry or profession, nor does it have to represent a range of persons interested in the subject matter to qualify for this exception. However, it must meet the requirements set out in 31 U.S.C. 1353.

2. Training from non-profit organizations or educational institutions - This authority applies to training that a civilian employee attends while on official duty or training that has been paid for in whole or in part by the government. This exemption only applies to benefits provided by tax-exempt organizations, such as non-profit institutions or universities. Records on the gift must be maintained by the agency. (5 U.S.C. 4111, 5 C.F.R. § 410.501-602).
3. Gifts to the Agency – Many agencies have statutory gift acceptance authority that may authorize them to accept gifts, including training. For DoD see 10 U.S.C. 2601 and 2608.
4. Widely Attending Gathering - The widely attended gathering exception allows government personnel in their personal capacity to accept free attendance at a training event that meets the criteria set out in 5 C.F.R. § 2635.204(g). Widely attended gatherings must be open to a wide audience or represent a range of persons interested in the subject matter. Attendance at the event is not a gift to the agency and is an exception to the general gift acceptance rule for the individual.

XV. MISUSE OF POSITION/ENDORSEMENT

- A. Government personnel may not use their public office for their private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends or other persons. Furthermore, government personnel may not use their position or authority in a manner that is intended to coerce or induce another to provide any benefit to family, friends, or associates with whom the government employee is affiliated in a nongovernmental capacity. (5 C.F.R. § 2635.702)

Example: A Government employee's best friend is looking for a job. She has heard from contractor employees with whom she is working that the contractor has several openings in her friend's area of expertise. She can pass on public information about this job opening to her friend, but she cannot ask the contractor to interview or hire her friend.

Example: A contractor employee with whom a government employee has worked on an official matter requests a letter of recommendation in support of her job application with a different private sector company. The military member may write the letter using his title and position because this recommendation is based on his official knowledge of the individual that he gained in the course of his government employment. The letter may not be amount to an endorsement of the contractor employer. Note: Due to the severe limits on contractor recognition, such a letter of appreciation would only be appropriate if the contract that the two individuals had worked together on had expired.

XVI. SWITCHING SIDES

The opportunity for inadvertent violation of the post-employment statutes and rules increases when contractor employees and Government personnel are working side-by-side.

A. Contractor Employee Moving to the Government:

When a contractor employee applies for a government position, ensure all of the appropriate hiring procedures are followed, especially if the employee supports tasks within the hiring office.

1. A former contractor employee is disqualified for two years from working on particular matters in which his former employer is or represents a party if he received an extraordinary payment. An “extraordinary payment” is any item, including cash or investment interest, exceeding \$10,000 based on a determination made after it became known that the employee was being considered for or has accepted a government position, and other than pursuant to the former employer’s established compensation, partnership, or benefits program. A compensation, partnership, or benefits program will be deemed an established program if it is contained in bylaws, contract or other written form, or if there is a history of similar payments made to others not entering into Federal service. See 5 CFR § 2635.503.
2. A former contractor employee may also have conflict of interest limitations under 18 USC § 208 if the employee retains a financial interest in the former employer, such as a retirement or pension plans, deferred compensation, stock or profit distributions, or re-employment options.

B. Impartiality Requirements for Recently-Hired Government Personnel:

1. Reasonable people who are aware of the circumstances may question the ability of former contractor employees who are now working for the government to be impartial in a particular matter concerning their previous employer. Such personnel should consult with their supervisors and ethics counselors to assist them in resolving the perceived loss of impartiality regarding their former contractor employer. (5 C.F.R. § 2635.502)

Example: A former contractor employee has just started work as a government employee. When he left his private sector job, his former boss told him to let her know of any business opportunities that would increase the company’s market within the government. The government employee would like to help his former boss. The government employee can pass on public information, such as an announced solicitation, but he cannot pass on non-public information about agency programs, possible contracts, cost estimates or other potential business opportunities.

2. Recently hired former contractor employees sometimes continue to hold financial interests in their former employer, such as retirement benefits or stock. Such financial interests may require them to disqualify themselves from official matters affecting the financial interests of their former employer. (5 C.F.R. § 2640)

C. Government Personnel Moving to a Contractor: **(Note: The below situations illustrate only the common issues that arise when contractors work in the Federal workplace. Federal personnel who leave the government for private employment must comply with applicable restriction including 18 U.S.C 207 and the Procurement Integrity Act, 41 U.S.C. 423, Section 847 which are not fully discussed here. Please see the Post Government Employment Tab in the Deskbook.)**

1. Government personnel seeking or negotiating for employment with a contractor may not work on any particular matter affecting the financial interests of the prospective contractor employer. (18 U.S.C. § 208, 5 C.F.R. § 2635.604).
2. If a contractor employee offers to discuss employment opportunities (unsolicited) with a government employee, unless the government employee makes a clear and immediate rejection, he must disqualify himself from participating in matters that affect the financial interests of the contractor. (5 C.F.R. § 2635.604) Also, if the employee is covered by procurement integrity, 41 U.S.C. 423, the employee is also required to notify the head of the contracting activity, contracting officer, source selection authority, supervisor, and ethics counselor.

Example: A contractor employee approaches a government employee who is working on a matter that affects the contractor and starts employment discussions with the government employee. If the government employee does not immediately and clearly reject the possibility of employment, the employee must stop working on the matter. As indicated above, he may also have to report the contact to appropriate authorities.

XVII. NON-DISCLOSURE

Government personnel with access to nonpublic information may not disclose it without authorization. Nonpublic information is any information gained by reason of government employment that government personnel know or reasonably should know has not been made available to the general public. (5 C.F.R. § 2635.703). Sharing nonpublic information with contractor employees (unless they are cleared and authorized to receive such information) is the same as releasing it outside the government. Therefore, ethics officials should caution government employees to take particular care when discussing nonpublic information in areas where contractor personnel are co-located: in elevators, break and rest rooms, cafeterias, and other public areas.

If the contractor employee needs access to nonpublic information to perform his duties under the contract, then the contract should stipulate the limits of the access and appropriate protection. Issues to consider when providing nonpublic information to contractor employees:

- A. Is the purpose of providing access to the nonpublic information within the scope of the contract?
- B. Is there a need to know or to have the access?
- C. Is permission required?
- D. Has contractor employee signed a non-disclosure agreement? No information should be provided contractor employees unless they have executed a non-disclosure agreement. (5 C.F.R. § 2635.703). Note: government employees do not sign non-disclosure agreements prepared by contractors to protect proprietary information.
- E. Have adequate precautions been taken to maintain the integrity of the procurement process and have steps been taken to ensure against providing unfair competitive advantage?

- F. While the Trade Secrets Act (18 U.S.C. 1905) does not apply to contractor employees, the Procurement Integrity Act (41 U.S.C. 423) and its prohibition against obtaining and disclosing proprietary information does apply to them.
- G. Privacy Act, 5 U.S.C. 552a
- H. Espionage Act, 18 U.S.C. 1831 – 1839
- I. Release of classified material? 18 U.S.C. 1905, FAR 14.211, Executive Order 12333

XVIII. CHARITABLE FUNDRAISING

The Combined Federal Campaign (CFC) is a Government attempt to control the solicitation for contributions by private organizations of government personnel while in the government workplace. An exception allows organization heads to approve “by your own for your own” solicitations of government personnel. Reminder: The approval does not allow solicitation of individuals who are not government personnel.

- A. Government personnel, in their official or their personal capacities, may not solicit contractor employees either on or off duty. (5 C.F.R. § 2635.808(c)(1)(i)).
- B. Government personnel may engage in volunteer and personal charitable activities when not on duty, not at worksite, or otherwise not acting in an official capacity.
- C. Just like any charitable organization, contractor employees cannot solicit government personnel in the Federal workplace.

Example: A Government employee’s religious organization is sponsoring a night each month at a homeless shelter for members to cook, to help maintain the facility, and to provide counseling services to the residents. The Government employee knows that one of the contractor employees is part owner of a restaurant. She would like to ask for donations of excess food to use at the shelter. She cannot solicit contractor employees, either on or off duty, for contributions. Further, government personnel may not solicit or ask contractor employees to participate in group "runs" for charity, to sponsor an employee's participation in a charitable "walk" or "run," or to purchase cookies, gift wrap, candy bars or similar items in support of personal charitable activities. (Please note that only solicitation is prohibited. Contractor personnel are not prohibited from voluntarily contributing or purchasing items for sale.)

XIX. OUTSIDE EMPLOYMENT

Government personnel are prohibited by [18 U.S.C. § 205](#) and [18 U.S.C. § 203](#) from representing an outside employer or third party to the government. This makes problematic the increasingly common practice of government personnel, who are moonlighting as contractor personnel, physically working in government offices. The criminal statutes preclude government personnel from representing their contractor employers to Federal personnel. Since an employee is

an agent for the contractor, it is extremely difficult for a moonlighting employee to interact with Federal personnel in a government workplace without making a prohibited representation. For that reason, it is more prudent for moonlighting government personnel to work for the contractor “behind the scenes” at a contractor office, non-governmental office, or otherwise away from the government workplace.

The old view that “merely performing a contract” is not a representation was overturned by OGE in their [opinion 99 x 19](#). OGE later advised that the logic in that opinion also applies to the application of 18 U.S.C. § 203 and 205. Hence, an Intelligence Analyst, preparing a report under an X Corp Government contract, represents X Corp to the Government when he submits his report. Regardless of whether the report is accurate, timely, useful, responsive, understandable, and comprehensive, it is the representation that is prohibited according to OGE.

Government personnel may not engage in outside activities that conflict with their official duties if such activities are prohibited by statute or regulation or would require employees’ disqualification from matters critical *to* their office. (5 C.F.R. § 2635.802)

- A. Government personnel may not represent others to agencies of the Government on any matter in which the United States is a party or has a direct and substantial interest. (18 U.S.C. § 203 and 205)
- B. These rules apply equally to officers in the military service that are employed during their terminal leave. If employed by a contractor, officers in the military service generally may not work in the Government workplace during this time. (18 U.S.C. § 203 & 205)
- C. Government personnel required to file financial disclosure statements must obtain prior written approval from their Agency Designee before working for a prohibited source. Permission shall be granted unless the outside activity involves conduct prohibited by statute or regulations (5 C.F.R. § 2635.803; JER 2-206 & 3-306)

Bottom line: It is almost impossible for Government personnel to work as contractor employees in the Federal workplace. Government personnel who wish to work for a contractor may be able to arrange to work in the contractor workplace. For military officers on terminal leave, if they can't work behind the scenes for the contractor, they may advance their retirement date and sell back their leave, or delay starting work until after they actually retire.

XX. CONFUSION OF IDENTITY

Due to the different roles, responsibilities, authority, and restrictions, it is necessary that the identities of Federal personnel and contractor personnel be apparent. FAR 37.114(c) provides:

“All contractor personnel attending meetings, answering government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression in the minds of members of the public or Congress that they are government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. They must also ensure that all documents or reports produced by contractors are suitably marked as contractor products or that contractor participation is appropriately disclosed.”

XXI. CONTRACTOR CONDUCT AND OPERATIONS IN THEATRE

- A. Theatre Commanders may direct military and DOD civilian personnel. Except during threat to life and safety, Commanders may not supervise contractor personnel.
- B. General Orders (such as those prohibiting alcohol use in theatre) and instructions issued by theatre Commanders apply to contractors.
- C. Command and control determined by the contract and task orders.
- D. Contractor management personnel will be required to have supervisors on site to direct contract performance and coordinate safety measures.
- E. May be required to possess and display theatre badges at all times. Similarly, contractors may be required to obtain CAC credentials and return CAC at the expiration of the contract or their service.
- F. Personnel will have support determined by the contract, or as determined by relevant theatre instructions. For example, contractor personnel with CAC credentials may have access to dining facilities (DFACs), gyms, exercise and MWR facilities, exchange privileges, legal assistance privileges, and medical care. Contract language may be modified by theatre policies and may even conflict with the contract provisions.
- G. Weapons are regulated by theatre General Orders and host nation agreements. The contract may contain clauses regarding self-defense weapons. Generally, no personal weapons of any type are authorized in theatre. If contractors are allowed to carry defensive weapons, they will be issued at the Individual Deployment Site or Contractor Deployment Processing Center. All personnel will be required to adhere to weapons training requirements and safety procedures. The contractor must ensure that employees are not prohibited under U.S. law to possess firearms (e.g., Lautenberg Amendment, 18 U.S.C. § 922(d)(9)).
- H. Motor vehicle operation. Contractor personnel may be authorized to operate government vehicles in theatre, subject to theatre Commander orders, terms of the contract and host nation agreements. Contractor personnel may also be provided vehicles under the terms of the contract. Contractor personnel may be subject to host nation civil and criminal actions resulting from operations of motor vehicles, unless they enjoy special status.
- I. Life Support Areas. Typically, contractor personnel will have their own Life Support Areas (LSA) separate from military and DOD civilian personnel, and separate from host nation or third country national personnel. Contractor may also be required to live in field conditions, often austere and communal, characterized by temporary structures and primitive facilities.
- J. Military Extraterritorial Judicial Act (MEJA), 18 USC §3261, et. Seq. implemented by DoD Instruction 5525.11, dated 3 March 2005. This statute provides for Federal jurisdiction over crimes committed outside the United States to offenses that, if committed within the special maritime and territorial jurisdiction of the United States, are punishable by imprisonment for

more than 1 year. This jurisdiction covers members of and persons employed by or accompanying the Armed Forces. Contractors in theatre will be subject to MEJA.

K. Contractor salary. Contractor personnel are not entitled to special pay or tax exempt status directly from DOD as a result of their service in theatre. All salaries are determined by the contract and by the employment relationship. All tax privileges are determined by the Internal Revenue Service.

L. Uniforms and organizational wear. Contractors are generally not authorized to wear a uniform or attire that resembles US DOD uniforms. Theatre Commanders may authorize contractors to wear uniforms in writing for operational reasons. The authorizations will be carried by contractor personnel at all times. The uniform will indicate civilian status.

FAR 7.5 – Inherently Governmental Functions:

- (1) The direct conduct of criminal investigations.
- (2) The control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution.
- (3) The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.
- (4) The conduct of foreign relations and the determination of foreign policy.
- (5) The determination of agency policy, such as determining the content and application of regulations, among other things.
- (6) The determination of Federal program priorities for budget requests.
- (7) The direction and control of Federal employees.
- (8) The direction and control of intelligence and counter-intelligence operations.
- (9) The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.
- (10) The approval of position descriptions and performance standards for Federal employees.
- (11) The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
- (12) In Federal procurement activities with respect to prime contracts—
 - (i) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
 - (ii) Participating as a voting member on any source selection boards;
 - (iii) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
 - (iv) Awarding contracts;
 - (v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);
 - (vi) Terminating contracts;
 - (vii) Determining whether contract costs are reasonable, allocable, and allowable; and
 - (viii) Participating as a voting member on performance evaluation boards.
- (13) The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.
- (14) The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.
- (15) The approval of Federal licensing actions and inspections.
- (16) The determination of budget policy, guidance, and strategy.
- (17) The collection, control, and disbursement of fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute, such as 31 U.S.C. 952 (relating to private collection contractors) and [31 U.S.C. 3718](#) (relating to private attorney collection services), but not including—
 - (i) Collection of fees, fines, penalties, costs, or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard case management techniques; and

- (ii) Routine voucher and invoice examination.
- (18) The control of the treasury accounts.
- (19) The administration of public trusts.
- (20) The drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity.

CHAPTER L: RESERVE COMPONENT ETHICS ISSUES

I. REFERENCES

- A. Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR 2635, Subparts G & H
- B. DoD 5500.07-R, Joint Ethics Regulation
- C. Title 10, United States Code, Section 973, 12301, and 12601
- D. Title 18, United States Code, Sections 203, 205, 207, 208 and 209
- E. Title 22, United States Code, Sections 611, et seq.
- F. Political Activities of Federal Employees, 5 CFR Part 734
- G. Federal Acquisition Regulation (FAR) Parts 3.6 and 9.501
- H. DoD Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*, 19 February 2008.
- I. AFI 51-902, *Political Activities by Members of the US Air Force*, 27 August 2014.
- J. ANGI 36-101, *Air National Guard Active Guard Reserve Program*, 3 June 2010.
- K. AF Form 3902 (Application and Approval of Off-duty Employment).

- L. Army Regulation 27-1, *Judge Advocate Legal Services*, 30 September 1996 (RAR 13 September 2011).
- M. Army Regulation 600-20, *Army Command Policy*, 6 November 2014.
- N. Army Regulation 135-18, *The Army National Guard and Army Reserve Active Guard Reserve Program*, 1 November 2004.

II. INTRODUCTION

- A. Reserve Component (RC) service members (SM) are an integral and vital part of the total military force. Mobilization of RC SMs, as well as their increased day-to-day operational involvement in the missions of the armed services significantly heightens the potential trouble spots that Ethics Counselors must understand and evaluate.
- B. Service Reserve and National Guard (NG) personnel continue to provide substantial forces for missions across the globe.
- C. Reserve and NG personnel serving on active duty are subject to the same ethical restrictions as their Regular service counterparts. NG personnel not in a Federal status MAY be subject to certain Ethics restrictions.
- D. Commanders of Reserve and NG Soldiers, airmen, sailors, and Marines (and Ethics Counselors) must be alert to the common ethics issues that arise with RC SMs. The issues become more important and pronounced when RC SMs are activated or mobilized.
- E. Ethical matters involving Reserve component (RC) personnel include:
 - 1. Identification and prevention of actual and apparent conflicts of financial interest, both individual and organizational.
 - 2. Filing financial disclosure reports

3. Outside (off-duty) employment and off-duty business activities by mobilized RC SMs.
 4. Whether RC SMs can continue to hold civil offices.
 5. Supplementation of salary.
 6. Post-Government employment restrictions.
 7. Gifts.
- F. Commanders have an affirmative obligation under the JER § 5-408 to refrain from assigning RC SMs to perform duties that could enable them to obtain non-public information or gain unfair advantage over competitors, or which present an actual or apparent conflict of interest.
1. Commanders (or designees) **must** screen RC SMs to ensure that no actual or apparent conflict exists between their private interests and their duty assignment.
 2. RC SMs have an affirmative obligation to disclose material facts in this regard. However, receiving commands cannot assume compliance and must independently screen incoming personnel to avoid conflicts of interest.
 3. Screening document should elicit (at minimum) the following information:
 - a. Civilian employer of the reservist, location, job title, phone number;
 - b. Duties and responsibilities of the reservist with his/her civilian employer;
 - c. Government contracts held by the RC SMs civilian employer, as well as any pending or potential contracts;

- d. Reserve assignment and job responsibilities (include office symbol);
 - e. Whether the reservist is being mobilized or involuntarily ordered to active duty;
 - f. Whether the reservist will be performing duty relating to contractual actions (and, if so, the nature of the duty); and
 - g. The reservist's supervisor's name, date and an affirmative (signed) statement that a conflict of interest analysis has been performed.
4. This is not the DoD Civilian Employment Information (CEI) program. DoD gathers information about civilian employment of RC SMs for other purposes unrelated to a conflict of interest analysis.

III. CONFLICTS OF FINANCIAL INTERESTS

- A. The mobilization/activation of RC SMs dramatically increases the potential for conflicts of interest because RC SMs are often called upon to perform duties that call for greater responsibility than when they are in training status. Commanders must pay particular attention to the assignments and duties of RC SMs and refrain from assigning them to positions that could cause conflicts of interest. JER § 5-408, 18 U.S.C. § 208
- B. Employees may not engage in outside activities that conflict with their official duties if such activities are prohibited by statute or regulation, or would require their disqualification from matters critical to their office. 5 CFR § 2635.802, 10 U.S.C. § 973
- C. Use of nonpublic information. Federal employees, including RC SMs, may not use nonpublic information to further their own private interests or those of another. 5 CFR § 2635.703. This includes information not releasable under the Freedom of Information Act (FOIA), protected by the Privacy Act of 1974, classified (18 U.S.C. § 798, 50 U.S.C. Code § 783(b)), protected by procurement integrity law (41 U.S.C. § 423), or the Trade Secrets Act (18 U.S.C. § 1905).

- D. Organizational conflicts of interest. Reserve Component SMs and contracting officials must be aware of potential “organizational conflicts of interest” (see Federal Acquisition Regulation, FAR 9.501 *et seq.*) that can be created by the civilian employment held by RC SMs. An organizational conflict of interest may disqualify their private sector employer from participating in procurement actions when the reservist returns to his/her civilian job after serving on active duty.
1. Organizational conflicts of interest arise when, as a result of activities or relationships, a person is deemed unable to render impartial assistance to the Government, the person’s objectivity may be impaired, or the person may have an unfair advantage.
 2. An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required. FAR Part 9.502
 3. The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity. FAR Part 9.503
- E. The FAR also prohibits contracting officers from knowingly awarding a government contract to a government employee or to a business concern or other organization owned or substantially owned or controlled by one or more government employees. FAR Part 3.6. However, FAR 3.601(b) exempts special government employees (as defined in 18 U.S.C. § 202) from this provision unless the special government employee’s duties directly affect the procurement. Many RC SMs are considered SGEs; accordingly, their civilian businesses could still be awarded government contracts so long as the member was not in a position to influence the procurement.
- F. Conflicts of interest may often be resolved through use of disqualification letters, which may be prepared with the assistance of an Ethics Counselor, or reassignment of duties.

IV. FINANCIAL DISCLOSURE REPORTS

- A. Financial disclosure reports are required for certain RC SMs – dependent upon their rank, position, number of days serving on active duty and responsibilities.
- B. OGE 278e, Public Financial Disclosure Report
1. Required for all O-7s, SES personnel, and others serving in certain “covered positions” if they serve 61 or more days of active duty in a “covered position” during a calendar year to trigger a reporting requirement. The Air Force mandates filing for all O-7s by policy regardless of the number of days of active duty served.
 2. THIS IS VERY DIFFICULT TO TRACK. Best advice– inform personnel as soon as possible (and as often as possible) of the potential that they may have to file a financial disclosure report.
 3. The 61st day of active duty (when a reserve SM is being paid as an O-7) in a calendar year triggers the requirement to file a new entrant report. Reports are due within 15 days thereafter. Annual reports are due at the same time that their active duty counterparts file their disclosure forms.
 4. If a filer is stationed in a Designated Combat Zone on the filing due date, then their OGE 278e filing date may be extended until 180 days after the later of either (i) the last day of the individual's service in the Designated Combat Zone; or (ii) the last day of the individual's hospitalization as a result of injury received or disease contracted while serving in the Designated Combat Zone. Ethics in Government Act of 1978, 5 U.S.C. Appendix § 101(g)(2)(a).
 5. Termination reports are not required of Reserve officers who do not serve more than 60 days of active (Title 10) duty during the calendar year in which the officer is transferred to the Retired Reserve. By implication, Reserve officers who are transferred to the Retired Reserve in the same calendar year in which they served more than 60 days of active duty must complete a termination report. The JER does not specify the timing of this report. As a practical matter, the report should be completed and signed on the date the officer is released from active duty if the officer knows at that time that he or she will retire in that calendar year.

6. On 5 February 2011, the Secretary of the Air Force directed that all Reserve Component Air Force General Officers file OGE 278s similar to those officers on active duty, regardless of the number of active duty days the GO performs. That directive was implemented by the Air Force DAEO on 10 May 2011.

C. OGE Form 450, Confidential Financial Disclosure Report

1. According to 18 US Code § 202, “a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special government employee while on active duty solely for training.” However, the JER § 7-300 provides exception to the requirement to file for RC SMs on active duty for less than 30 consecutive days during a calendar year. Furthermore, by policy, the General Counsel’s Office has excluded RC SM from filing the OGE 450 unless it is otherwise determined that the duties of the Reserve SM meet the filing criteria in 5 C.F.R. § 2634.904(a)(1)(i). Memorandum, SAGC, 9 Dec 11, Exclusion of Members of the Reserve Component from Filing the Confidential Financial Disclosure Report.
2. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special government employee.
3. Special Government Employees (SGEs) should file OGE Form 450s before they undertake any duties associated with their reserve position.
4. If a Reserve officer of the Armed Forces or an officer of the National Guard of the United States is voluntarily serving a period of extended active duty in excess of one hundred and thirty days, they are treated the same as active servicemembers for the purposes of 18 U.S.C. § 203 and §§ 205 through 209 and 218. Check RC SMs’ orders – RC SMs who are ordered to Active Duty for Operational Support pursuant to 10 US Code 12301(d) are serving voluntarily.

5. Anticipated change to *JER* will exclude SGEs who are not occupying covered positions as defined in the *JER*. DoD currently does not require ALL RC SMs considered SGEs to file OGE Form 450s. Service Secretaries have excluded most SGEs from filing unless they would otherwise have to file based on the nature of their position or duties.
 6. JER 7-300(b) Exclusion from filing
 - a. Any DoD employee or group of DoD employees may be excluded from all or a portion of the reporting requirements when the DoD Component Head or designee makes a determination under 5 CFR 2634.905. The DoD, Air Force, Navy and Army have excluded from filing those individuals who make or approve annual purchases totaling less than the simplified acquisition threshold, as defined in the Federal Acquisition Regulations (currently \$150,000). See, e.g., 11 Oct 01 categorical exclusion letter from Army Secretary Thomas E. White.
 - b. DoD employees who are not employed in contracting or procurement and who have decision-making responsibilities regarding expenditures of less than \$2,500 per purchase and less than \$20,000 cumulatively per year are excluded from the requirement to file the OGE Form 450 (formerly SF 450)¹. However, Agency Designees may require such DoD employees, in individual cases, to file the OGE Form 450. Such DoD employees remain subject to conflict of interest statutes and regulations.
 - c. OGE has granted extensions of time to file due for personnel participating in deployments due to the current declared national emergency. 5 CFR 2634.903(d)(2)
- D. All financial disclosure forms must be carefully screened to identify actual or potential conflicts of interest.

¹ Even though the threshold amount for micropurchases has been raised to \$3,000.00, the *JER* still reflects the amount as \$2,500.

V. OUTSIDE (OFF-DUTY) EMPLOYMENT AND OFF-DUTY BUSINESS ENTERPRISES

- A. Active duty officers may not accept outside employment that interferes with their performance of military duties. 10 U.S.C. § 973(a).
- B. Employees may not engage in outside activities that conflict with their official duties if such activities are prohibited by statute or regulation, or would require their disqualification from matters critical to their office. 5 C.F.R. § 2635.802
- C. Supplemental regulation may be helpful in outlining the responsibilities of RC personnel, their supervisors and ethics counselors in approving or disapproving off-duty employment or off-duty business activities, e.g., Wright-Patterson AFB Directorate of Ethics and Fraud Remedies Instruction 51-201. Approval of Air Force personnel to have an off-duty job or engage in an off-duty business enterprise is accomplished via an AF Form 3902 (approved by supervisor prior to the off-duty employment or business enterprise).
- D. Army Regulation (AR) 27-1, paragraph 4-3c, prohibits Army judge advocates called to active duty for 30 days or more from engaging in the outside practice of law or appearing as counsel in civilian courts, tribunals, or boards. Exceptions to this policy may only be granted by the Army TJAG.
- E. Office of Government Ethics Rules, 5 CFR 2635.704 and 705, prohibit the use of government property and government time for other than official purposes. While there are limited exceptions for the use of phones and computers for personal use, there are generally no exceptions for business use.
- F. The use of DoD communication systems, resources, and official time may be authorized to complete an orderly transition to military service, consistent with JER §§ 2-301(a)(2) and (b)(1). Examples of permissible uses include using government phones or e-mail to inform the courts of the attorney's situation, request court delays, transfer cases to other attorneys, or other similar uses. Such exceptions must be weighed for reasonableness and consider the amount of notification the RC judge advocate had before mobilization, the length of the mobilization, and the relative experience of the judge advocate.
- G. "Telling their story" -- 5 C.F.R. § 2635.807 prohibits the acceptance of compensation for teaching, speaking, or writing when:

- a. The activity is undertaken as part of the employee's official duties;
 - b. The invitation was extended because of the employee's official position rather than his/her expertise;
 - c. The invitation is from a person whose interest may be affected by the employee's official duties;
 - d. The presentation is based on nonpublic information;
 - e. The topic deals with the employee's current duties or those during the previous year; or
 - f. The topic deals with a policy, program, or operation of the employee's agency.
2. Rationale: prevent an employee from selling to others what the Government already pays him/her to do.
 3. "Compensation" includes all payments, including royalties, meals, but excludes gifts that could be accepted from prohibited sources and free attendance at the event in which the speaking or teaching takes place.
 4. Does not preclude matters within the employee's discipline or expertise based on education or experience.
 5. Does not preclude teaching certain courses, e.g., multiple presentation course as part of a regularly established curriculum.
 6. Policy & Security Reviews: A lecture, speech, or writing that pertains to military matters, national security issues, or subjects of significant DOD concern shall be reviewed for clearance by appropriate security and public affairs offices. JER § 3-305
 7. RC SMs are free to "tell their story" once they are released from active duty.

VI. HOLDING CIVIL OFFICE WHILE ON RESERVE DUTY

- A. Retired regular officers and reserve officers serving on active duty under a call or order to active duty for a period **in excess of 270 days**, may not exercise, by election or appointment, the functions of a civil office in the government of a State, the District of Columbia, or a territory, possession, or commonwealth of the United States (or of any political subdivision of any such government). 10 U.S.C. § 973 (b). This statute no longer prohibits such officers from holding civil office except if prohibited by state law or if the holding of the office would interfere with military duties as determined by SECDEF.

- B. DoD Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*, 19 February 2008.
 - 1. DoD Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty has been recently revised.

 - 2. The following provisions of DoD Directive 1344.10 that affect Reserve members have been changed:
 - a. Expands coverage for some provisions to include Service members not on active duty.

 - b. For the purpose of this instruction only, defines active duty to include full-time National Guard duty. See Enclosure 2.

 - c. Consolidates the lists of allowed and prohibited activities in the August 2, 2004, version found in subparagraph 4.1., moving some from their previous location at appendix 3 and deleting some that were located in both places.

 - d. Withholds to the Secretary Concerned the authority to make decision regarding certain political activities that might have previously been delegable. See paragraphs 4.1.1.4. (to serve as an elections official), 4.2.2.1. (to be a nominee or candidate as a regular member, or retiree or RC member when on a call or order to active duty for more than 270 days), and 4.5.3.2. (to hold a State office as a retiree or RC member when on a call or order to active duty for more than 270 days.)

- e. Requires a military member on AD for more than 270 days to have non-delegable Service Secretary permission to hold or continue to hold a covered non-Federal office. See para 4.5.3.2. Under the previous directive, such member was presumed to be allowed to hold such office unless the Service Secretary affirmatively determined that holding the office interfered with the performance of duty. (See former 4.3.5.4.)
- f. Clarifies and modifies the rules concerning campaign contribution given to and from members of the Armed Forces. Prohibits giving and receiving only when both giver and receiver are on active duty. Emphasizes, however, that when one is not on active duty, provisions of the Joint Ethics Regulation could still affect the transaction.
- g. Clarifies and emphasizes that the prohibitions of subparagraph 4.1.2. do not apply to members of the Armed Forces not on active duty as long as the Service members are not in uniform or otherwise give rise to an appearance of official endorsement or sponsorship.
- h. Simplifies the previous directive by creating separate sections focusing on specific actions and statuses.
- i. Expands the prohibitions and limitations of holding civil office under this instruction to those who are appointed by the President regardless of whether confirmed by and with the consent of the Senate. With respect to holding and executing Federal civil offices, this expands the statutory prohibitions. See subparagraphs 4.2.1.1.2., 4.3.1., and 4.4.1.2.
- j. Removes the authority of the Secretary concerned to delegate the authority to grant or deny permission to a regular member, or to a retired regular member or Reserve Component member on active duty under a call or order to active duty for more than 270 days to be a nominee or candidate for covered civil office. See subparagraph 4.2.2.1.
- k. Retains unchanged the authority for the Services to determine the proper procedures and proper persons for determining whether the nomination or candidacy for a covered office of a retired regular member or Reserve Component member under a call or order to active duty for 270 or fewer days interferes with that member's duty performance. See subparagraph 4.2.3.
- l. Adds a new subparagraph setting out limitations on nomination,

candidacy, and campaigning for members. These provisions address use of military information in campaign biographies and websites for those not on active duty, and it establishes significant limitations on campaigning for those who may be on active duty but who are allowed to be (or not otherwise prohibited from being) a candidate or nominee for office. See subparagraph 4.3.

- m. Clarifies and records current policy that candidates for covered civil office who are on active duty may not participate in any campaign activities, including all behind-the-scenes activities. See subparagraph 4.3.3.
 - n. Establishes an Acknowledgement of Limitations form for those on active duty or those called to active duty who are or wish to become candidates or nominees for a covered civil office. See Enclosure 4.
 - o. Excludes issues relating to *Federal* constitutional amendments from the list of examples of issues normally associated with nonpartisan political activity by adding the qualifying word “State” to the list of such issues. See paragraph E2.4.
3. When retirement or discharge is not an option, the only options are to refrain from exercising the functions of the civil office while on extended active duty (typically done by taking a leave of absence) or to resign the office. In the case of retired regular members and reserve members, resignation is not required unless mandated by State law or holding the civil office interferes with military duties. With regard to Reserve or National Guard members under a call or order to active duty in excess of 270 days, paragraph 4.3.5.2 requires the Secretary of each Military Department to grant permission to hold the office after determining whether the holding of a civil office interference with military duties.
- C. DoD now requires that active duty commanders and mobilizing RC SMs are trained on the above provisions (*see* Memorandum, Under Secretary of Defense (Personnel and Readiness), Subject: Mobilization of Civil Officeholders, 2 October 2003).
- D. The provisions of DoDD 1344.10 (and AFI 51-902) have again been made applicable to Full-Time National Guard Duty personnel (Paragraph E2.1) as well as to members not on active duty under certain circumstances.

VII. SUPPLEMENTATION OF SALARY

- A. 18 U.S.C. § 209 has four elements. It prohibits: (1) receipt of salary or contribution to or supplementation of salary, (2) as compensation, (3) for services as an employee of the United States, (4) from any source other than the United States. See also JER 5-404 Compensation From Other Sources
- B. The statute applies even if the payor has no dealings or relations with the employee's agency and is not attempting to influence the employee. See OGE Informal Advisory Letter 83 x 15 dated October 19, 1983
- C. 18 U.S.C. § 209 does not apply to Special Government Employees (see Section IV.C, *supra* to determine if a reservist is subject to supplementation of salary restrictions).
- D. 18 U.S.C. § 12601 permits any Reserve member who, before being ordered to active duty, was receiving compensation from any person to continue to receive compensation while on active duty.

VIII. POST-GOVERNMENT EMPLOYMENT

- A. RC SMs are subject to the same restrictions regarding post-government employment as their active duty counterparts. Accordingly, RC SMs may need to disqualify themselves from matters that may affect their civilian government employment (or their potential employers).
- B. Each time a reservist completes a tour of active duty (whether serving for one day or one year), a new period of "post-Government employment" begins. Note, however, that the post-government restrictions may differ for RC SMs who were considered Special Government Employees or who served fewer than a certain number of days. *See, e.g.*, 18 U.S.C. §§ 205 and 207(c).
- C. Restrictions imposed by post-Government employment regulations and statutes are explained elsewhere in the Ethics Counselor Course materials and are not set forth here.

- D. 18 U.S.C. § 207 prohibits RC SMs from appearing before or making representations to officials of the Federal Government with the intent to influence, on particular matters involving specific parties in which the reservist participated while on active duty.
- E. 18 U.S.C. § 208 prohibits RC SMs from engaging in actions that constitute a financial conflict of interest.
- F. Emoluments Clause of the Constitution (Article I, section 9, Clause 8) applies to RC SMs. 37 U.S.C. § 908
- G. Both the Secretary of State and the Secretary of the appropriate Military Department must approve a request to receive foreign pay. Failure to obtain approval in advance may result in the loss of retired or reserve pay in an amount equal to the foreign pay received.

IX. GIFTS

- A. Due to the public outpouring of support for the military, military members have been offered gifts by the public for their wartime service. The offers have consisted of plane tickets, first class upgrades, home improvements, cash, and appearances on reality TV.
- B. Ethics Counselors should keep in mind the applicability provisions of the JER. Generally, unless a Reserve or National Guard member is on orders or using his or her status or authority as a military member, neither the CFR nor the JER will apply to that member. Members have legally accepted gifts because of this lack of applicability.
- C. Notwithstanding the fact that Reserve and National Guard members may accept gifts under certain circumstances, such members run the risk of violating the “Washington Post” test or the “legal but stupid” test.
- D. Legislation regarding gifts to servicemembers injured in combat and gifts to the Department of Defense for the benefit of servicemembers was contained in the FY06 National Defense Authorization and Appropriations Acts. Change 6 to the JER was added to implement these changes.

- E. In recent years, Congress has provided authority for servicemembers and their families, DoD, and the Coast Guard to directly accept gifts. 10 U.S.C. § 2601a. This authority has been amended numerous times and has not yet been fully implemented by DoD regulation.

X. CONCLUSION

As RC SMs continue to be unitized with recurring frequency, agency ethics counselors must have a working knowledge of the rules and issues associated with RC SMs that enter their commands. Furthermore, RC SMs present unique challenges to their RC commands as they navigate the ethical rules associated with their multiple roles as SMs and civilians.

