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TAB A: ETHICS COUNSELOR FUNDAMENTALS

I. REFERENCES.


II. 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.

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III. JOINT ETHICS REGULATION (JER).

A. Created by DOD Dir. 5500.07, Standards of Conduct, (August 30, 1993).


2. Rescinds old DODD 5500.7 (Source of AR 600-50; AFR 30-30; SECNAVINST 5370.2).

3. Applies to all DOD Components.


5. Makes parts of the JER punitive. Rules printed in bold italics in 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, UCMJ.

B. Foreword to the JER. Directs that all DOD and service directives and regulations that are inconsistent with the JER be canceled.

C. Overview. A single, comprehensive regulation covering more than traditional standards of conduct.

D. Applies OGE rules (CFR provisions) to DOD.

1. Republishes and specifically applies many of the OGE rules to enlisted members and National Guard.
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).*

E. 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 nonappropriated 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. [Changed from a status to an action analysis.]

   f. Foreign national employees if consistent with labor agreements and international treaties and agreement, and host country laws, *e.g.*, local national employees in Germany and Japan are not subject to JER; but Korean national employees are.

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g. Employees from outside the US Government, 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. Designated Agency Ethics Official (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). DAEO is responsible for the implementation and administration of the component's ethics program.

3. Ethics Counselor (EC) (JER § 1-212): A DOD employee (must be attorney) appointed in writing by 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.

a. Communications to an EC are not protected by any attorney-client privilege while communications received in a legal assistance capacity usually are. Attorneys who serve as ECs must advise individuals being counseled as to the status of that privilege prior to any communications. See U.S. v. Schaltenbrand, 930 F.2d 1554 (11th Cir., 1991).

b. ECs advise and assist on issues, such as:

(1) acceptance of gifts and gratuities;

(2) business visitors (e.g., product demonstrations and capabilities briefings);

(3) ethics training;
(4) participation in or dealings with private and professional associations, such as AUSA;

(5) review of public (OGE Form 278) and confidential (OGE 450) financial disclosure reports, and resolving conflicts of interests;

(6) post-Government employment restrictions; and

(7) use of Government resources and time.

c. The Ethics Counselor as “Ethics Magistrate:”

(1) 5 C.F.R. § 2635.107 gives the EC authority to make factual determinations and render decisions on matters falling under the OGE Rules.

(2) Advice may be oral, but written is preferred often and sometimes required (see below under specific duties).

(3) EC's advice generally precludes disciplinary action against an employee who follows EC's advice. De facto but not de jure immunity under 5 C.F.R. § 2635.107(b).

d. Independent Agency Authority. 5 C.F.R. § 2635.105(c)(3) allows agencies to rely upon independent authority, i.e., Title 10 authority or inherent command authority. Example: Gift acceptance statutes, Government Vehicle use.
4. **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 supervision 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 0-7 or above who is in command and any civilian Presidential appointee confirmed by the Senate, the Agency Designee is his Ethics Counselor.

5. **Special Government Employee (JER § 1-227):** Person, including an enlisted member, who performs temporary duties NTE 130 days during any period of 365 consecutive days. Includes RC officer “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.” Caveat: See also 18 U.S.C. 202, which provides a slightly different definition regarding when RC officers are SGEs. Consult the online websites listed at the end of this outline for future updates and clarification on this matter.

**IV. AUTHORITY AND APPOINTMENT OF ETHICS COUNSELORS.**

A. **Army:**

1. Secretary of the Army appointed GC as DAEO.

2. GC appointed The Judge Advocate General of the Army as Alternate DAEO.

3. DAEO appointed Deputy DAEOs and delegated authority: Principal Deputy General Counsel; Deputy General Counsel (Ethics and Fiscal); TJAG; TAJAG, Chief Counsel, USACE; Command Counsel, USAMC; Chief, SOCO.

4. Deputy DAEOs appointed senior ECs and delegated authority.

5. Senior ECs appoint ECs and delegate authority.
B. Air Force:

1. Secretary of the Air Force appointed the Air Force General Counsel Office (SAD/GC) as the DAEO.

2. GC appointed Principal Deputy as Alternate DAEO.

3. GC appointed Deputy GCA as Deputy DAEO.

4. GC appointed other Associate GCs as Ethics Officials.

5. GC appointed MAJCOM and Field Operating Agency (FOA) Staff Judge Advocates as Ethics Counselors (with authority to re-delegate to installation staff judge advocates).

C. Navy:

1. Secretary of the Navy appointed GC as DAEO and TJAG as the Alternate DAEO.

2. DAEO appointed Deputy DAEOS: Principal Deputy General Counsel; Deputy General Counsel; Deputy Judge Advocate General; Director, Judge Advocate Division, HQ Marine Corps; Counsel, Commandant of the Marine Corps; Assistant General Counsel (Ethics).

3. DAEO also appointed EC's: Associate General Counsels; Assistant General Counsels; SJAs to Flag Officers; Counsel in Charge of OGC Field and Branch Offices. (See General Counsel memorandum, dated 25 January 1996, for entire list.)
V. EC RESPONSIBILITIES.

A. Implements, administers, and oversees all aspects of the organization’s ethics program and all matters relating to ethics covered by the JER (See JER 1-401a and 5 C.F.R. § 2638.201 in Chapter 11 of the JER).

B. Specific responsibilities set out in the Ethics rules;

1. Chapter 2, JER:

   a. 5 C.F.R. § 2635.107(b) - Advise 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.

   d. 5 C.F.R. § 2635.502(a)(1) - Consult with EC 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.

   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. (Delegated by DAEO to Chief, Litigation Division for Army. Current and former Air Force employees rules are found in Air Force Instruction 51-301 (20 June 2002), Chapter 9.)

   g. JER § 2-202b - Determination regarding gifts of scholarship and grants.
2. Chapter 3, JER. (5 C.F.R. § 2636.103) – Advisory opinions (honoraria, etc.).

3. Chapter 10, JER - EC responsibility to consult on and report violations of the ethics laws.


C. “Agency Designees” consult with ECs 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).

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. Parts 301-1 & 304-1; JER §§ 4-100 & 4-101 HQDA Letter 55-98-1; SECNAVINST 4001.2H (14 MAR 06) (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.


3. 5 U.S.C. App. 504(b); Chapter 3, JER, 5 C.F.R. § 2636.103 (Compensation for Teaching).


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.


4. Provide copies of precedential ethics opinions to DAEO.

VI. 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 accountable 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 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.

VII. REQUIRED REPORTS.

A. **OGE Form 450 - Confidential Financial Disclosure Reports** (or the DOD version of OGE Optional Form 450-A, Confidential Certificate of No New Interests) *(Due 15 February).*

B. **OGE Form 278 - Public Financial Disclosure Reports** *(Due 15 May).*

C. **Gifts of Travel - (31 U.S.C. 1353).** *(Due within 30 days of travel) (Agency submits semi-annual reports to OGE NLT 31 May & 30 Nov).*
D. **Annual Ethics Training Plan.** (5 C.F.R. § 2638.702) (Chapter 11, JER § 11-302). Due December each year. (Note: In the Air Force, only the Air Force General Counsel's Office is required to have a written training plan. For all other Air Force legal offices, it is recommended that they have a written training plan, but it is not required. See HQ USAF/JAG Ethics Update pamphlet, December 2000, page 13.) (Note: In the Navy, the AGC(E) prepares the written Annual Agency Ethics Training Plan.).

E. **Annual Ethics Program Survey.** (5 C.F.R. § 2638.602(a)). (Due Feb each year).


VIII. **RESOURCES (IN ADDITION TO LAW AND REGULATION)**


D. Your MACOM/MAJCOM/higher command EC.

E. Navy JAG (Code 13); Navy Assistant General Counsel (Ethics); AF/JAG General Law Division; Army SOCO.


IX. CONCLUSION.
SPECIFIC DUTIES UNDER THE STANDARDS OF CONDUCT

(all short references are to 5 CFR 2635)

**Agency Designee** The first commanding officer or supervisor above the grade of GS-11 in the chain of command or supervision of the employee concerned.

.102(b) Definition: Any employee who, by agency regulation, has been delegated authority to make determinations or give approval under the Standards of Conduct. (X-ref .105(c)(2)(i))

.204(g)(3)(i) Shall make written finding of agency interest in the personal acceptance of free attendance at a widely attended gathering.

.204(g)(3)(ii) Has the power to make blanket determination that agency interest allows a category of employees to accept free attendance at a widely attended gathering.

.204(g)(6) May authorize spouse acceptance of free attendance at a widely attended gathering.

.205(a)(2) May decide how to dispose of improper perishable gift (note: all supervisors have this power).

.402(C)(2) May require written disqualification in resolving conflicting financial interest under 18 USC 208 (note: all supervisors have this power).

.402(d)(2) May waive 18 USC 208 conflict which is not likely to affect the integrity of the Government (note: hiring or appointing authority exercises this power).

.402(d)(3) May waive 18 USC 208 conflict for Special Government Employees serving on an advisory committee (note: all appointing authorities exercise this power).

.403(b) May determine that an individual employee may not acquire or hold a specific class of financial interests.

.502(a);(c);(d) May authorize, upon independent finding, participation in matters which, although not violating 18 USC 208, would otherwise raise questions about the employee's impartiality.

.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).

.604(c) May require written disqualification while "seeking employment" (note: all supervisors have this power).
.605(b) May authorize participation in matters where "seeking employment" would otherwise create appearance of impropriety.

.606(b) May extend period of disqualification after "seeking employment" has ended.

Agency Ethics Official: An individual appointed in writing by the DAE0, 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 (aka "Ethics Counselor").

.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 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 USC 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 USC 207, 5 CFR 2637; 2641, 41 USC 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.

**Designated Agency Ethics Official** (or designee) An employee appointed in writing to administer agency ethics program.

.102(c) DAEO and various designees are also agency ethics officials.

.107(a) Responsible for managing agency ethics program.

.805(c) May authorize, in coordination with DoJ, service as an expert witness which might otherwise violate 18 USC 205 or 18 USC 207.

2634.201(f) Reviewing official (DAEO or alternate) may grant 45 extension for filing SF 278.

2634.204(a) May determine that filer will serve less than 60 days in a given year and not have to file SF 278.

2634.602 SF 278s are filed with DAEO.

2634.604(a) SF 278s must be reviewed within 60 days after filing.

2634.604(b) SF 278s are to be reviewed for facial completeness and apparent conflicts.

2634.604(b) When SF 278s are incomplete:

(1) Reviewer must request info by date certain (usually no more than 90 days)

(2) Must give filer notice & opportunity to respond

(3) Must pursue remedies to resolve conflicts

(4) Must notify head of agency if in noncompliance

2634.605(b) DAEO must maintain list of 278 filers in non-compliance.

**2634.803(d)** DAEO may enter into ethics agreements to resolve conflicts of interest (should this power be expressly delegated to Ethics Counselors?)

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 IG

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, 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 USC 207(c) coverage.

Head of Agency

.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 SF 278 filers in noncompliance

2638.202(a);(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, the greatest extent possible, the operative verbs and objects in the regulations have been retained.

SPECIAL GOVERNMENT EMPLOYEES UNDER OGE RULES

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

.102(1) Definition of "SGE" incorp from 18 USC 202(a), i.e., on temp duty not to exceed 130 days per year

.202(c)(4) "Public official" under 18 USC 801 (bribery) includes SGEs
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.

SGEs who are members of advisory committees may get 18 USC 208 waivers.

SGE used as an example of how sending a resume is not negotiating for employment (implying that SGEs are subject to 18 USC 208 conflicts on this issue).

SGE used as an example of when duties would conflict with negotiating for employment.

Summarizes four statutes in which SGEs mentioned.

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

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.

SGE prohibited from receiving compensation for speaking, teaching or writing about official duties.

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 the 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 SGE’s 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, 9.

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.
CHAPTER B

RUNNING AN EFFECTIVE AND EFFICIENT ETHICS PROGRAM

I. GOAL OF THIS SECTION

A. Recognizing that for most DoD ethics counselors, providing ethics advice is only part of their duties, this chapter offers techniques and practices to help you carry out your ethics counselor duties effectively and efficiently.

II. IDENTIFY YOUR CLIENT

A. Your client is your agency. (Not your agency head, supervisor, or any particular person.)

B. Ramifications:

1. Correctly identifying your client resolves apparent conflicts of interest and conflicts of loyalty (e.g.: your boss asks you to destroy records sought by the IG).

2. In ethics issues, there is no attorney-client relationship with employees, including your agency head. (5 C.F.R. 2635.107(b))

   a. When employees start to tell you about things they “have done,” stop them and remind them that there is no attorney-client privilege. Tell them you can advise them about applicable laws and regulations.

3. As a Federal employee, you have a duty to report all violations of Title 18. (28 U.S.C. 535)

4. Federal employees are protected from disciplinary action when they rely in good faith on the advice of an ethics official. (5 C.F.R. 2635.107(b))

5. Bottom Line: The regulations are structured to encourage personnel to seek advice before they take actions.

III. FINDING THE RIGHT ANSWER THE FIRST TIME.

A. Build your own reference library:

1. Organize and tailor frequently-used materials to your own style. Start with the chapters for the DoD Ethics Counselor Deskbook.

   a. Loose-leaf deskbook.
b. Files, folders, or binders

c. Computer files and folders

d. Add to the Ethics CD or other computer memory device

B. Reach out to other experts

1. Consult other ethics counselors within your agency.

2. Build your “Brain Trust,” of other ethics counselors whose advice you trust.

C. Check the internet

1. DoD SOCO website: www.defenselink.mil/dodgc/defense_ethics (Be sure to subscribe and automatically receive email notices of all website updates.)


3. Navy website:

Public site (open to all):

http://ethics.navy.mil/

Employee site (available to anyone with CAC access):

https://donogc.navy.mil/Ethics/

Legal Community site (restricted site only available to DON legal community and support staff):


4. Air Force website:


6. Office of Government Ethics (OGE) website: http://www.usoge.gov/ (Be sure to sign up for OGE list serve and receive notifications of updates.)
7. Interagency Ethics Council (IEC) Journal: [http://www.iecjournal.org](http://www.iecjournal.org) (This is a blog for Federal ethics officials and contains the most current ethics related information.)

D. Confirm your opinion before you deliver it. (Two-lawyer rule)

IV. HOW TO BECOME AN EFFECTIVE ADVISOR (AND GET YOUR CLIENT TO LISTEN TO AND BELIEVE YOU).

(Two facts of life: #1 Advice is best before decisions are made and actions taken.
#2 In many cases you are the only lawyer involved in the decision.)

A. **Grab a seat at the table.** Become part of planning apparatus. Become an essential part of planning meetings, strategy sessions, brain-storming meetings. Remember that you offer a unique competence and legal training that others don't have. You are needed to spot legal/ethical issues which managers and other specialists may not see. Ensure your presence adds value to the meeting.

(Practice Hint: To be effective at meetings, focus on adding value to the deliberations. Don’t pontificate, don’t be legalistic, and don’t try to display everything you learned in law school.)

1. Ensure you are included in the distribution of agency documents, schedules of meetings for agency leadership, your customer’s daily calendar, correspondence, daily reports from public affairs office, status reports, etc.

B. **Make allies** of the aide, executive assistant, Commander’s secretary, public affairs officer, protocol chief, senior enlisted advisor, etc. Show them how you can make their job easier -- provide guidelines, checklists, training programs that are tailored to their duties and answer questions they are frequently asked.

1. How to make allies:

   a. Meet them when they (or you) first join the organization. Schedule a meeting, introduce yourself, point out what issues at work you both share (e.g. gifts with the aide, speeches at non-Federal entities with the public affairs officer), seek their assistance in keeping you informed so you can better advise them. Demonstrate that you are on the same team. Evaluate their knowledge of the rules and their willingness to comply with them.

   b. Be responsive to their questions. (Respond the same day if possible.)

   c. Provide them guidance, e.g.: tailored guidance, info papers, links to website, briefings at their staff meetings.

C. Know and practice those traits that are critical to your role:
1. Be candid. Disclose pros and cons. Disclose your level of confidence in your advice. (Don’t bluff it!)

2. Be accessible. (Use a cell phone, Blackberry)

3. Be Responsive. Answer the question.

4. Protect the confidentiality of information and privacy of your customer.

5. Be precise, especially in your professional advice.

6. Display the courage to give the best advice even if you think that you may suffer because of it.

D. Assist your boss to accomplish your agency's mission. (Be a problem-solver rather than a nay-sayer):

1. Use your unique expertise, experience, training, perspective to facilitate accomplishment of the agency's mission.

2. Remember, you're the most qualified to spot legal and ethics-related issues.

3. Be a team player.

4. Consider more than just the strictly legal issues (for example: don’t ignore decisions that may cause others to challenge your customer’s judgment; Hotline complaints; IG investigations; adverse media attention; Congressional intervention, adverse impact on reputation and integrity).

However, in your advice, identify the legal factors as separate from matters of prudence.

5. Explain your advice in terms of cost benefit to the agency: benefits of following your advice and the costs of not following it. This is especially effective if your customer is a risk-taker and will use this same analysis to weigh your advice.

6. Be creative. (Look for solutions in addition to legal remedies.)

E. Get into the mainstream of agency business. Know what is happening.

1. Get out of your office and rub elbows. Ensure people recognize you as the ethics official.

a. Join agency bowling, golf, and softball teams. Use health club or gym.

b. Walk the halls. Put a jar of candy in your office.
c. Do “in person” training.

F. Use Fear

1. Drag in the Dead Bodies --Publicize real examples of employees who have been disciplined for violating conflicts of interest statutes or the standards of conduct. Include these examples in training, mini-briefings, employee newsletters, and the agency intranet.

a. Examples are available in the Encyclopedia of Ethical Failure: [http://www.dod.mil/srch/search?searchview=d3&amp;c=d5&amp;changequery=1&amp;s=1&amp;template=%2Fdodgc%2Fdefense_ethics%2Fsearch%2Ftemplate.html&amp;nd=c&amp;cat=defense_ethics&amp;q=encyclopedia](http://www.dod.mil/srch/search?searchview=d3&amp;c=d5&amp;changequery=1&amp;s=1&amp;template=%2Fdodgc%2Fdefense_ethics%2Fsearch%2Ftemplate.html&amp;nd=c&amp;cat=defense_ethics&amp;q=encyclopedia). Other examples are found in newspapers, OGE website, and agency IG reports.

b. Have the public affairs officer include media stories related to prosecutions for ethical failures in installation internal communications and news clips provided to leadership.

Key concept to convey to personnel: You don't have to be evil to screw up. Many regulations and statutes are not well known, are counter-intuitive, and have been violated in the past. People violate them unintentionally and unwittingly. (e.g.: 18 U.S.C. 205, 18 U.S.C. 207(a)(2)).

2. Encourage and assist the agency or organization’s head to publish memos addressing ethics issues. This guidance from the top, sets the ethical tone for the organization, publicly commits the organization’s head, and reminds all personnel of their ethical obligations.

3. Obtain from your IG examples of cases from your organization.

G. Provide your opinion in writing.

1. A written memo or email puts the decision-maker on notice that you're serious. (No wiggle room, no plausible deniability, and no, "He didn't tell me" defense.)

2. The fact that it is important enough that the ethics counselor took time to write the opinion means that this is serious and that the ethics official is building a record to cover him/herself.

H. Explain the principles as well as discuss appropriate rules.

1. Helps employee understand why adherence to ethics is beneficial to the agency. “Oh, so there is a reason for this rule!” Educate the employee.

2. If they understand the rule, employee may embrace the advice rather than oppose it.

I. When your customer won’t take your advice.

1. Talk to others, whom your customer trusts. They may be more persuasive or lend the weight of their opinions.

2. Offer to seek advice from higher echelon or authority. Guidance from higher authority may be more difficult for your customer to reject.

3. Write an opinion and deliver it to your customer.

J. What do you do when the decision-maker, who knows your opinion, avoids asking the question?

V. PRESERVING AND PROTECTING YOUR ADVICE.

A. When providing ethics advice:

1. Know the authority under which you are advising.
   a. Procurement Integrity Act (41 U.S.C. 2101-07, 48 C.F.R. Part 3 (Federal Acquisition Regulations)).
   b. Delegated authority from DAEO (5 C.F.R. 2635.102(c)).
      (a) Section 1-212 of DoD 5500.07-R, (Joint Ethics Regulation) requires designations to be in writing. DoD ethics counselors must be attorneys.
   c. Effect of advice: 5 C.F.R. 2635.107(b) provides that no disciplinary action may be taken against personnel for actions they have taken in good-faith reliance on advice of an ethics counselor after full disclosure of relevant circumstances. However, for violations of 18 U.S.C., good faith reliance does not bar prosecution, but will be weighed heavily by the Justice Department.

B. Memorialize facts and advice. Know when you need to memorialize. (cost-benefit analysis)
   a. Benefits:
      (1) Creates a record
      (2) Resolves ambiguities
      (3) Protects you and protects your customer
      (4) Eliminates frivolous questions
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(5) Focuses issue and analysis

d. Vehicles for advice:
   (a) E-mail
   (b) Memoranda and letters between parties
   (c) Memo to the file
   (d) Personal computer log.

B. Protect uniformity of advice: (You are not the only ethics official in town.)

   1. Coordinate advice within local area, especially for events which will involve multiple organizations. (If we use same rules, why do we provide different answers?)

   2. Coordinate advice up and down your agency's chain of command.

      a. Prior coordination prevents higher authority from being “surprised” by your organization’s actions.

   3. Help your shipmate. Don’t wait for questions, if your advice will be considered by other organizations; give their ethics counselors a warning. (Examples: widely attended gathering determination, providing speakers for a civic event.)

   4. Beware of forum shopping!

VI. MINIMIZING ETHICAL LAPSES, IG INVESTIGATIONS, ADVERSE PUBLICITY, CONGRESSIONAL HEARINGS, & ASSORTED IRRITANTS.

   A. Identify the greatest ethical threats to your agency/department/client: (Take a preemptive strike.) Ask, “Where are we vulnerable?”

      1. Common threats:

         a. Common problems: (gifts, travel, contracts, contractor personnel in the workplace, use of agency computers, partisan political activities).

         b. Sensitive issues. (Most explosive: e.g., downloading porn).

         c. Cowboys? (People who think the rules don't apply to them, and those who play fast and loose.)

         d. Issues arising from spouses of senior personnel.

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e. New challenges such as BRAC, A-76 competitions, new personnel system, budget cuts, hiring freezes

2. Evaluate and analyze the weakness

a. Identify causes of weakness. Conduct an audit. Seek assistance from your internal review division.

3. Take remedial action

a. Eliminate or consolidate the program.

b. Change procedures.

c. Develop options that will eliminate the weakness.

d. Educate personnel. Raise the consciousness of personnel about these specific problems.

   (a) Provide information papers, guidebooks, tailored guidance.

   (b) Give tailored briefings to affected personnel. Add brief discussions of the vulnerabilities to staff meetings.

   (c) Build awareness throughout the organization of the weakness through internal communications such as intranet and employee communications.

   (d) Brief incoming personnel.

   (e) Include these issues in Annual Ethics Training.

   (f) Seek reinforcement from organization’s head (Caveat: must be sincere, honest, and knowing.)

   (g) Think of yourself as a teacher providing instruction of the rules

B. Maximize the benefits of ethics training:

1. Focus training on threats identified above.

Consider training as a unit (at least for high-level staffs):

   (a) Reinforces common acceptance.

   (b) Allows subordinates to see where the boss stands.

   (c) Raises and resolves common issues.

   (d) Facilitates consistency in local practices.
2. Integrate ethics issues into other training, such as travel, BRAC, deployment preparations, contracting, advisory groups.

3. Studies indicate that the most effective medium for training is small groups with a leader. Promote discussion among employees, not just a lecture.

4. Conduct training for leaders and supervisors. Surveys indicate they set the ethical tone for their unit/workplace.

C. Review and utilize financial disclosure reports to benefit the agency:
   1. Identify possible conflicts of interest or appearances of such conflicts.
      (a) Financial interests
      (b) Outside activities
   2. Caution employee (and supervisor) of potential conflicts.
   3. Identify common vulnerabilities that should be addressed agency wide?

D. Communicate and coordinate with:
   1. Other ethics officials who may be involved
   2. Compliance officers of affected corporations (especially Defense contractors).

E. Actively seek feedback from many sources.
   1. What you don't know can hurt you.
   2. What you think is happening, may not be happening. Just because there is guidance, doesn’t mean everyone is complying with it.
      (a) “I don’t understand how they could do this. The JER specifically prohibits it.”
   3. Become part of organization’s internal review process. (Audits, inspections, reviews, etc.)

Please note. Affirmative action is required for this guidance to be useful. You must take preventative action now to reduce or eliminate remedial action later.
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, Subpart D – Conflicting Financial Interests


4. 5 C.F.R. Part 2635, Subpart F – Seeking Other Employment. [This Chapter addresses only non-employment conflicts. For conflicts in seeking or holding outside positions, see Post Government Service chapter.]

5. 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


12. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions (Final Rule), 76 Fed. Reg. 68017-68026, Nov. 12, 2010; 48 C.F.R. Parts 1, 3, 12, and 52


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


   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 – Renumeration;

(4) JER 5-404 – Compensation from Other Sources

b. Applicability to Enlisted Personnel and National Guards, JER 1-300.b.(1)(b) 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 Noncareer 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. Office of Government Ethics Legal Advisories and Opinions –
   http://www.usoge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories/

   1. To search by subject:


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.

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(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


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).


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;
   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).


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).

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(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 § 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: An employee may participate in any particular matter affecting one or more holdings of a sector mutual fund where (a) the affected holding is not invested in the sector in which the fund concentrates and where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund or (b) the disqualifying interest in the matter arises because of ownership of an interest in the fund and the aggregate market value of interests in any affected sector fund or funds 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).

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) Medical Products. SGE serving on a Federal Advisory Committee may participate in committee matters concerning medical products or devices. 5 C.F.R. 2640.203(i).

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.

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


(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.


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.)

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(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.


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 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.

B. Agency regulation prohibiting certain financial interests. 5 C.F.R. 2635.403(b). 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. 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 an 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.

B. **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).


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.gov/dodgc/defense_ethics/resource_library/sge_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.


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).


4. Exceptions.


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 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.


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.

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.


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.
CHAPTER D
FINANCIAL DISCLOSURE
RUNNING AN EFFECTIVE PROGRAM

I. REFERENCES.

A. General


2. DoD 5500.7-R, Joint Ethics Regulation (JER), Chapter 7 (www.dtic.mil/whs/directives/corres/pdf/55007r.pdf)

B. Public Financial Disclosure (OGE Form 278)


2. 5 C.F.R. § 2634.101 to 805 (http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=cbc7425f9cf4949f6e219b8737e5b2b2&rgn=div5&view=text&node=5:3.0.10.10.8&idno=5)

3. JER 7-200 to 7-209


5. OGE materials


b. OGE Form 278 software:  
(www.dod.mil/dodgc/defense_ethics/resource_library/oge_278_supervisor_signature_dec_2011.pdf) (OGE Form 278 with supervisor’s certification)

C. Confidential Financial Disclosure (OGE Form 450)

1. 5 C.F.R. § 2634.901 to 909 (http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=cbe7425f9cf4949f6e219b8737e5b2b2&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)  

b. OGE Form 450: A Reviewers Guide (September 1996)  
(http://www.usoge.gov/forms/oge450_pdf/rf450guide_96.pdf)

   Warning: Portions are superseded by changes in OGE Form 450 and implementing regulations.

c. OGE DAEOgram 06 x 36 on Revised Confidential Financial Disclosure Regulation and OGE Form 450  

d. Helpful Resources for Confidential Financial Disclosure Filers  

   (1) 450 Frequently asked Questions (www.oge.gov/Financial-Disclosure/Confidential-Financial-Disclosure-450/450-FAQ/FAQs-About-the-OGE-Form-450/)

4. OGE Form 450 software:

a. OGE Form 450  

b. OGE Optional Form 450-A with DoD certification (http://oge.gov/Forms-Library/OGF-Form-450-A--Confidential-Certificate-of-No-New-Interests-(Executive-Branch)-(PDF)/)
II. ROLE OF FINANCIAL DISCLOSURE.


*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 training of 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.

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 application 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.

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 identify 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 (0-7s 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).

5. Political appointees (Schedule C, regardless of pay grade).

6. Civilians detailed to positions mentioned in 2, 3, and 5, above.

7. Reserve and National Guard officers (0-7’s and above) if they served on active duty more than 60 days in a calendar year.


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 expected to work less than 61 days in a calendar year

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.

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).

C. Filing Status.

1. New Entrant/Nominee Reports – Ethics counselors must identify, notify and collect reports from new filers/nominees.
Best Practices:
- Work with AO & HR to get at least monthly reports of new SES promotions, new O-7 promotions (not frocking), and any new employees at the appropriate pay level.
- Notify filer of all ethics program requirements at same time—completion of incumbent and termination disclosure reports, annual ethics training, and annual post-Government employment certification (see below discussion).

a. **Report Coverage:** The reporting period for the 278 varies depending on the Schedule. Schedule A covers the prior calendar year (CY) and the current CY up to the date of filing; Schedule C, Part I covers the prior CY and the current CY up to a selected date within 30 days prior to the date of filing (need date to determine value); Schedule C, Part II is current as of the date of filing; and Schedule D covers the prior two CYs and the current CY up to the date of filing. Do not complete Schedule B.

b. **Dates and Times:** New entrants must file within 30 days of assuming a new position. 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. Nominees must file between nomination and 5 days after transmission of the nomination to the Senate. Reports must be retained 6 years.

   (1) Air Force implemented a new policy requiring all Reserve GOs to file a 278.

   **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 do a new substantive conflict review. See 5 C.F.R. § 2634.201(b)(2)(i).

c. **Initial reviews** must be conducted within 60 days from the date of agency receipt. No extensions! Technical deficiency reviews—procedural review to ensure form is signed, dated, complete, and include all relevant parts, etc.—meet the requirements of an initial review and stop the 60-day clock. DoD ethics counselors are expected to conduct technical deficiency reviews within the 60 days. After that review, obtain answers to any questions that are raised, conduct the conflict of interest review, implement any required remedy, and then certify the report.

   **Best Practice:** OGE program reviews are looking for 30-day completion of initial review, or better yet, certification.
d. DoD personnel who file 278s must certify annually that they are aware of the disqualification and employment restrictions, and have not violated them. DoD recommends collecting 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 www.dod.mil/dodgc/defense_ethics/resource_library/2012_post_emp_cert.pdf

e. Try to see new filers to give them a form and discuss the ethics rules. This is a good opportunity to meet with upper management and introduce them to the ethics office.

2. Incumbent (Annual) Reports -

a. Report Coverage: Schedules A, B, and C, Part I, cover the prior CY; Schedules C, Part II and D, Part I should cover the prior CY and the current CY up to the date of filing. Annual filers do NOT complete Schedule D, Part II.

b. Use the ethics office database to determine filers - All incumbent filers from prior year, minus the termination reports, plus the new entrant filers who entered prior to November 2 of the prior year. If a new entrant report was filed between November 2 and December 31 of the prior year, they do not need to file an incumbent report because they must work over 60 days in the preceding calendar year before filing is required. NOTE: The database or other system used to track filers must be able to distinguish these filers and remember to notify of the incumbent filing requirement the following year.

c. The ethics office should directly notify filers, in addition to using the assistance of the individual client office Action Officers (AOs). Recommend the notice be transmitted no earlier than January, to avoid premature filing, and at least by March, so filers can fill out the reports while they complete their taxes since it involves most of the same information. Notices should also include the form, hardcopy or hyperlink, if they are not electronically filing through the Army’s Financial Disclosure Management program (FDM), and the Post-Government Employment Certification.

d. 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.

e. Initial reviews must be conducted within 60 days from the date of agency receipt. No extensions! Technical deficiency reviews meet the requirements of an initial review and stop the 60 day clock. DoD ethics counselors are expected to conduct technical deficiency reviews within the 60 days. After that review, obtain answers to any questions that are raised, conduct the
conflict of interest review, implement any required remedy, and then certify the report.

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

f. General and Flag Officers assigned outside of their Military Department (for example, at an OSD component) file their report with their Service DAEO but the current component should conduct the initial review since it is in the best position to identify conflicts. See 5 C.F.R. § 2634.602. The Service DAEO should have the official copy of the report. For the time being, an FDM filer report should be filed with the component where they are assigned, and a copy of the completed report should be sent to the Military Department as the official copy.

g. All DoD personnel who file 278s must certify annually that they are aware of the disqualification and employment restrictions and have not violated them. DoD recommends collecting the certifications with the annual 278. JER 8-400. A model certification, **Post-Employment Certification**, which also constitutes the required notice to senior officials of the “cooling-off” period, is on the DoD SOCO website at www.dod.mil/dodgc/defense_ethics/resource_library/2012_post_emp_cert.pdf

h. Recommend sending reminder in early May, alerting filers again of the $200 late filing fee if the original notice does not include this information, and of the possibility of making a written request for a good cause extension prior to expiration of the filing deadline.

3. **Termination Reports** -

a. **Report Coverage:** Schedules A, B, C and D, Part I cover the period between the date covered by the prior filing and the termination date.

b. **Dates:** 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 14. 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. 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.
D. **Filing Extensions** – DAEO (or authorized designee) may grant good cause extensions up to 45 days, and DoD DAEOs or designees may grant an additional 45 days in writing. The second extension must be documented, which may be done by email. Check your Ethics Counselor delegations to determine if they are broad enough to include the designee authority. 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) ([www.oge.gov/Laws-and-Regulations/Statutes/Compilation-of-Federal-Ethics-Laws/](http://www.oge.gov/Laws-and-Regulations/Statutes/Compilation-of-Federal-Ethics-Laws/)). This extension is different from those granted to confidential filers.

E. **Final Review** – After the initial, technical deficiency review, conduct the final substantive conflict of interest review. Compare current report to last report and determine basis for any differences. If you have questions or someone 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.

1. Check for potentially conflicting financial interests such as publically traded stock interests or sector funds. See OGE Advisory Opinion 00 x 8 ([www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2309](http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2309)) 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 are required to compare reports against the DoD $25K list; all others must consult with their DAEOs to determine the correct procedure for their components. But the substantive review does not end there.

2. Familiarize yourself with the filer’s duties and office’s projects and activities. 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. Finally, when all information is contained on the form, review the report against the filer’s duties to identify possible conflicts.

3. When done, and if no conflicts are found, certify the report. If a conflict is uncovered, only after you **resolve the conflict** should you certify the report.

**Best Practice:** Recommend sending filers periodic letters of warning or caution reinstating the law and potential exemptions, identifying potential conflicts, and providing general ethics guidance on outside activities—customized to their individual interests. Letters of warning or caution may be distributed electronically with a copy to the filer’s supervisor. OGE has identified DoD's use of these letters as a best practice.
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 www.defenselink.mil/dodgc/defense_ethics/resource_library/tracking_system.xls.

2. What is the date of receipt? It is the date of delivery to the 1st reviewing office, which starts the 60-day review clock. 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.

3. Retain reports for six (6) years.

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. Be available to answer questions for filers preparing their report, including on-line (email) assistance, and train your office program staff on the same.

3. Consider offering training on how to complete the report. See e.g., OGE’s “How to file a 278” online training module: www.oge.gov/Education/Education-Resources-for-Federal-Employees/How-to-file-the-Public-Financial-Disclosure-Report-(OGF-form-278)/.

**NOTE:** This online training module is good as a refresher for reviewers too.


**NOTE:** Army and several other DoD Agency require mandatory use of FDM. Check if you are unsure.

5. When requested, provide copy of previous 278. DoD recommends that filing instructions remind employees to make a copy before filing the current year’s report. Consider sending filers a copy of the final, correct form for their records, in electronic format if possible.

**Best Practice:** DoD encourages electronic filing whenever possible.
6. Recommend 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 before forwarding, correct simple errors, and forward as soon as possible. Ask the reviewer to contact you if there are questions.

8. View the exercise as an opportunity to reconnect with senior clients to discuss their person obligations as well as discuss ethics issues.

H. Confidentiality of the Process – Although the final report may be released, it is not publically available without compliance with OGE’s systems of record requirements. See 5 C.F.R. § 2634.603(c). Remember drafts and reports still within the first 30 days after submission are not releasable. Even then, requestors must complete the OGE Form 201 before a report can be released, because reports are not covered by FOIA.

Best Practice: As a courtesy to filers, notify them of any anticipated release including the requirements for release.

I. Collection/Enforcement –

1. Notify Filers. See 5 C.F.R. § 2634.703(c). Filers have a 30 day grace period after missing the filing deadline or after any granted extension expires, whichever is later. Once late, ethics officials should notify filers immediately of the grace period to assist them avoid the late filing fee; and must notify filers of the application of the fee (and the opportunity to request a waiver) once they are 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. 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. The check must be made out to the “U.S. Treasury,” and deposited as miscellaneous receipts through the appropriate financial office. Filers may submit a written request for waiver of payment to their DAEO or designee for extraordinary circumstances. OGE will audit collection of late filing fees and whether waivers granted were in accordance with the regulations. 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. 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. Willful failure to file a report or information required in the report, or falsifying information on the report, can result in greater penalties, including referral to the Department of Justice for civil and criminal action (up to a $11,000 fine), as well as administrative action at DoD. See 5 C.F.R. § 2634.701.

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

The confidential financial disclosure report and program was created by the U.S. Office of Government Ethics (OGE) by regulation 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? 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.

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, 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.

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 JER 1-201. The Department of the Army has not delegated this authority; however, the DoD 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 card holders 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).


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(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) Navy General Counsel Memorandums, subj: Determination Concerning Exclusions of Reservists from Filing the Confidential Financial Disclosure Report, dated Nov. 18, 2011.


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, filers using the Army’s electronic Financial Disclosure Management program (FDM).

NOTE: Army and several other DoD Agency require mandatory use of FDM. Check if you are unsure.

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.

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. OGE will not be satisfied by 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 to get at least monthly, preferably bi-weekly, reports of new employees, SGEs, and changes to covered positions.

b. Provide live initial ethics orientation training to provide information and identify filers, as well as give potential new filers forms.

c. If a determination as to filing needs to be made, afterward notify HR to update the notation on official rolls.
d. 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 do a new substantive conflict review. See 5 C.F.R. § 2634.903(a)(2)(i).

<table>
<thead>
<tr>
<th>NOTE:</th>
<th>Date of appointment is the date they assumed the new duties that made them a filer.</th>
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<tbody>
<tr>
<td><strong>Best Practice:</strong></td>
<td>Consider including this in any required new or refresher supervisory training.</td>
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e. 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.

f. Develop a relationship with HR so they inform the ethics office of new PDs with a filing requirement. Encourage the office to seek assistance on new PDs to determine if there should be a filing requirement.

g. 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 which 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.

5. **Initial reviews** (IRs) must be conducted **within 60 days from the date of agency receipt**. No extensions! Technical deficiency reviews—procedural review to ensure form is signed, dated, complete, and include all relevant parts, etc.—meet the requirements of an initial review and stop the 60-day clock. Ethics counselors are expected to conduct technical deficiency reviews within the 60 days. After that review, obtain answers to any questions that are raised and conduct the conflict of interest review, then sign the report.

6. **DoD SGEs** (and 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, Optional Form 450-A, or alternate form

1. Work with HR to scrub the list of annual filers before the beginning of the annual filing season. Remind HR that the report now covers the calendar year, so filers should be identified no later than mid-December but preferable earlier. Update the ethics database, FDM, 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. Reports must be retained 6 years.

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 [www.dod.mil/dodc/defense_ethics/resource_library/oge_450_dec_2011_edition.pdf](http://www.dod.mil/dodc/defense_ethics/resource_library/oge_450_dec_2011_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. **Initial reviews** must be conducted within 60 days from the date of agency receipt. No extensions! Technical deficiency reviews—procedural review to ensure form is signed, dated, complete, and include all relevant parts, etc.—meet the requirements of an initial review and stop the 60-day clock. DoD ethics counselors are expected to conduct technical deficiency reviews within the 60 days. After that review, obtain answers to any questions that are raised and conduct the conflict of interest review, then sign the report.

7. **Timelines:** Ensure that there is sufficient time from position review, to employee notification, to filing, to review.

8. 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: www.oge.gov/Forms-Library/OGE-Form-450-A---Confidential-Certificate-of-No-New-Interests-(Executive-Branch)/.

9. Notify HR 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://www.defenselink.mil/dodge/defense_ethics/resource_library/tracking_system.xls.

2. What is the date of receipt? It is the date written in the Date Received by Agency box. 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.

3. Make sure that everyone files - reconcile lists from HR, 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** – After the initial, technical deficiency review, conduct the final substantive conflict of interest review. Compare current report to last report and determine basis for any differences. If you have questions or someone 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.

1. **Check for potentially conflicting financial interests such as publically traded stock interests or sector funds.** See OGE Advisory Opinion 00 x 8 (www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2309) 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 are required to compare reports against the DoD $25K list; all others must consult with their DAEOs to determine the correct procedure for their components. But the substantive review does not end there.

2. **Familiarize yourself with the filer’s duties and office’s projects and activities.** 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. Finally, when all information is contained on the form, review the report against the filer’s duties to identify possible conflicts.

3. **When done, and if no conflicts are found, certify the report.** If a conflict is uncovered, only after you **resolve the conflict** should you certify the report.

**Best Practice:** Recommend sending filers periodic letters of warning or caution reinstating the law and potential exemptions, identifying potential conflicts, and providing general ethics guidance on outside activities—customized to their individual interests. Letters of warning or caution may be distributed electronically with a copy to the filer’s supervisor. OGE has identified DoD's use of these letters as a best practice.

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. Be available to answer questions for filers preparing their report, including on-line (email) assistance, and train your office program staff on the same.

3. Consider offering training on how to complete the report. *E.g.,* OGE’s online training module: www.oge.gov/Education/Education-Resources-for-Federal-Employees/How-to-file-an-OGE-Confidential-Financial-Disclosure-Form-(OGE-form-450)/.

Financial Disclosure: Running an Effective Program
10th Ethics Counselor’s Course

D-19

5. When requested, provide 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.

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 DAEO 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.

VI. RESOURCES

A. General - Army Financial Disclosure Management program (FDM), Resources tab under Help & Support [https://www.fdm.army.mil/](https://www.fdm.army.mil/)
CHAPTER E

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FISCAL LAW OVERVIEW

I. INTRODUCTION.

A. The U.S. Constitution gives Congress the authority to raise revenue, borrow funds, and appropriate the proceeds for federal agencies. See U.S. Constitution, Art. I, §§ 8 and 9. In implementing these express constitutional powers, Congress limits strictly the obligation and expenditure of public funds by the Executive Branch. Congress regulates virtually all Executive Branch programs and activities through the appropriations process.

1. Congress has enacted fiscal controls, which, if violated, subject the offender to serious adverse personnel actions and possible criminal penalties.

2. Congress and the Department of Defense (DoD) have agreed informally to additional restrictions. The DoD refrains from taking certain actions without first giving prior notice to, and receiving consent from, Congress. These restraints are embodied in regulation or instituted through historical practice.

B. What are the major fiscal limitations?

1. An agency may obligate and expend appropriations only for a proper purpose;

2. An agency may obligate only within the time limits applicable to the appropriation (e.g., O&M funds are available for obligation for one fiscal year); and

3. An agency may not obligate more than the amount appropriated by the Congress.

C. Philosophy of Fiscal Law. “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” United States v. MacCollom, 426 U.S. 317, 321 (1976).
II. KEY TERMINOLOGY.

A. Fiscal Year. The Federal Government’s fiscal year begins on 1 October and ends on 30 September.

B. Period of Availability. The period of time in which budget authority is available for original obligation. Most appropriations are available for obligation for a limited period of time. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation thereafter. *GAO Red Book*, Vol. I, p 5-3, GAO-04-261SP (Jan. 2004).

C. Obligations. A definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States. Payment may be made immediately or in the future. An agency incurs an obligation, for example, when it places an order, signs a contract, awards a grant, purchases a service, or takes other actions that require the government to make payments to the public or from one government account to another. The standards for the proper reporting of obligations are found in section 1501(a) of title 31 of the *United States Code*. *GAO, A Glossary of Terms Used in the Federal Budget Process*, p.70, GAO-05-734SP (Sept. 2005) (“*GAO Glossary*”).

D. Budget Authority.

1. Congress finances federal programs and activities by granting budget authority. Budget authority is also called obligational authority.

2. Budget authority means “the authority provided by Federal law to incur financial obligations . . .” *2 U.S.C. § 622(2).*

3. “Contract Authority,” is a limited form of “budget authority.” Contract authority is specific statutory authority to contractually obligate the United States to future payments even though no appropriations are available to pay the obligations at the time the contract is made. Hon. Alan Cranston, 1990 WL 10007871, at *3, Comp. Gen. No. B-239435 (Aug. 24, 1990). An example of such statutory authority is the Feed and Forage Act, 41 U.S.C. § 11.


2. The Comptroller General has the authority to issue advance decisions regarding the propriety of payments that a disbursing official or head of an agency will make or a voucher presented to a certifying official for certification, except in those instances described in paragraph 3 below (see 31 U.S.C. § 3529), BUT DoD policy is to resolve legal issues internally. DoD agencies are the military departments are prohibited from requesting advance decisions from the Comptroller General without prior approval of the agency’s General Counsel and the DoD General Counsel. Finance officers should direct their questions through channels to the appropriate General Counsel’s office for an advance decision. It is DoD policy not to seek to recover a payment from an accountable official if that individual has obtained from the General Counsel concerned an opinion advising that the payment could legally be made. DOD FMR, Vol. 5, Ch. 25, ¶ 2503 (December 2010); 31 U.S.C. § 3527(b).


a. DoD: uniformed service member pay, allowances, travel, transportation, and survivor benefits.


1. These are codes used to manage appropriations. They implement the administrative fund control system and help to ensure correct use.


G. Understanding an Accounting Classification. The following is a sample fund cite:

<table>
<thead>
<tr>
<th>AGENCY</th>
<th>FISCAL YEAR</th>
<th>TYPE OF APPROPRIATION</th>
<th>OPERATING AGENCY CODE</th>
<th>ALLOTMENT NUMBER</th>
<th>PROGRAM ELEMENT</th>
<th>ELEMENT OF EXPENSE</th>
<th>FISCAL STATION NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>21</td>
<td>5</td>
<td>2020</td>
<td>67</td>
<td>1234</td>
<td>P720000</td>
<td>2610</td>
<td>S18001</td>
</tr>
</tbody>
</table>

The first two digits represent the military department. The “21” in the example shown denotes the Department of the Army.

III. AVAILABILITY AS TO PURPOSE.

A. The “Purpose Statute” provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. 31 U.S.C. § 1301(a).
B. Three-Part Test for a Proper Purpose. The Comptroller General has determined the following three conditions must be met in order to expend appropriated funds:

1. The expenditure of an appropriation must be for a particular statutory purpose, or necessary and incident to the proper execution of the general purpose of the appropriation.

2. The expenditure must not be prohibited by law.

3. The expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation.

C. Determining the Purpose of a Specific Appropriation.


   a. An appropriation is a statutory authorization “to incur obligations and make payments out of the Treasury for specified purposes.” See GAO Glossary, p.13, GAO-05-734SP (Sept. 2005).

   b. At the present time there are thirteen (13) regular annual appropriations acts. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. See, generally, GAO Red Book, Vol. I, pp. 1-26 to 1-27, GAO-04-261SP (Jan. 2004).

   c. In each of the two annual appropriations acts devoted to DoD, Congress grants multiple appropriations. See, e.g., Department of Defense Appropriations, 2012, Pub. L. No. 112-74, Division A and Division H.

   d. Earmarks. An earmark occurs when Congress designates a portion of an appropriation for a particular purpose by way of legislative language within the appropriation. See GAO Glossary, p.46, GAO-05-734SP (Sept. 2005).

   e. Researching Appropriation Acts. In addition to LEXIS™- and Westlaw™-based research, one can utilize the Thomas website (http://thomas.loc.gov/) within the Library of Congress to conduct research on legislation enacted since 1973. This website also has a consolidated listing of appropriations legislation enacted since 1998 and a list of pending appropriations bills for the current or upcoming fiscal year.

2. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency that a subsequent appropriation act will fund. GAO Red Book, Vol. I, p. 2-40, GAO-04-261SP (Jan. 2004). This organic legislation provides the agency with authority to conduct the program, function, or mission and to utilize appropriated funds to do so.
a. Example: 10 U.S.C. § 111 establishes the Department of Defense as an executive department. Various statutes scattered mainly throughout Title 10 of the United States Code establish programs or functions that the department is to carry out. See, e.g., 10 U.S.C. § 1090 (giving the Secretary of Defense the mission to “identify, treat, and rehabilitate members of the armed forces who are dependent on drugs or alcohol”).

b. Organic legislation may be found in appropriation acts, authorization acts, or “stand-alone” legislation. It may also be codified or uncodified.

c. Organic legislation rarely provides any money for the agency, program, or activity it establishes.


a. An authorization act is a statute, passed annually by Congress that authorizes the appropriation of funds for programs and activities. See GAO Glossary, p.15, GAO-05-734SP (Sept. 2005)

b. An authorization of appropriations is, under congressional rules, a prerequisite for such an appropriation. Thus, for example, a point of order may be raised in either house objecting to an appropriation in an appropriation act that is not previously authorized by law. This rule is seldom enforced in practice and generally there is no other requirement to have an authorization in order for an appropriation to occur. There are, however, certain statutorily-created situations in which Congress must authorize an appropriation. For example 10 U.S.C. § 114(a) states that “No funds may be appropriated for any fiscal year” for certain purposes, including procurement, military construction, and/or research, development, test and evaluation “unless funds therefore have been specifically authorized by law” (emphasis added).

c. An authorization act does not provide budget authority. That authority most commonly stems from the appropriations act.

(1) Congress may choose to place limits in the authorization act on the amount of appropriations it may subsequently provide, however.
(2) In the alternative, Congress may also authorize the appropriation of “such sums as may be necessary” for a particular program or function.


(1) The general rule regarding statutory construction is “that statutes should be construed harmoniously so as to give maximum effect to both whenever possible.” Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

(2) If there is an irreconcilable conflict between two statutes or if the latter of the two statutes is clearly intended to substitute for the prior statute, the more recent statute governs. The “intention of the legislature to repeal must be clear and manifest” in either case. Id.

(3) Differences in Amount. In general, Congress enacts authorization acts before it enacts appropriation acts. Application of the above rules will therefore usually result in the agency being able to use the amount specified in the appropriation act, regardless of whether it is more or less than what is in the authorization act.

(4) Differences in Purpose. Congress can expressly expand or limit authorized purposes in an appropriations act but must otherwise appropriate funds in accordance with the authorization act in terms of purpose. However, Congress cannot expand the purposes of a specific appropriation through authorizing acts. See, generally, GAO Red Book, Vol. I, pp. 2-51 to 2-52, GAO-04-261SP (Jan. 2004).


a. Congress often enacts statutes that expressly prohibit or authorize the use of appropriated funds.

(1) Express Prohibition: 10 U.S.C. § 2491a prohibits DoD from using its appropriated funds to operate or maintain a golf course except in foreign countries or isolated installations within the United States.
(2) **Express Authorization**: 10 U.S.C. § 520b permits DoD to use its appropriated funds “for the issue of authorized articles to applicants for enlistment.”

b. **Express Prohibitions and Authorizations** may also be either temporary or permanent. For example, if the restriction arises out of a provision in an appropriation act that does not expressly state the duration of the restriction, an agency may presume the restriction is effective only for the fiscal year covered by the act. This presumption may be overcome if the restriction uses language indicating futurity, or if the legislation clearly indicates its permanent character. Compare Bureau of Alcohol, Tobacco, Firearms, and Explosives-Words of Futurity in Fiscal Year 2006 Appropriations Act, 2007 WL 2471778, Comp. Gen. No. B-309704 (Aug. 28, 2007) (prohibiting use of “funds appropriated under this or any other Act with respect to any fiscal year” permanently precluded use of appropriations to disclose contents of Firearms Trace System database), to Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, 65 Comp. Gen. 588, 589 (1986) (prohibiting use of appropriations in “this Act or any other Act” in effect only for that fiscal year).

5. **Legislative History.**

a. Legislative history is any Congressionally-generated document related to a bill from the time the bill is introduced to the time it is passed. In addition to the text of the bill itself, it includes conference and committee reports, floor debates, and hearings.

b. Legislative history can be very useful for resolving ambiguities or confirming the intent of Congress.

c. If the underlying statute clearly conveys Congress’ intent, however, agencies will not be further restricted by what is included in legislative history. Intertribal Bison Cooperative, 2001 WL 1526039, at *5, Comp. Gen. No. B-288658, (Nov. 30, 2001) (legislative history may be used to analyze Congressional intent “with the recognition that only the most extraordinary showing of contrary intentions from such analysis will justify a limitation on the ‘plain meaning’ of the statutory language”); ANGUS Chem. Co., 1987 WL 102687, at *2, Comp. Gen. No. B-227033 (Aug. 4, 1987) (“there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history.”)
for the purpose of writing into law that which is not there”); SeaBeam Instruments, Inc., 1992 WL 175870, at *3, Comp. Gen. No. B-247853 (Jul. 20, 1992) (where Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, the clear inference is that Congress did not intend to impose legally binding restrictions, and restrictive language in committee reports and other legislative history do not impose any legal requirement on the agency); LTV Aerospace Corp., 55 Comp. Gen. 307 (1975) (Navy was not bound by a provision within the conference report accompanying the 1975 Defense Appropriations Act stipulating that adaptation of the Air Force’s F-14 to enable it to be capable of carrier operations was the prerequisite for the Navy’s use of $20 million in funds provided for a Navy fighter).

d. Legislative history may also not be utilized to justify an otherwise improper expenditure. Alberto Mora, Gen. Counsel, United States Info. Agy., 1992 WL 232403, Comp. Gen. No. B-248284.2 (Sept. 1, 1992) (agency violated the purpose statute when it utilized construction funds to host an overseas exhibit that should have been funded with salaries and expenses funds where the agency had only received informal written approval from the Chairmen of the House and Senate Subcommittees to reprogram the construction funds into salaries and expenses funds).

6. Other Documents Impacting the Usage of an Appropriation.

a. Budget Request Documentation. Agencies are required to justify their budget requests. OMB Cir. A-11, Preparation, Submission, and Execution of the Budget (2011), § 51.

(1) Within DoD, Volumes 2A and 2B of the DOD FMR provide guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Congressional Budget Justification Books, with a book generated for each appropriation.

(a) The document is prepared by the actual end user of the funds and is filtered through agency command channels until it is ultimately reviewed by the Chief Financial Officer and sent to Office of Management and Budget and then submitted by the President as part of the federal government’s overall budget request.
(b) These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited. If the agency did not have the requested program in the Congressional Budget Justification, then that program is considered a New Start.


(1) Background. When Congress enacts organic legislation establishing a new agency or giving an existing agency a new function or program, it rarely prescribes exact details about how the agency will carry out that new mission. Instead, Congress leaves it up to the agency to implement the statutorily-delegated authority in agency-level regulations.

(2) Where Congress charges an agency with the responsibility for administering a statute, by regulation or otherwise, the agency’s interpretation of the statute is entitled to considerable weight and deference. When the agency’s interpretation is in the form of a regulation which has the force and effect of law, then it receives the greatest deference. An agency’s statutory interpretation that takes the form of an interpretive regulation, manual or handbook is given somewhat less deference. See, e.g., Intertribal Bison Cooperative, supra., at *2-3 (deference not accorded to Department of Agriculture’s informal interpretation, as opposed to interpretation derived from rulemaking or adjudication, where agency interpretation was inconsistent with the plain meaning of the statutory language).

(3) Agency-level regulations may also place restrictions on the use of appropriated funds.

c. Additional Research Resources:

D. Necessary Expenses.

1. The Purpose Statute does not require Congress to specify every item of expenditure in an appropriations act. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See HUD Gun Buyback Initiative, 2000 WL 675589, at *3, Comp. Gen. No. B-285066 (May 19, 2000) (“where expenditures are not specifically authorized in an appropriation act, an agency may show that the expenditure is reasonably necessary to carry out an authorized function”); see also United States Dept. of Labor-Interagency Agreement. between Employment. and Trng. Admin. and Bureau of Intl. Affairs, 71 Comp. Gen. 402, 405 (1992) (“when we consider whether an expense is necessary, we determine only whether it falls within the agency’s legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range”).

2. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. Customs and Border Protection Relocation Expenses, 2006 WL 1985415, at *2, Comp. Gen. B-306748 (Jul. 6, 2006) (“the necessary expense rule recognizes that when Congress makes an appropriation for a particular purpose, by implication it authorizes the agency involved to incur expenses which are necessary or incident to the accomplishment of that purpose”); Hon. Bill Alexander, 63 Comp. Gen. 422, 427 (1984) (“first and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made”); Secretary of State, 42 Comp. Gen. 226, 228 (1962) (same); Major General Anton Stephan, 6 Comp. Gen. 619 (1927) (same).

3. In some instances, Congress has specifically authorized expenditures as “necessary expenses” of an existing appropriation. See e.g., 10 U.S.C. § 1124 (authorizing the Secretary of Defense to “incur necessary expense for the honorary recognition of a member of the armed forces” who increases their agency’s efficiency or improves its operations); 5 U.S.C. §§ 4503-4504 (authorizing the same for civilian employees).
   a. “[A]n expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function . . . .” Internal Revenue Serv. Fed. Credit Union-Provision of Automatic Teller Machine, 66 Comp. Gen. 356, 359 (1987) (emphasis added).
   b. The fact that an expense may be desirable or beneficial does not mean that it is a necessary expense. Utility Costs under Work-at-Home Programs, 68 Comp. Gen. 502 (1989) (payment for incremental utility costs at residential workplaces not a necessary expense); Secretary of the Interior, 34 Comp. Gen. 599 (1955) (construction of sewage system in excess of capacity required by government for joint use with reclamation camp and general public not a necessary expense even if the cost of the larger system would be about the same).

5. Determinations are fact/agency/purpose/appropriation specific. See Federal Executive Bd.-Appropriations-Employee Tax Returns-Electronic Filing, 96-1 CPD ¶ 129, Comp. Gen. No. B-259947 (Nov. 28, 1995) (New Orleans Federal Executive Board appropriations may not be used to provide its employees with means to electronically file income tax returns because there was no showing that such expenditures were reasonably related to the purpose of the appropriation); compare to Use of Appropriated Funds for an Employee Electronic Tax Return Program, 71 Comp. Gen. 28 (1991) (IRS appropriations may be used to provide its employees with means to electronically file income tax returns to facilitate tax collection efforts by improving IRS’s efficiency in processing returns, resulting in cost savings to the government).

E. Typical Questionable Expenses.

1. Agencies may have specific guidance about “questionable” expenditures. See, e.g., AFI 65-601, Budget Guidance and Procedures, Vol. 1, Ch. 4, §§ 4K-4O (3 March 2005).
2. Food: Buying food for individual employees (who are not away from their official duty station on travel status) generally does not materially contribute to an agency’s mission performance. As a result, food is generally considered a personal expense, and appropriated funds are legally unavailable for such expenses. See Department of the Army-Claim of the Hyatt Regency Hotel, 1989 WL 241549, Comp. Gen. No. B-230382 (Dec. 22, 1989) (charges for coffee breaks, bar costs, and buffet costs not payable as unauthorized entertainment expenses). It may be permissible to use appropriated funds for food, at some types of events, for some types of personnel, under the following very limited circumstances. See Memorandum for Under Secretary of Defense (Comptroller), Use of Appropriated Funds to Purchase Food at Conferences, Meetings, and Events, September 1, 2005.


b. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is acceptable for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and comparably priced to the fees of other facilities that do not include food as part of their rental fee. See Nuclear Regulatory Agy.-Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Serv. at NRC Workshops, 1999 WL 1498239, Comp. Gen. No. B-281063 (Dec. 1, 1999).
c. Regulatory-based “light refreshments” exception has been eliminated. Through 27 January 2003, federal agencies commonly paid for “light refreshments” at government-sponsored conferences under a regulatory exception found in the travel regulations where a majority of the attendees were from a different permanent duty station than the sponsoring activity. That exception was overturned, at least with respect to paying for the refreshments given to any personnel not on travel status. See Use of Appropriated Funds to Purch. Light Refreshments at Conferences, 2003 WL 174196, Comp. Gen. No. B-288266 (Jan. 27, 2003) (holding that there is no authority for payment, under General Services Administration’s travel regulation on conference planning, for light refreshments at official government-sponsored conferences where a majority of attendees are in travel status except as part of an employee’s travel subsistence allowance and such expenditures should not be authorized for employees in nontravel status).

d. Award Ceremonies:

(1) The award recipients are either federal employees or military members

(2) The award recipients are publicly recognized, and

(3) The authorized agency official has determined that food materially advances the recognition of the recipient.

(4) Sources: 5 U.S.C. §§ 4501, 4503-4504 (civilian incentive awards) and 10 U.S.C. § 1124 (military cash awards only); Defense Reutilization and Mktg. Serv. Award Ceremonies, 1997 U.S. Comp. Gen. LEXIS 104, Comp. Gen. No. B-270327 (Mar. 12, 1997) (agency authorized to pay for refreshments as a necessary expense to honor awardees where the agency determines that a reception with refreshments would materially enhance the effectiveness of its awards ceremony); Refreshments at Awards Ceremony, 65 Comp. Gen. 738 (1986) (under 5 U.S.C. § 4503, cost of refreshments are a necessary expense where agency determines that a reception with refreshments materially enhances the effectiveness of the ceremony).

e. Cultural Awareness Ceremonies:
(1) The food is part of a formal program intended to make the audience aware of the cultural or ethnic history being celebrated,

(2) The food is a sample of the food of the culture and is being offered as part of the larger program to serve an educational function, and

(3) The portions and selection of dishes do not constitute a meal, for which appropriated funds are not available under this exception.

(4) Be careful with this exception; ensure it is not misused.

Sources: U.S. Army Corps of Engineers, 2004 WL 2085487, Comp. Gen. No. B-301184 (Jan. 15, 2004) (officers may not certify appropriations to reimburse EEO director for cost of food served at Black History Month program, despite determination that serving food would advance agency’s EEO objectives, where the food served amounted to a meal and not a sampling).

f. Training:

(1) When food constitutes a non-severable portion of the registration or attendance fee for the training program.

(2) Food costs are non-severable if billed as part of the overall costs of the conference, and the conference costs cannot be reduced by foregoing the food or by breaking out the food costs as a separate optional item.

(3) The cost of food provided at a training program conducted by the Government is presumed to be severable because the Government is responsible for arranging the program.

(4) If food costs are a severable part of the registration fee, appropriated funds are available for such costs only where necessary for the employee to obtain the full benefit of the training. For example, where essential training is conducted during a luncheon session, food may be provided at Government expense. Simply labeling a session as a “training event” is not sufficient; instead, the event must be a substantive program designed to improve trainee and agency performance.
Sources: 5 U.S.C. §§ 4101, 4109 (applicable to civilian employees); 10 U.S.C. §§ 2013, 4301, 9301 (applicable to service members); Federal Hwy. Admin.-Cost of Social Events, 66 Comp. Gen. 350 (1987) (agency may expend appropriations for required registration fee at state-sponsored conference where fee included cost of social event where the social event cost was a mandatory non-separable element of the registration fee); Secretary of Agriculture, 39 Comp. Gen. 119 (1959) (same, even where employee is not in travel status).

Routine Agency Meetings:

1. Held to discuss internal day-to-day operations of government
2. The meeting is held at an outside facility
3. The cost of the food is a non-separable, non-negotiable portion of the cost of the conference space, and
4. The cost of the space is demonstrably priced competitively with facilities at which food is not provided.
5. Note: To be applied rarely because, in most cases, the cost of conference space with food will not be competitively priced with similar cost of conference space without food.

Sources: Payment of a Non-Negotiable Non-Separable Facility Rental Fee that Covered the Cost of Food Served at NRC Workshops, 1999 WL 1498239, Comp. Gen. No. B-281063 (Dec. 1, 1999) (authorizing payment of all-inclusive facility rental fee even though the result was food served to agency employees at their official duty stations).

Conferences:

1. A conference typically involves topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants. Other indicators include registration, a published agenda, and scheduled speakers or discussion panels.
2. Conferences have been receiving a tremendous amount of scrutiny due to media reports of excessive costs at conferences. You should check with your finance office to see if they have issued any new guidance.
(3) Paying for Employees to Attend a Conference

(a) Sponsored by Non-Federal Entities:

(i) Non-Severable Fee:

(a) An agency may pay or provide reimbursement for food purchased as a non-severable, non-negotiable portion of a registration or attendance fee.


(ii) Severable Fee: Available only to the extent that

(a) The expenditure is necessary to obtain the full benefit of the meeting or conference,

(b) Meals and refreshments are incidental to the meeting or conference, and

(c) The employee cannot take the meals elsewhere without missing formal discussions, lectures, or speeches that are essential parts of the conference.


(b) Sponsored by Another Government Agency:

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(i) If the criteria above for “conferences sponsored by a non-federal entity with a severable fee are met and

(ii) The meeting or conference involves matters of topical interest to multiple agencies and/or nongovernmental participants.


(4) DoD Sponsored Conferences:

(a) The conference is a formal conference with registration, a published and substantive agenda, and scheduled speakers, and not just a routine meeting that involves the day-to-day operations of the government.

(b) The conference involves matters of topical interest to actual participants from multiple agencies and/or nongovernmental participants

(c) Meals and refreshments are incidental to the overall purposes of the formal conference

(d) Attendance at the meal or when refreshments are provided is important to the host agency to ensure the attendees’ full participation in essential discussions and speeches concerning the purpose of the conference, and

(e) The meal and refreshments are part of the formal conference that includes substantial sessions apart from those at which food is served.


(5) Where Contractors Collect Fees to Defray Conference Costs:
(a) Only permissible where sponsoring agency has specific statutory authority to charge the fee for the conference and retain the proceeds. [NOTE: DoD has authority with conditions pursuant to 10 U.S.C. § 2262.]

(b) Conference costs include food.

(c) Sources: National Institutes of Health-Food at Govt.-Sponsored Confs., supra; Contractors Collecting Fees at Agency-Hosted Confs., 2006 WL 39435, at *2, Comp. Gen. No. B-306663 (Jan. 4, 2006) (“a government agency that lacks the authority to charge and retain fees may not cure that lack of authority by engaging a contractor to do what it may not do”). See 10 U.S.C. § 2262.

(6) Conference Fees

(a) Congress enacted 10 U.S.C. §2262 which provides permanent authority for the Secretary of Defense to collect fees in advance, either directly or by using a contract, from individuals and commercial participants attending DoD sponsored conferences, seminars, exhibits, symposiums, or similar meetings.

(b) A conference is defined as any form of meeting, workshop, seminar, symposium, or training session.

(7) Relevant Regulations. DoD Components collecting fees by contract, to include contractors under no-cost contracts, are permitted to structure such contracts to permit contractors to offset from fees collected the actual costs incurred by the contractor (to include its fee) in providing conference-related services. Fee collections in excess of such amounts shall be credited to the appropriation from which other conference costs are payable. See also DOD FMR, Vol. 12, Ch. 32 (July 2009).
3. Bottled Water. Bottled water generally does not materially contribute to an agency’s mission accomplishment. It is therefore generally a personal expense.

   a. GAO-Sanctioned Exception Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building’s water supply is unwholesome or unpotable. See Department of the Army-Use of Appropriations for Bottled Water, 2008 WL 341539, Comp. Gen. No. 341539 (Feb. 4, 2008) (Corps of Engineers may provide bottled water to employees working at remote sites with no access to potable water); United States Agy. for Intl. Dev.-Purchase of Bottled Drinking Water, 1992 U.S. Comp. Gen. LEXIS 1170, Comp. Gen. No. B-247871 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).

   b. Relevant Regulations. See also DOD FMR, Vol. 10, Ch. 12, ¶ 120203 (July 2010) (permitting use of appropriations to purchase drinking water when necessary from the government’s standpoint, such as when the public water is unsafe for human consumption, there is an emergency failure of the water source on the installation, there is a temporary facility with no drinking water available within a reasonable distance, or no water fit for drinking purposes is available without cost or at a lower cost to the government); AR 30-22, ¶ 5-19 (discussing bottled water in the context of a deployment /contingency).

   c. On January 13, 2012 the United States Court of Appeals for the D.C. Circuit repudiated the Federal Labor Relations Authority review of an arbitrator’s award which determined that even if a past practice of providing bottled water violated appropriations law, that past practice overruled any fiscal law objections. The Court disagreed and stated “Federal collective bargaining is not exempt from the rule that funds from the Treasury may not be expended except pursuant to congressional appropriations. Navy v. FLRA, 2012 WL 104384.

4. Workplace Food Storage and Preparation Equipment (i.e. microwave ovens; refrigerators; coffee pots).
a. In the past, the Comptroller General opined that buying food storage and/or preparation equipment generally did not materially contribute to an agency’s mission performance. As a result, these items were generally considered to be a personal expense.

b. Under a “necessary expense” analysis, the GAO sanctioned the use of appropriated funds to buy food storage and preparation equipment only when the purchase was:

(1) “reasonably related to the efficient performance of agency activities,” and

(2) “not just for the personal convenience of individual employees.”

See, e.g., Central Intelligence Agy.-Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, 97-1 CPD ¶ 230, Comp. Gen. No. B-276601 (Jun. 26, 1997) (authorizing appropriations to purchase refrigerators where on-site cafeteria was not open for dinner, the nearest commercially available eating facility was 10-15 minutes away, and having food delivered for dinner required a 15-20 minute commute from the headquarters facility to the Visitors Center to receive deliveries); Purchase of Microwave Oven, 1983 U.S. Comp. Gen. LEXIS 1307, Comp. Gen. No. B-210433 (Apr. 15, 1983) (permitting appropriation to purchase microwave oven where commercial facilities were unavailable, employees worked 24 hours a day, seven days a week, and restaurants were not open during much of this time).
c. In June 2004 the GAO revisited this issue and determined that regardless of the availability of commercial eating facilities, food storage and/or preparation equipment did reasonably relate to the efficient performance of agency activities, and thus appropriated funds could be spent for these items. See Use of Appropriated Funds to Purchase Kitchen Appliances, 2004 WL 1853469, Comp. Gen. No. B-302993 (June 25, 2004) (modifying the earlier decisions and observing that these items reasonably related to workplace safety in that, as a result of fire safety measures, employees were not allowed to have coffee makers in their workspace areas and further noting that providing such equipment results in benefits for the agency, “including increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment”) (Note: agency level regulations and policies should be consulted prior to relying on this decision).

5. Clothing. Buying clothing for individual employees generally does not materially contribute to an agency’s mission performance. Clothing is, therefore, generally considered a personal expense unless a statute provides to the contrary. See IRS Purchase of T-Shirts, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized).

a. Statutorily-Created Exceptions. See 5 U.S.C. § 7903 (authorizing purchase and maintenance of special clothing and equipment, for government benefit, which protects against hazards in the performance of duties); 10 U.S.C. § 1593 (authorizing DoD to pay an allowance or provide a uniform to a civilian employee who is required by law or regulation to wear a prescribed uniform while performing official duties); and 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). See also Purchase of Insulated Coveralls, Vicksburg, Mississippi, 2002 WL 31242199, Comp. Gen. No. B-288828 (Oct. 3, 2002); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Engs., 2002 WL 31521355, Comp. Gen. No. B-289683 (Oct. 7, 2002) (both provide an excellent overview of each of these authorities).
b. Opinions and Regulations on-point. See also White House Communications Agy.-Purchase or Rental of Formal Wear, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Service-Purchase of Safety Shoes, 67 Comp. Gen. 104 (1987) (authorizing safety shoes for supply clerk whose work included movement of heavy objects with various equipment); DoD FMR, Vol. 10, Ch. 12 (July 2010), ¶ 120220 (civilian uniform allowances); AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees (1 July 1980).

6. Entertainment. Entertaining people generally does not materially contribute to an agency’s mission performance. As a result, entertainment expenses are generally considered to be a personal expense. HUD Gifts, Meals, and Entertainment Expenses, 68 Comp. Gen. 226, 228 (1989); see also, Hon. Fortney H. Stark, 64 Comp. Gen. 382 (1985) (holiday greeting cards and letters are personal expenses); Use of Appropriated Funds for Navy Fireworks Display, 82-2 CPD ¶ 1, Comp. Gen. No. B-205292 (Jun. 2, 1982) (fireworks display was unauthorized entertainment and could not be funded with appropriations).


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c. Agencies that are authorized emergency and extraordinary expense or similar funds (e.g., representation funds), may also use such funds to entertain distinguished visitors to the agency. See discussion beginning on page 44, infra., for an overview. See also Hon. Michael Rhode, Jr., 1993 WL 86813, at *2, Comp. Gen. No. B-250884 (Mar. 18, 1993) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).

7. Decorations. Under a “necessary expense” analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. See Department of State & Gen. Servs. Admin.-Seasonal Decorations, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations as consistent with work-related objectives because they contribute to a pleasant working atmosphere thereby improving morale and efficiency); Purchase of Decorative Items for Indiv. Ofcs. at the United States Tax Court, 64 Comp. Gen. 796 (1985) (modest expenditure on art work proper as being consistent with work-related objectives of improving efficiency and morale and adding to the dignity of the Federal courts, where not primarily for the personal convenience or personal satisfaction of a government employee); but see Hon. Fortney H. Stark, 64 Comp. Gen. 382 (1985) (Christmas cards and greeting letters were not a proper expenditure because they were for personal convenience). See also AFI 65-601, Vol. 1, ¶ 4.26.2 (prohibiting use of appropriations to purchase or mail seasonal greeting cards).

NOTE: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, Hanukkah, etc.)
8. Business Cards. Under a “necessary expense” analysis, the GAO has sanctioned the use of appropriated funds to purchase business cards for agency employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, 1998 WL 807760, Comp. Gen. No. B-280759 (Nov. 5, 1998) (purchase of business cards with appropriated funds for government employees who regularly deal with public or outside organizations is a proper “necessary expense”) (emphasis added).

a. This case “overturned” a long history of Comptroller General’s decisions holding that business cards were a personal expense because they did not materially contribute to an agency’s mission accomplishment. See, e.g., Forest Service-Purchase of Information Cards, 68 Comp. Gen. 467 (1989).

b. More Restrictive Agency Level Regulations. The military departments have implemented policies that permit only recruiters and criminal investigators to purchase commercially prepared business cards. All others are permitted to use appropriated funds to purchase card stock and printer ink and then use in-house computing resources to print their own business cards. See AR 25-30, The Army Publishing and Printing Program, ¶ 7-11 (27 Mar. 2006); but see Department of Defense memorandum, 15 July 1999, and Department of the Army memorandum, 2 August 1999 (indicating agencies may procure commercially prepared business cards from the Lighthouse for the Blind if the cost of procuring the cards is equivalent to or less than the cost of producing the cards on a personal computer).

9. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that an employee incurs to obtain a license or certificate enabling them to carry out their duties are considered a personal expense rather than a “necessary expense” of the government. See Bureau of Land Management-Availability of Appropriations to Pay Expenses for Employees to Obtain a Certified Govt. Fin. Mgr. Designation, 1995 WL 628851, Comp. Gen. No. B-260771 (Oct. 11, 1995) (appropriation not available to cover costs of obtaining professional recognition of employee’s credentials); Secretary of Health, Education, and Welfare, 46 Comp. Gen. 695 (1967) (state license fees imposed on Public Health Service medical doctor not payable absent statutory authority); A. N. Ross, 22 Comp. Gen. 460 (1942) (fee for attorney’s admission to Court of Appeals not payable).


b. Legislative Exception.


(a) professional accreditation;
(b) state-imposed professional licenses;
(c) professional certification; and
(d) the costs of any examinations required to obtain such credentials.

10. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase “mementos” or personal gifts. See EPA Purchase of Buttons and Magnets, 72 Comp. Gen. 73 (1992) (requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:

a. Awards for Service Members. Congress has provided specific statutory authority for SECDEF to “award medals, trophies, badges, and similar devices” for “excellence in accomplishments or competitions,” and to “provide badges or buttons in recognition of special service, good conduct, and discharge under conditions other than dishonorable.” 10 U.S.C. § 1125.

(1) The Army has implemented this statute in AR 600-8-22, Military Awards (11 Dec. 2006). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e. the Army Achievement Medal, the Meritorious Service Medal, the Purple Heart, etc).

(2) Chapter 11 of the regulation allows the presentation of other nontraditional awards for “excellence in accomplishments and competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, and military aerial competition.”

(3) These awards must “be made on a one time basis where the achievement is unique and clearly contributes to increased effectiveness.” See AR 600-8-22, ¶ 11-2.
(4) Trophies may include, but are not limited to, loving cups, plaques, badges, buttons, and similar objects that represent the type of achievement or contest. Cash prizes or savings bonds are not authorized. The awards will not exceed the value of $75 for an individual award or $250 for a team award. AR 600-8-22, ¶ 11-3. The MACOM commander or head of the principal HQDA agency must approve the purchase of the particular item to be awarded, however. See AR 600-8-22, ¶ 1-7d. See also Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, 1992 WL 409431, Comp. Gen. No. B-247687 (Apr. 10, 1992) (approving the use of appropriated funds to purchase belt buckles as awards for the annual "Peacekeeper Challenge").

(5) The Navy implemented this statute in Secretary of the Navy Instruction 1650.1G (Navy and Marine Corps Awards Manual) of 7 Jan 02.

(6) Specific Issues Concerning Unit or Regimental Coins. For a detailed discussion of the issues related to commanders’ coins, see Major Kathryn R. Sommerkamp, Commanders’ Coins: Worth Their Weight in Gold?, ARMY LAWYER, Nov. 1997, at 6.

b. Awards for Civilian Employees of the U.S. Government. Congress has provided agencies with various authorities to pay awards to their employees. See Title 5, United States Code, Chapter 45. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at 5 U.S.C. § 4503.

(1) Regulatory Implementation. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DoD civilians must also be in accordance with DoD 1400.25-M, subchapter 451 as well as DoD FMR, Vol. 8, Ch. 3, ¶ 0311 (Jun. 2010). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993).
Non-Cash Awards. The statute technically states that the “head of an agency **may pay a cash award** to, and incur necessary expense for the honorary recognition of” one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. The agency regulations each expressly permit non-cash awards, however. Curiously, the GAO has sanctioned the giving of non-cash awards to civilian employees. See National Security Agy.-Availability of Appropriations to Purchase Food as a Nonmonetary Award under the Govt. Employees Incentive Awards Act, 1997 WL 93303, Comp. Gen. B-271511 (Mar. 4, 1997) (appropriations may be used to purchase food and food vouchers for use as nonmonetary awards for civilian employees); Awarding of Desk Medallion by Naval Sea Systems Command, 1980 WL 16052, B-184306 (Aug. 27, 1980) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements).

c. Awards for Contractor Employees. No awards for contractor employees are authorized. Such awards are outside the scope of applicable award authorities for military personnel and civilian employees. Award fees and other forms of award to the contractor itself (but not to the individual employees) may be authorized, but only through the contracting officer, and only in accordance with the terms of the contract.

d. Agencies that are authorized emergency and extraordinary expense or similar funds may also use such funds to purchase mementoes for their distinguished visitors. See discussion beginning on page 44, *infra*, for an overview.

e. DA Memo 600-70 (16 Jan. 2004): Applies to HQDA & FOAs, only; only BG or SES Level HQDA Principals May Purchase Coins with Appropriated Funds. May be delegated to one GS-15 / 0-6 or above; No coins for Contractors; Only the Secretary of the Army, Army Chief of Staff, and Army Sergeant Major may personalize coins with name.
11. Use of Office Equipment. Lorraine Lewis, Esq., 1999 WL 54498, Comp. Gen. No. B-277678 (Jan. 4, 1999) (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See Office of Personnel Management memorandum, subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999) (providing general guidance to assist federal agencies in determining the circumstances in which employee time and agency equipment may be used to carry out limited National Guard or Reserve functions) available at http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/OPM_Reserves.htm. See also CAPT Samuel F. Wright, Use of Federal Government Equipment and Time for Reserve Unit Activities, RESERVE OFFICERS ASS’N L. REV., May 2001 (providing a good overview of this authority).


a. AR 25-1, ¶ 6-4w: Official use limited to requirements that cannot be satisfied by other available telecommunications methods and are authorized when warranted by mission requirements, technical limitation, feasibility, or cost considerations; authorized personal use of cellular phones is subject to the same restrictions and prohibitions that apply to other communication systems per ¶ 6-1e.

b. AFI 33-106, Sec. B., ¶ 4.9.3: Like land line telephones, Air Force cellular telephones are to be used for official and authorized purposes; “official” purposes include any calls in furtherance of the Air Force mission; in addition, subject to local command and supervisor restrictions, members are authorized to use cellular phones to make short infrequent personal calls when appropriate (e.g., notifying family members of changes in schedules, checking on medical, school, or childcare appointments, inquiring as to car repair status).

13. Chaplain Programs. 10 U.S.C. § 1789. Permanent authorization for chaplain-led programs (retreats, conferences) to maintain strong families; authorized support services are costs of transportation, food, lodging, child
care, supplies, fees, and training materials for members of the armed forces and their family members while participating in these programs.

F. Is the Expenditure Prohibited?

1. After determining that an expenditure is a “necessary expense,” the next step in the three-part Purpose analysis is to determine whether Congress or other authority has prohibited the expenditure. Hon. Bill Alexander, 63 Comp. Gen. 422, 433 (1984) (41 U.S.C. § 12 prohibition against funding DoD construction projects unless specifically authorized by Congress, interpreted to prohibit use of general appropriations for such projects);

2. This step in the analysis again requires review of the Appropriations and Authorization Acts, statutes, and regulations. For example, 10 U.S.C. § 2491a(a) states that “funds appropriated to the Department of Defense may not be used to equip, operate, or maintain a golf course at a facility or installation of the Department of Defense,” except in limited circumstances.

3. For a discussion of the permanency of prohibitions/restrictions, see “Miscellaneous Statutory Provisions” discussed above at p. 9.

G. Is the Expenditure Otherwise Provided For in a Separate Appropriation?

1. If there is another, more specific appropriation available, it must be used in preference to the more general appropriation. See e.g., Funding for Tech. Assistance for Conservation Progs. Enumerated in Sec. 2701 of the 2002 Farm Bill, 2002 WL 31371936, at *9, Comp. Gen. No. B-291241 (Oct. 8, 2002) (general operating appropriation not available to fund programs, even though reasonably related to the general appropriation, where the expenditure falls specifically within the scope of another appropriation); Hon. Lane Evans, 2002 U.S. Comp. Gen. LEXIS 145, Comp. Gen. No. B-289209 (May 31, 2002) (Coast Guard may not use Oil Spill Liability Trust Fund appropriations to pay administrative costs of processing Oil Pollution Act claims because annual operating expense appropriations are available to pay necessary expenses for the operation and maintenance of the Coast Guard); Hon. Bill Alexander, 63 Comp. Gen. 422, 443-47 (1984) (may not use Army O&M funds to finance civic/humanitarian activities during training exercise when Congress has appropriated foreign assistance funds specifically for that purpose).

   a. That a specific appropriation is exhausted is immaterial. Secretary of Commerce, 36 Comp. Gen. 386 (1956).
b. General appropriations may not be used as a back-up for a more specific appropriation. General Services Administration, 38 Comp. Gen. 758 (1959) (agency operating appropriations generally not available to reimburse GSA to fund tenant agency’s changes, alterations, and improvements to office space); Secretary of the Navy, 20 Comp. Gen. 272 (1940) (regular Navy appropriation not available to supplement specific construction appropriation to build more expensive structure).

c. Limitation applies even if specific appropriation is included in the more general appropriation. Library of Congress, 1997 WL 692913, Comp. Gen. No. B-278121 (Nov. 7, 1997) (prohibiting use of portion of Library of Congress operating fund earmarked for purchase of materials for any other operating expense); Secretary of the Interior, 20 Comp. Gen. 739 (1941) (cost of transporting motor vehicle to be charged against amounts specifically appropriated for the purchase automobiles and not against agency’s general operating appropriation).
2. If there are two appropriations equally available:

a. The agency may choose either appropriation. Department of Homeland Security-Use of Mgmt. Directorate Appropriations to Pay Costs of Component Agencies, 2006 WL 2567514, Comp. Gen. No. 307382 (Sep. 5, 2006) (costs chargeable to both Management Directorate appropriations or component agencies’ management and administration appropriations); Payment of SES Performance Awards of the Railroad Retirement Board’s Office of Inspector General, 68 Comp. Gen. 337 (1989) (performance awards payable from either Board’s general appropriation or appropriations of its Office of Inspector General). GAO generally affords agencies broad discretion in determining whether a specific expenditure is reasonably related to the accomplishment of an authorized purpose. Hon. Howard M. Metzenbaum, 63 Comp. Gen. 145, 150 (1984) (“Although GAO generally affords agencies broad discretion in determining whether a specific expenditure is reasonably related to the accomplishment of an authorized purpose, an agency’s discretion in such matters is not unlimited”); Secretary of Agriculture, 18 Comp. Gen. 285, 292 (1938) (while Congress leaves largely to administrative discretion the choice of ways and means to accomplish the objects of an appropriation, administrative discretion may not transcend the statutes, nor be exercised in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation).

b. BUT, once the election is made, the agency must continue to use the selected appropriation to the exclusion of any other, during the current fiscal year. See Funding for Army Repair Projects, 1997 WL 702260, at *3, Comp. Gen. No. B-272191 (Nov. 4, 1997) (“Once that election has been made, the agency must continue to use the same appropriation for that purpose unless the agency, at the beginning of the fiscal year, informs the Congress of its intent to change for the next fiscal year”). The election is binding even after the chosen appropriation is exhausted. Hon. Clarence Cannon, B-139510, May 13, 1959) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).
c. If Congress specifically authorizes the use of two accounts for the same purpose, the agency is not required to make an election between the two and is free to use both appropriations for the same purpose. See Funding for Army Repair Projects, supra. (Army not required to elect between O&M and Real Property Maintenance, Defense appropriation where Congress expressly authorized for fiscal year in question the use of O&M in addition to RPM,D funds for major repair and minor construction projects); see also 10 U.S.C. § 166a (Combatant Commander Initiative Funds are in addition to amounts otherwise available for an activity).

3. Investment/Expense Threshold.

a. Expenses are the costs incurred to operate and maintain the organization, such as personal services, supplies, and utilities. DoD FMR, Vol. 2A, Ch. 1 (Oct. 2008), ¶ 010201.B.1.

b. Costs budgeted in the Operation and Maintenance and Military Personnel appropriations are considered expenses. Costs budgeted in the Research, Development, Test and Evaluation, Base Realignment and Closure, and Family Housing appropriations include both expenses and investments. Id., ¶ 010201.C.3.

c. Items procured from the Defense Working Capital Funds will be treated as expenses in all cases except when intended for use in weapon system outfitting, government furnished material on new procurement contracts, or for installation as part of a weapon system modification, major reactivation, or major service life extension. Id., ¶ 010201.C.4.


(1) Labor of civilian, military, or contractor personnel.
(2) Rental charges for equipment and facilities.
(3) Food, clothing, and fuel.
(4) Supplies and materials designated for supply management of the Defense Working Capital Funds.
(5) Maintenance, repair, overhaul, rework of equipment.
(6) Assemblies, spares and repair parts, and other items of equipment that are not designated for centralized item management and asset control and which have a system unit cost less than the currently approved dollar threshold of $250,000 for expense and investment determinations.

(7) Cost of incidental material and items that are not known until the end item is being modified or conditional requirements and are considered expenses because the material is needed to sustain or repair the end item.

(8) Engineering efforts to determine what a modification will ultimately be or to determine how to satisfy a deficiency.

e. Investments are the costs that result in the acquisition of, or an addition to, end items. These costs benefit future periods and generally are of a long-term character such as real property and personal property. Id., ¶ 010201.B.2. Investments are costs to acquire capital assets such as real property and equipment. Id., ¶ 010201.D.2.


(1) All items of equipment, including assemblies, ammunition and explosives, modification kits (the components of which are known at the outset of the modification), spares and repair parts not managed by the Defense Working Capital Funds, that are subject to centralized item management and control.

(2) All equipment items that are not subject to centralized item management and asset control and have a system unit cost equal to or greater than the currently approved expense and investment dollar threshold of $250,000. The validated requirement may not be fragmented or acquired in a piecemeal fashion in order to circumvent the expense and investment criteria policy.

(3) Construction, including the cost of land and rights therein (other than leasehold). Construction includes real property equipment installed and made an integral part of such facilities, related site preparation, and other land improvements.
(4) The cost of modification kits, assemblies, equipment, and material for modernization programs, ship conversions, major reactivations, major remanufacture programs, major service life extension programs, and the labor associated with incorporating these efforts into or as part of the end item are considered investments. All items included in the modification kit are considered investment even though some of the individual items may otherwise be considered as an expense. Components that were not part of the modification content at the outset and which are subsequently needed for repair are expenses. The cost of labor for the installation of modification kits and assemblies is an investment.

(5) Supply management items of the Defense Working Capital Funds designated for weapon system outfitting, government-furnished material on new procurement contracts, or for installation as part of a weapon system modification or modernization, major reactivation or major service life extension.

(6) Also considered as investments are support elements such as data, factory training, support equipment and interim contractor support, which are required to support the procurement of a new weapon system or modification.

g. Exception Permitting Purchase of Investments with O&M Funds. In each year’s Defense Appropriation Act, Congress has permitted DoD to utilize its O&M appropriations to purchase investment items having a unit cost that is less than a certain threshold. See, e.g., Department of Defense Appropriations, Pub. L. No. 112-74, § 8030 (Dec. 23, 2011) (establishing the threshold at $250,000 for FY 2012).

(1) Expenses. Operation & Maintenance, Army (OMA) appropriations generally are available to acquire systems and equipment items that are **locally purchased** and **cost less than $250,000**. DOD FMR, Vol. 2A, Ch 1, ¶ 010201.D.1.

(2) Investments. Other Procurement, Army (OPA) appropriations are used to acquire equipment items that are **centrally managed** or **cost $250,000 or more**. Id., ¶ 010201.D.2.
(3) Systems. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold ($250,000). This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.

(a) Agencies must consider the “system” concept when evaluating the procurement of items. The determination of what constitutes a “system” must be based on the primary function of the items to be acquired, as stated in the approved requirements document.

(b) A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.

(c) Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate “system” for funding purposes, only if the primary function of the end item is to operate independently.

(d) Do not fragment the acquisition of an interrelated system of equipment merely to avoid exceeding the O&M threshold.

H. Augmentation of Appropriations & Miscellaneous Receipts.


a. Augmentation is action by an agency that increases the effective amount of funds available in an agency’s appropriation. Generally, this results in expenditures by the agency in excess of the amount originally appropriated by Congress.

b. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:

(1) Article I, Section 9, Clause 7, of United States Constitution. No money shall be drawn from the treasury except in consequence of appropriations made by law.
(2) 31 U.S.C. § 1301(a) (Purpose Statute).
Appropriations shall be applied only to the objects for
which the appropriations were made except as otherwise
provided by law.

(3) 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute).
Except as . . . [otherwise provided] . . . an official or agent
of the government receiving money for the government
from any source shall deposit the money in the Treasury as
soon as practical without any deduction for any charge or
claim.

c. Types of Augmentation.

(1) Augmenting by using one appropriation to pay costs
associated with the purposes of another appropriation. This
violates the Purpose Statute, 31 U.S.C. § 1301(a). See,
e.g., Hon. Robert C. Byrd, 2007 WL 2737318, Comp. Gen.
No. B-308762 (Sept. 17, 2007) (Department of Homeland
Security’s Preparedness Directorate required to adjust
accounts of all appropriations benefitting from shared
services to reflect the actual value of benefits received to
avoid unlawful augmentation); Use of Agencies’
Appropriations to Purchase Computers for Dept. of Labor’s
(GAO found violation of Purpose Statute where Secretary
of Labor failed to allocate costs of centrally-purchased
computer network to subordinate agencies based on actual
value of computer equipment provided to each agency).
Augmenting an appropriation by retaining government funds received from another source. This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See Maritime Admin. Disposition of Funds Recovered From Pvt. Party For Damage to Govt. Bldg. 2002 WL 1554364, Comp. Gen. No. B-287738 (May 16, 2002) (agency required to deposit into the Treasury as miscellaneous receipts amounts recovered from private party for damage to a government building and equipment); Interest Earned on Unauthorized Loans of Fed. Grant Funds, 71 Comp. Gen. 387 (1992) (interest must be deposited into Treasury as miscellaneous receipts); but see Bureau of Alcohol, Tobacco, and Firearms-Augmentation of Appropriations-Replacement of Autos by Negligent Third Parties, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 only applies to monies received, not to other property or services such as in-kind replacement of damaged automobile).

(a) Expending the retained funds generally constitutes an improper augmentation of an appropriation. Director, United States Information Agy., 46 Comp. Gen. 31, 34 (1966).

2. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted that expressly authorize agencies to retain funds received from a non-Congressional source include:

a. Economy Act. 31 U.S.C. § 1535 authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. See also 41 U.S.C. § 23 (project orders).

b. Foreign Assistance Act. 22 U.S.C. § 2392 authorizes the President to transfer State Department funds to other agencies, including DoD, to carry out the purpose of the Foreign Assistance Act.
c. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See 10 U.S.C. § 2208; National Technical Info. Serv., 71 Comp. Gen. 224 (1992) (funds advanced to agency for publications and other services may be used only for operating expenses directly related to services to be performed); Administrator, Veterans Administration, 40 Comp. Gen. 356 (1960) (retaining and using cash derived from property acquired by an appropriation for a revolving supply fund would amount to an unauthorized augmentation of the revolving fund).

d. Defense Gifts. 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, monetary defense gifts may not be expended until appropriated by Congress.

e. Health Care Recoveries. 10 U.S.C. § 1095(g). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.

f. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts “shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned.” 42 U.S.C. § 2651(f). The U.S. Army Claims Service has taken the position that such recoveries should be credited to the installation’s operation and maintenance account. See Affirmative Claims Note, Lost Wages under the Federal Medical Care Recovery Act, ARMY LAW., Dec. 1996, at 38.

g. Military Leases of Real or Personal Property. 10 U.S.C. § 2667(e). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration.
h. Damage to Real Property. 10 U.S.C. § 2782. Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.

i. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. 10 U.S.C. § 2575(b). Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.

j. Host nation contributions to relocate armed forces within a host country. 10 U.S.C. § 2350k.


3. GAO-sanctioned Exceptions to the Miscellaneous Receipts Statute. In addition to the statutory authorities mentioned above, the Comptroller General recognizes other exceptions to the Miscellaneous Receipts Statute, including:


b. Refunds.

(1) Refunds for erroneous payments, overpayments, or advance payments may be credited to agency appropriations. Department of Justice-Deposit of Amounts Received from Third Parties, 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/insurers for damage to employee’s property for which agency has paid employee’s claim).
(2) Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency-Disposition of Monetary Award Under False Claims Act, 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts).

(3) Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency-Disposition of Funds Paid in Settlement of Contract Action, 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government’s claim for damages must be deposited as miscellaneous receipts).

(4) Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Ctr. Contractors, 73 Comp. Gen. 210 (1994) (General Services Administration may deposit commission rebate checks from travel center contractors to the general Treasury where agency elects not to credit rebates to appropriation originally charged); Secretary of War, 23 Comp. Gen. 648 (1944) (amounts collected for erroneous or illegal charges must be deposited to the credit of the appropriation originally charged even if lapsed). This rule applies to refunds in the form of a credit. See GAO Red Book, Vol. II, p. 6-191 (Feb. 2006); Appropriation Accounting-Refunds and Uncollectables, 1995 WL 761474, Comp. Gen. No. B-257905 (Dec. 26, 1995) (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed).

c. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the Treasury as a miscellaneous receipt. Hon. John D. Dingell, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).
d. Nonreimbursable Details.

(1) The Comptroller General has held that nonreimbursable agency details of personnel to other agencies are generally unallowable. Department of Health and Human Svcs.-Detail of Ofc. of Community Svcs. Employees, 64 Comp. Gen. 370, 382 (1985).

(2) Exceptions.


(b) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency’s mission. Details to Congressional Commissions, 1988 WL 227433B, Comp. Gen. No. 230960 (Apr. 11, 1988).

(i) Details falling within this exception must entail minimal cost, and the receiving agency cannot obtain the service by other means. Department of Health and Human Svcs.-Detail of Ofc. of Community Svcs. Employees, 64 Comp. Gen. 370, 380 (1985).

I. Emergency and Extraordinary Expense Funds.

1. Definition. Emergency and Extraordinary Expense (“EEE”) funds are appropriations that an agency has much broader discretion to use for "emergency and extraordinary expenses." Expenditures made using these funds need not satisfy the normal purpose rules.

2. Historical Background. Congress has provided such discretionary funds throughout our history for use by the President and other senior agency officials.

3. Appropriations Language.

a. For DoD, Congress provides EEE funding authority as a separate item in the applicable Operation and Maintenance appropriation. For example, in FY 2012, Congress provided the following authority within the Army O&M appropriation: “[f]or expenses, not otherwise provided for, necessary for the operation and
maintenance of the Army, as authorized by law; and not to exceed $12,478,000 can be used for emergencies and extraordinary expenses to be expended on approval and authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes . . . .” Department of Defense Appropriations, Pub. L. No. 112-74 (Dec. 23, 2011).

b. Not all agencies receive emergency and extraordinary expense funds. If Congress does not specifically grant an agency emergency and extraordinary expense funds, that agency may not use other appropriations for such purposes. See, HUD Gifts, Meals, and Entertainment Exp., 68 Comp. Gen. 226 (1989) (agency operating appropriation not available for unauthorized purpose).

4. Statutory Background.


      (1) Authorizes the Secretary of Defense and the Secretary of a military department to spend EEE funds for "any purpose he determines to be proper, and such a determination is final and conclusive."

      (2) Requires a quarterly report of such expenditures to the Congress.

      (3) Congressional notice requirement. In response to a $5 million payment to North Korea in the mid-90s using DoD EEE funds, Congress amended 10 U.S.C. § 127, imposing the following additional restrictions on DoD’s use of these funds:

         (a) If the amount to be expended exceeds $1 million: the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 15 days.

         (b) If the amount exceeds $500,000 (but is less than $1 million): the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 5 days.
5. Regulatory Controls. Emergency and extraordinary expense funds have strict regulatory controls because of their limited availability and potential for abuse. The uses DoD makes of these funds and the corresponding regulation(s) dealing with such usage are as follows:

a. Official Representation Funds (ORF). This subset of EEE funds are to extend official courtesies to dignitaries and officials of foreign governments.

(1) DoD Regulations: DOD Instruction 7250.13, Official Representation Funds (30 Jun 2009); DOD FMR, Vol. 10, Ch. 12, ¶ 120222.B.

(2) Army Regulation: AR 37-47, Representation Funds of the Secretary of the Army (12 March 2004).


b. Criminal Investigation Activities. This subset of EEE funds is available for unusual expenditures incurred during criminal investigations or crime prevention. See Army Regulation: AR 195-4, Use of Contingency Limitation .0015 Funds for Criminal Investigative Activities (30 Aug. 2011).

c. Intelligence Activities. This subset of EEE funds is available for unusual expenditures incurred during intelligence investigations. See Army Regulation: AR 381-141(C), Intelligence Contingency Funds (30 July 1990).

d. Other Miscellaneous Expenses (other than official representation). This subset of EEE funds is available for such uses as Armed Services Board of Contract Appeals witness fees and settlements of claims. AR 37-47, ¶ 1-5b.

a. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. DoD Instruction 7250.13, ¶ 3a; AR 37-47, ¶ 2-1. Official courtesies are subject to required ratios of authorized guests to DoD personnel. See, e.g., DoD Instruction 7250.13, Encl 3, ¶ 2; AR 37-47, ¶¶ 2-1b and 2-5. Courtesies are defined as:

1. Hosting of authorized guests to maintain the standing and prestige of the United States;
2. Luncheons, dinners, and receptions at DoD events in honor of authorized guests;
3. Entertainment of local authorized guests for civic or community relations;
4. New commander receptions;
5. Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and foreign vessels to U.S. ports;
6. Official functions in observance of foreign national holidays and similar occasions in foreign countries; and
7. Dedication of facilities.

b. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.

1. The gift may cost no more than $335. See, DoD Instruction 7250.13, Encl 3, ¶ 4.a.(1)(h)3. See also, AR 37-47, ¶ 2-9a(1). GSA sets the dollar figure and adjusts it from time to time. The current limit of $335 went into effect on 1 Jan 08 and is still in effect.
2. Gifts to DoD personnel may cost no more than $40. Dept. of Defense memorandum, 23 December 2002, Subject: Official Representation Funds
3. AR 37-47, ¶ 2-9d, prohibits use of ORF to purchase gifts and mementos for presentation to DoD personnel.

c. Levels of expenditures. Levels of expenditures are to be “modest.” DoD Instruction 7250.13, Encl 3, ¶ 2b(7)(b); AR 37-47, ¶ 2-2a.

(1) Any use not specifically authorized by regulation requires an exception to policy. AR 37-47, ¶ 2-10.

(2) Per AR 37-47, ¶ 2-10, exceptions will not be granted for the following:
   (a) Classified projects and intelligence projects;
   (b) Entertainment of DoD personnel, except as specifically authorized by regulation;
   (c) Membership fees and dues;
   (d) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);
   (e) Gifts and mementos an authorized guest wishes to present to another;
   (f) Personal items (clothing, cigarettes, souvenirs);
   (g) Guest telephone bills;
   (h) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and
   (i) Repair, maintenance, and renovation of DoD facilities.

(3) Use for retirements and change of command ceremonies, is permitted as an exception, but must be specifically approved in advance by the Service Secretary. AR 37-47, ¶ 2-4g; United States Army School of the Americas—Use of Official Representation Funds, 69 Comp. Gen. 197 (1990) (new commander reception distinguished from change of command ceremony).

e. Approval and accounting procedures. AR 37-47, Chapter 3; AFI 65-603, ¶ 8; SECNAVINST 7042.7J, ¶ 10.

(1) Fiscal year letters of authority. AR 37-47, ¶ 3-1a(1)(a).

(2) Written appointment of certifying and approving officer. AR 37-47, ¶ 3-1b.

(3) Written appointment of representation fund custodian. Id.
(4) Funds must be requested and made available before obligation. Requests for retroactive approval must be forwarded to the SA or his designee. AR 37-47, ¶ 3-1e(1)(a).

(5) Legal review. AR 37-47, ¶ 3-1c(4).


J. Military Construction

1. Congressional oversight of the Military Construction Program is extensive and pervasive.

2. “Specified” Military Construction Projects. 10 U.S.C. § 2802. The Secretary of Defense (SECDEF) and the Secretaries of the military departments may carry out military construction projects authorized by law.


      (1) Congress funds the entire military construction program with lump sum appropriations. The Army’s principal appropriations are the “Military Construction, Army” (MCA) appropriation, and the “Family Housing, Army” (FHA) appropriation.

      (2) The Military Construction Authorization Act itself, or the conference report that accompanies the Military Construction Appropriations Act, breaks down the lump sum appropriations by project.

   b. Authorized Use.

      (1) Congress normally “specifies” military construction projects expected to exceed $2.0 million.
(2) A military department may not carry out military construction projects expected to exceed $2.0 million without specific Congressional authorization and approval.


(1) Congress appropriates “Unspecified Minor Construction” funds to each military department in the conference report that accompanies the Military Construction Appropriations Act; however, the conference report does not break down these appropriations by project.

(2) The Army refers to its “unspecified” appropriation as “Unspecified Minor Military Construction, Army” (UMMCA). See, AR 420-1, Army Facilities Management (Nov. 2, 2007), ¶ 4-9b(1).

b. Authorized Use. 10 U.S.C. § 2805(a). See AR 420-1, ¶ 4-9b(1). The Secretary concerned may use these funds to carry out UMMC projects not otherwise authorized by law to fund unforeseen requirements that cannot be delayed until the next MILCON cycle.

(1) An UMMC project is defined as a military construction project with an approved cost of $2.0 million or less.

(2) However, an UMMC project may have an approved cost up to $3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.

c. Requirements for Use. 10 U.S.C. § 2805(b)(2); AR 420-1, App. D.

(1) Before beginning an UMMC project with an approved cost greater than $750,000, the Secretary concerned must approve the project.

(2) In addition, the Secretary concerned must:

(a) Notify the appropriate committees of Congress; and
(b) Wait 21 days.

4. UMMC Projects Financed by Operation & Maintenance (O&M) Funds


   (1) Statutory Exception for UMMC Projects. 10 U.S.C. § 2805(c). See AR 420-1, ¶ 4-9b (9)(c)1. The Secretary of a military department may use O&M funds to finance UMMC projects costing less than $750,000.

   (2) There used to be an exception that allowed use of O&M for projects costing less than $1.5 million if they were intended solely to correct life-threatening, health-threatening, or safety-threatening deficiencies, but the FY12 amendments to 10 U.S.C. § 2805(c) eliminated that exception.

b. Project scope is critical.

   (1) A “military construction project” includes all work necessary to produce a complete and usable facility, or a complete and usable improvement to an existing facility. 10 U.S.C. § 2801(b). See DoD FMR, Vol. 3, Ch. 17, ¶ 170102.L; AR 420-1, ¶ 4-17a; see also Hon. Michael B. Donley, 1991 WL 315260, Comp. Gen. No. B-234326 (Dec. 24, 1991) (concluding that the Air Force improperly split a project involving 12 related trailers into 12 separate projects).
(2) An agency may not treat “clearly interrelated” construction activities as separate projects. Hon. Michael B. Donley, supra.

5. Reserve Component Construction Authorities.


(1) Includes authority to acquire, lease, or transfer, and construct, expand, rehabilitate, or convert and equip such facilities as necessary to meet the missions of the reserve components.

(2) Allows the SECDEF to contribute amounts to any state (including the District of Columbia, Puerto Rico, and the territories and possessions of the United States, (10 U.S.C. § 18232(1)) for the acquisition, conversion, expansion, or rehabilitation for specified purposes.) 10 U.S.C. § 18233(a)(2)-(6).

(3) Authorizes the transfer of title to property acquired under the statute to any state, so long as the transfer does not create a state enclave within a federal installation. 10 U.S.C. § 18233(b).

(4) Like Active Component projects, every Army Reserve Military Construction undertaking must be specifically authorized and funded in MILCON legislation or performed under special statutory authority. AR 140-483, Army Reserve Land and Facilities Management (Jul. 24, 2007), ¶ 4-7a.
b. Unspecified Minor Military Construction-Army Reserve (“UMMCAR”). Like Military Construction, Army (MCA), Congress specifically appropriates UMMCAR for the construction of facilities pursuant to the authority conferred by Title 10, United States Code, Chapter 1803; Consolidated Appropriations Act, 2008, supra., 121 Stat. at 2255; and for projects costing $1.5 Million or less ($3 Million if intended solely to correct a deficiency that is a threat to life, health, or safety); AR 140-483, ¶ 4-7c(1).


   (1) Expenditure or contributions in excess of $750,000 may not be made until the SECDEF has notified the appropriate committees of Congress of the location, nature, and estimated cost of the project, and waited 21 days after notification. 10 U.S.C. § 18233a(a).

   (2) This limitation does not apply to:

      (a) Facilities acquired by lease, or to projects specifically approved by Congress. 10 U.S.C. §18233a(b).

      (b) Projects intended solely to correct a deficiency that threatens life, health or safety may have an approved cost of up to $1.5 million. 10 U.S.C. § 18233b.

(1) Unspecified Minor Military Construction costing $750,000 or less. 10 U.S.C. § 18233b. Like Active Component projects, RC UMMC projects may be funded with O&M appropriations if within the cost limitation prescribed by 10 U.S.C. § 2805(c) (currently $750,000).

(2) There used to be an exception that allowed use of O&M for projects costing less than $1.5 million if they were intended solely to correct life-threatening, health-threatening, or safety-threatening deficiencies, but the FY12 amendments to 10 U.S.C. § 2805(c) eliminated that exception for all components.


a. All Exercise-Related Projects. See AR 415-32, Engineer Troop Unit Construction in Connection With Training Activities (Apr. 15, 1998), ¶ 3-11d; and JCSI 4600.01, EXERCISE-RELATED CONSTRUCTION STANDARD OPERATING PROCEDURES (20 June 2001).

(1) If a military department expects to spend more than $100,000 for temporary or permanent construction during a proposed exercise involving U.S. personnel, the SECDEF must notify the appropriate committees of Congress of the plans and scope of the exercise. AR 415-32, ¶ 3-11d.

(2) The SECDEF must provide this notice 30 days before the start of the exercise.

b. Exercise-Related UMMC Projects Coordinated or Directed by the Joint Chiefs of Staff (JCS) Outside the U.S.


(2) General Rule. The Secretary of a military department may not use O&M funds to finance exercise-related UMMC projects coordinated or directed by the JCS outside the U.S.
(3) Exception. The Secretary of a military department may arguably use O&M funds to finance minor and/or temporary structures or any structures that are removed completely at the end of an exercise (e.g., tent platforms, field latrines, shelters, range targets, installed relocatable structures, etc.). See Hon. Bill Alexander, supra (noting that the “temporary structure” exception is extremely limited in scope). But see AR 415-32, ¶ 3-5c (stating that “the Army may use [O&M] funds for structures that are of a minor or temporary nature that are completely removed at the end of an exercise, except when the exercise-related construction is JCS directed or coordinated outside the United States”).


a. On 22 February 2000, the Army Deputy General Counsel (Ethics and Fiscal) issued an opinion stating that the Army should use O&M funds to build structures during combat and contingency operations if the structures “are clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations.” See Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000) (a/k/a “the Reres Doctrine”). To qualify for this Combat and Contingency Exception, the opinion stated the project must:

(1) be clearly intended to meet a temporary operational requirement;

(2) be intended to facilitate combat or contingency operations; and

(3) not be used for the purpose of satisfying requirements of a permanent nature at the conclusion of combat or contingency operations (i.e., follow-on operations, future exercises).
b. On 27 February 2003, the Under Secretary of Defense (Comptroller), issued a policy memorandum clarifying DoD’s position on the use of O&M funds for construction in support of contingency missions. See Memorandum, DoD Deputy General Counsel (Fiscal), Subject: Availability of Operation and Maintenance Appropriations for Construction, (February 27, 2003). The memorandum authorizes the use of O&M funds for such construction where:

(1) the construction is necessary to meet an urgent military operational requirement of a temporary nature;

(2) the construction will not be carried out with respect to a military installation as defined under 10 U.S.C. 2801; and,

(3) the United States has no intention to use the construction after the operational requirement has been satisfied.


(1) Section 1901 of the supplemental appropriation authorized the Secretary of Defense to transfer up to $150 million of funds appropriated in the supplemental act to carry out military construction projects not otherwise authorized by law. Such funds would then be available to DoD pursuant to the Secretary’s authority to carry out contingency construction under 10 U.S.C. § 2804.

(2) Section 1901 clarified the definition of “military installation” to exclude projects that would previously have been permitted under the Under Secretary’s 27 February 2003 memorandum. “Military Installation” includes not only buildings, structures & real property improvements under US operational control, but also, any building, structure or real property improvement to be used by the Armed Forces, regardless of whether such use is anticipated to be temporary or of longer duration.
The conference report accompanying the supplemental appropriation specifically rejected the policy articulated in the Under Secretary’s 27 February 2003 memorandum, and insisted the Secretary of Defense use his authority pursuant to 10 U.S.C. § 2804 to carry out contingency related construction in the future.


(1) Section 1301 of the act provided “temporary authority” for the use of O&M funds for military construction projects during FY 04 where the Secretary of Defense determined:

(a) the construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of Operation Iraqi Freedom or the Global War on Terrorism;

(b) the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence;

(c) the United States has no intention of using the construction after the operational requirements have been satisfied; and,

(d) the level of construction is the minimum necessary to meet the temporary operational requirements.


(1) Within seven days of when funds are first obligated, Secretary of Defense must submit detailed notice of the project to the congressional committees.

(2) Total cost of projects under this authority was limited to $200 million in FY04.

(3) **Important:** The statute provides that this authority and the authority of 10 U.S.C. § 2805 are the only legal authorities to use O&M for construction projects.

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i. Section 2801 of the National Defense Authorization Act for Fiscal Year 2008, supra., 122 Stat. at 538, extended this authority through Fiscal Year 2008, and further provided:

(1) Notification to the pertinent Congressional committees and a 10-day waiting period for unspecified overseas minor military construction projects with an estimated cost of more than the amounts set forth in 10 U.S.C. § 2805(c) ($750,000); and

(2) The total cost of projects under this authority in Fiscal Year 2008 may not exceed $200 Million.

8. Other Military Construction Authorities.

a. Emergency Construction Projects. 10 U.S.C. § 2803. See DoD Dir. 4270.5 (Feb. 12, 2005); AR 420-1, ¶ 4-9b(2); see also DoD FMR, Vol. 3, Chs. 7 and 17.

b. Contingency Construction Projects. 10 U.S.C. § 2804. See DoD Dir. 4270.5; AR 420-1, ¶ 4-9b(6); see also DoD FMR, Vol. 3, Ch. 17.

c. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DoD Dir. 4270.5; AR 420-1, ¶ 4-9b(7); see also DoD FMR, Vol. 3, Ch. 17.

10. Maintenance and Repair Projects.

a. Maintenance and repair projects are not construction. See AR 420-1, ¶ 4-17b. Therefore, maintenance and repair projects are not subject to the $750,000 O&M limitation on construction. See 10 U.S.C. § 2811(a) (specifically permitting the Secretary of a military department to use O&M funds to carry out repair projects for “an entire single-purpose facility or one or more functional areas of a multipurpose facility”). But see 10 U.S.C. § 2811 (requiring secretarial approval if the estimated cost of the project exceeds $5 million and congressional notification if the estimated cost of the project exceeds $10 million).

b. Maintenance. AR 420-1, ¶ 5-31a, and Glossary, Sec. II, defines “preventive maintenance” as the “systematic care, servicing, and inspection of equipment, utility plants and systems, buildings and structures, and grounds facilities for the purpose of detecting and correcting incipient failures and accomplishing minor maintenance.” It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). See DA Pam 420-11, Project Definition and Work Classification (Mar. 18, 2010), ¶ 1-6.

c. Repair.

(1) Statutory Definition. 10 U.S.C. § 2811(e). A “repair project” is defined as a project to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

(2) “New” DoD Definition. DoD FMR, Vol. 2B, Ch. 8, ¶ 080105 (December 2010 2007). The DoD FMR defines “Sustainment” to mean “the maintenance and repair activities necessary to keep an inventory of facilities in good working order. It includes regularly scheduled adjustments and inspections, preventive maintenance tasks, and emergency response and service calls for minor repairs. It also includes major repairs and replacement of facility
components (usually accomplished by contract) that are expected to occur periodically throughout the life cycle of facilities. This work includes regular roof replacement, refinishing of wall surfaces, repairing and replacement of heating and cooling systems, replacing tile and carpeting, and similar types of work.”

(a) When repairing a facility, the military department or agency may:

(i) Repair components of the facility by replacement; and

(ii) Use replacements that meet current building standards or code requirements.

(b) The term “repair” includes:

(i) Interior rearrangements that do not effect load-bearing walls; and

(ii) The restoration of an existing facility to: (a) allow for the effective use of existing space; or (b) meet current building standards or code requirements (e.g., accessibility, health, safety, or environmental).

(c) The term “repair” does not include additions, new facilities, and functional conversions. See 10 U.S.C. § 2811(c).

(3) Army Definition. See AR 420-1, ¶ 4-17b, and Glossary, Sec. II. The term “repair” means “to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose.”

(a) The term “repair” includes:

(i) Correcting deficiencies in failed or failing components to meet current building standards or code requirements if the Army can perform the work more economically by performing it concurrently with the restoration of other failed or failing components.
A utility system or component may be considered “failing” if it is energy inefficient or technologically obsolete.

(b) The term “repair” does not include:

(i) Bringing a facility or facility component up to applicable building standards or code requirements when it is not in need of repair;

(ii) Increasing the quantities of components for functional reasons;

(iii) Extending utilities or protective systems to areas not previously served;

(iv) Increasing exterior building dimensions; or

(v) Completely replacing a facility.

IV. AVAILABILITY AS TO TIME.

A. The Time Rule. 31 U.S.C. §§ 1502(a), 1552.

An appropriation is available for obligation for a definite period of time. An agency must obligate an appropriation during its period of availability, or the authority to obligate expires.


1. An agency may obligate appropriated funds only for bona fide needs that arise during the appropriation’s period of availability. See DFAS-IN 37-1, ¶ 080302; see also, Magnavox-Use of Contract Underrun Funds, 83-2 CPD ¶ 401, 1983 WL 27368, at *1, Comp. Gen. No. B-207433 (Sept. 16, 1983) (funds remaining available due to cost underrun not available for obligation to acquire additional quantities of items after expiration of period of availability).
2. Supply Contracts.

a. General Rule. Supplies are the bona fide need of the fiscal year in which the agency needs or consumes them. Thus, supplies with which the agency needs to operate during a given fiscal year are generally the bona fide need of that fiscal year. See Betty F. Leatherman, Dept. of Commerce, 44 Comp. Gen. 695 (1965) (requisition for printing of items to be delivered after expiration of funds not proper where copy for printing not furnished to Government Printing Office until seven months after end of fiscal year).

b. Exceptions. The Comptroller General has held that supplies ordered in one fiscal year for use in a subsequent fiscal year are the bona fide need of the year of purchase if one of two exceptions applies.

(1) The Stock-Level (Inventory) Exception. Supplies ordered to meet authorized stock levels are the bona fide need of the year of purchase, even if the agency does not use them until a subsequent fiscal year. Farmers Home Admin., Purchase of Office Chairs, 73 Comp. Gen. 259, 262 (1994) (chairs ordered and paid with obligations of one fiscal year were a bona fide need even though not delivered until following fiscal year where agency demonstrated continuing need for chairs to furnish office space and to replace stock).

(2) The Lead-Time Exception. If the agency cannot obtain supplies on the open market when it needs them because the time required to order, produce, and deliver the supplies requires the agency to purchase them in a prior fiscal year, the supplies are considered the bona fide need of the year of purchase. See Chairman, United States Atomic Energy Commission, 37 Comp. Gen. 155, 159 (1957) (if material needed in the future for work or processes currently under way cannot be obtained on the open market at the time needed for use, a contract for its delivery when needed may be considered a bona fide need of the fiscal year when the contract is made).
   
a. General Rule. Services are generally the bona fide need of the fiscal year in which they are performed.

b. Exceptions.
   
(1) Severable Service Contracts. A military department or DoD agency may use current year funds to award a severable service contract or a lease of real or personal property (including maintenance of such property when part of the lease agreement) for a period not to exceed 12 months at any time during the fiscal year. 10 U.S.C. § 2410a. Non-military department or agency may use 41 U.S.C § 253l to use current funds to award a severable service contract that crosses fiscal years.

(2) Non-Severable Service Contracts. An agency may use current year funds to award a non-severable service contract (i.e., a contract that seeks a single or unified outcome, product, or report), even if contract performance crosses fiscal years. See DFAS-IN 37-1, Tbl. 8-1; Incremental Funding of U.S. Fish and Wildlife Svc. Research Work Orders, 73 Comp. Gen. 77 (1994) (concluding that work on an environmental impact statement properly crossed fiscal years).

C. “Parking” Funds

1. The “Bona Fide Needs” Rule Still applies.

2. Intra-Governmental Acquisitions: Banking Your Money With GSA / Ordering off of GWACs (Government-wide Acquisition Contracts). (See also Chapter 8, Fiscal Law Deskbook).
   
a. The Economy Act (31 U.S.C. § 1535) provides general authority to transfer funds to another agency to enter into a contract under certain conditions. If the other agency does not award the contract before the end of the fiscal year, the funds expire as provided by 31 § 1535(d) and the funds must be deobligated and returned to the requesting agency. Neither the servicing agency nor the requesting agency can use these funds for new obligations in a subsequent fiscal year.

b. When an authority other than the Economy Act is used for an interagency agreement, the deobligation provisions of...
31 U.S.C. § 1535 may not apply. If your funds were **properly obligated**, they remain obligated and can continue to be used by the other agency. Generally, funds are properly obligated if you have a legitimate separate authority, a written agreement (MOA, order, etc.) with the other agency, a specific requirement, and a Bona Fide Need of the current fiscal year. (GAO provides an excellent explanation of Economy Act and non-Economy Act transactions in National Park Service Soil Surveys, 1999 WL 795735, Comp. Gen. No. B-282601 (Sept. 27, 1999)).

c. Elements of the General Services Administration, e.g., The Federal Systems Integration and Management Center (FEDSIM) and the Federal Computer Acquisition Center (FEDCAC), provide services under separate authority (a designation by the Office of Management and Budget) as an executive agent for government wide acquisitions, and the Information Technology Fund (40 U.S.C. § 757).

d. Many IT managers incorrectly believe that their funds can be “banked” with FEDSIM and FEDCAC for use in future years. This belief is fueled from time-to-time by aggressive, but ill-informed, GSA marketing representatives. The “banked” funds, however, will not be legally obligated if they do not satisfy a Bona Fide Need of the current fiscal year. The GAO has held that it is improper to “bank” an agency’s annual funds with a GSA account to cover future year needs. See Implementation of the Library of Congress FEDLINK Revolving Fund, 2001 WL 1029307, Comp. Gen. No. B-288142 (Sept. 6, 2001); see also Continued Availability of Expired Appropriation for Additional Project Phases, 2001 WL 717355, Comp. Gen. No. B-286929 (Apr. 25, 2001) (expired appropriation not available for additional phases of project even though first phase was funded with that appropriation).

e. Parking funds in the GSA Information Technology Fund was a possible violation of the Antideficiency Act when the United States Army Claims Service (USARCS) provided the GSA fund with $11.6 million of FY 1997 through FY 2000 Operation and Maintenance Funds for procurement of support services and information technology. See OFFICE OF THE INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE, ARMY CLAIMS SERVICE MILITARY INTERDEPARTMENTAL PURCHASE REQUESTS, REPORT NO. D-2002-109 (June 19, 2002) (hereinafter DoD REPORT NO. 02-109).

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(1) Of the $11.6 million, $3.8 million were obligated without defining USARCS’ needs and without establishing a bona fide need for tasks relating to the personnel claims software development project, the torts and affirmative claims software development project, and the acquisitions of hardware and software. $2.8 million of these funds were “banked” in the GSA IT Fund to meet “future” requirements.

(2) The report also found that $8.5 million of the funds were obligated within the last three days of FY 2000. Although USARCS could technically obligate funds at the end of a fiscal year, the obligation should be based on a valid need in the fiscal year of the appropriation in order to comply with the bona fide need rule.¹

V. AVAILABILITY AS TO AMOUNT.

A. Administrative Subdivision of Funds. 31 U.S.C. § 1514(a) requires agencies to control the various subdivisions of appropriations.


2. Agencies subdivide these funds among their subordinate activities.

3. In the Army, the Operating Agency/Major Command (MACOM) generally is the lowest command level at which the FORMAL ADMINISTRATIVE SUBDIVISIONS of funds required by 31 U.S.C. § 1514 are maintained for O&M appropriations. Below the MACOM level, O&M subdivisions generally are informal targets or allowances.

B. Agencies promulgate regulations to control the rate of obligation and expenditure of funds. See, e.g., DoD FMR, Vol. 14, Chap. 1; DFAS-IN Reg. 37-1.

¹ The report also found that USARCS had violated the “purpose” bona fide need rules, in addition to “time” bona fide need rules. Specifically, USARCS incorrectly obligated $3.3 million of O & M funds for the development of personnel claims software and the torts and affirmative claims software instead of research, development, test and evaluation, and/or procurement funds. See DoD REPORT NO. 02-109, pp. 16-18. Last, the report found that USARCS may have exercised better control over administrative costs by partnering with larger Army contracting offices. Id. at pp. 10-11.
VI. THE ANTIDEFICIENCY ACT.

A. Prohibitions. The Antideficiency Act prohibits any government officer or employee from:

1. Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A);

2. Making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds, or amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). 31 U.S.C. § 1517(a);

3. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); or


B. Antideficiency Issues with P-T-A.


a. Common “Purpose” Issues - O&M Funds.

(1) There is a limitation of $750,000 on the use of O&M funds for construction. This is a “per project” limit. See 10 U.S.C. § 2805(c). Exceeding this threshold may be a reportable ADA violation. See DoD FMR, Vol. 14, Ch. 10, ¶ 100205.
b. Analysis. Officials may be able to avoid an Antideficiency violation if:

(1) Proper funds were available at the time of the erroneous obligation;

(2) Proper funds were available continuously from the time of the erroneous obligation; and

(3) Proper funds were available for the agency to correct the erroneous obligation.

Discussion Problem: On 3 August 2011, the Fort Tiefort contracting officer awarded a contract for 100 computers at a total price of $260,000. The funds certified as available were FY 2011 O&M funds. The computers were to be used in a newly completed warehouse complex. Any fiscal issues here?


b. To determine whether a Bona Fide Needs Rule violation is correctable, follow the same analytical process used for correcting a “Purpose Statute” violation.

Discussion Problem: Having some end-of-year money to spend, the Fort Tiefort contracting officer awarded a contract on 15 August 2011 for 50 off-the-shelf computers. The contract price totaled $200,000 and cited FY 2011 O&M funds. The computers were to be used in a warehouse complex that would be completed (i.e., ready for installation of the computers) sometime in November 2011. Any fiscal issues here?
3. Amount. Making or authorizing obligations or expenditures in excess of funds available in an APPROPRIATION, APPORTIONMENTS, or FORMAL ADMINISTRATIVE SUBDIVISIONS violates the Antideficiency Act. 31 U.S.C. §§ 1341 and 1517. To determine whether making or authorizing obligations in excess of funds available in an INFORMAL SUBDIVISION results in an Antideficiency Act violation, follow the same analytical process in determining whether a “Purpose” violation violates the Antideficiency Act.

**Discussion Problem:** On 30 August, Fort Tiefort had $170,000 remaining in its O&M allowance. On 2 September, the contracting officer awarded a contract for $170,000 using these funds, but the Defense Accounting Office recorded this obligation as $120,000. As a result, the Directorate of Resource Management believed erroneously that the Fort still had $50,000 left in the O&M allowance. To avoid losing this money, the contracting officer awarded a contract on 20 September obligating $50,000 in O&M. Is there an ADA violation?


1. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. 31 U.S.C. § 1342(b); Army’s Authority to Accept Svcs. from the American Assoc. of Retired Persons/Natl. Retired Teachers Assoc., 1982 WL 27133, Comp. Gen. No. B-204326, at *1 (Jul. 26, 1982) (voluntary services prohibited except in the emergencies specified; however, gratuitous services permitted).

   a. Voluntary services are those services rendered without a prior contract for compensation or without an advance agreement that the services will be gratuitous. Army’s Authority to Accept Svcs. from the Am. Assoc. of Retired Persons/Natl. Retired Teachers Assoc., supra.


2. Examples of Voluntary Services Authorized by Law

   a. 5 U.S.C. § 593 (members of Administrative Conference of the United States not entitled to pay for service).

   b. 5 U.S.C. § 3111 (student intern programs).
c. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).

d. 10 U.S.C. § 2602 (the President may accept assistance from Red Cross).

e. 10 U.S.C. § 10212 (the SECDEF or a Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).

f. 33 U.S.C. § 569c (the Corps of Engineers may accept voluntary services on civil works projects).

3. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. To Mr. Vernon R. Kruse, 1973 WL 7901, Comp. Gen. No. B-177836 (Apr. 24, 1973) (exception not applied where property owner incurred expenses to remedy damage to land caused by government); Voluntary Svcs.-Towing of Disabled Navy Airplane, 10 Comp. Gen. 248 (1930) (exception not applied for towing of disabled Navy plane where no sudden emergency involving loss of human life or destruction of government property shown); Voluntary Svcs. in Emergencies, 2 Comp. Gen. 799 (1923) (exception applied for costs incurred by private ship in responding to distress call from Army troop transport taking on water). This exception does not include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342.

4. Gratuitous Services Distinguished.

a. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. Army’s Authority to Accept Servs. from the American Assoc. of Retired Persons/Natl. Retired Teachers Assoc., supra.
b. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. Hon. Tom Tauke, 1988 WL 228230, Comp. Gen. No. B-206396 (Nov. 15, 1988); The Agency for Intl. Dev.-Waiver of Compensation Fixed by or Pursuant to Statute, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries or accept less that the salary established by law); Director, Bureau of the Budget, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable where compensation not fixed by law).


1. General. A violation of the Antideficiency Act is a serious matter. Violators are subject to appropriate administrative discipline, including suspension from duty without pay or removal from office. 31 U.S.C. §§ 1349(a), 1518. Knowing and willful violators are subject to a $5,000 fine and imprisonment for two years. 31 U.S.C. §§ 1350, 1519; DoD FMR, Vol. 14, Ch. 9, ¶ 0901.

2. Flash Report. The commander of an Army activity at which a suspected violation occurs must send a flash report through command channels to DA within 15 days of discovery. DFAS-IN 37-1, Ch. 4, ¶ 040204.B.
3. Investigations.

a. The first step is a preliminary review. The commander must appoint an investigating officer (IO), a legal representative, and a subject matter expert to an investigating team. The investigating team conducts the preliminary review to determine whether and Antideficiency Act violation occurred. The results of the preliminary review must reach DA not later than 90 days from the date of discovery of the potential violation. DFAS-IN 37-1, Ch. 4, ¶ 040204.

b. If the preliminary review determines that a violation occurred, a formal investigation must be conducted. The purpose of the formal investigation is to determine the relevant facts and circumstances of the violation – what caused the violation, what are appropriate corrective actions, and who was responsible. DoD FMR, Vol. 14, Ch. 4, ¶ 0401. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within 9 months after the formal investigation began. DoD FMR, Vol. 14, Ch. 7.

c. If the IO believes criminal issues may be involved, the investigation should be suspended immediately and the IO should consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. DoD FMR, Vol. 14, Ch. 5, ¶ 050301E.

d. Prior to taking disciplinary action, the Service must submit a preliminary summary report of violation, with legal counsel coordination, to the OSD (Comptroller) and to DFAS. The OSD (Comptroller) will forward the report to the OSD Deputy General Counsel (Fiscal) for a final determination concerning the occurrence of the ADA violation. Following that review, the report will be returned for final Department/Agency action. Memorandum, Under Secretary of Defense (Comptroller), to Department and Agency Comptrollers; subject: Processing of Antideficiency Act (ADA) Violation Cases (19 November 2003).

4. Reports to the President and Congress. The Secretary of Defense must report violations to the President and Congress. OMB Cir. A-11 § 145.7 DoD FMR, Vol. 14, Ch. 7, ¶0705.
VII. CONCLUSION.
CHAPTER F

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).


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;
   - Be 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). See AR 25-1, para. 6-1d. See also AFI 33-100, para. 3.1, 3.9, and 4.9.

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. Air Force authorizations include: job searching if

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. 6-1f, AR 25-2, para. 4-5r(7). 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 25-1, Army Knowledge Management and Information Technology, para. 6-1f(5)(b). 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).


   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/


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.

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.


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.

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).


VII. CONCLUSION.
CHAPTER G

Relations with Non-Federal Entities: Official and Personal

I. REFERENCES.

A. Use of Government Resources (fiscal and ethical considerations):
   1. 5 C.F.R. 2635.704: Improper use of Government property
   2. 5 C.F.R. 2635.705: Improper 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. 3-305: 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)
   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 Operation 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)

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


**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
   a. JER 3-209: Endorsement
   b. JER 3-211: Support for 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


2. Department of Defense


3. Secretary of Defense Memoranda:


4. Department of the Air Force


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.

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5. Department of the Army


6. Department of the Navy


b. U.S. Marine Corps


E. Army Guidance:


2. AR 210-22, Private Organizations on Department of the Army Installations (October 22, 2001)

3. AR 360-1, The Army Public Affairs Program (9/15/00)
4. AR 600-29, Fund-Raising within the Department of the Army (6/1/01)
5. AR 600-20, Army Command Policy (3/18/08)

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 5720.44B, 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.
   2. JER: http://www.dod.mil/dodgc/defense_ethics/
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, NFESs, 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))

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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. If the NFE provides any travel expenses or other compensation, they must also disclose any reportable amounts. (5 C.F.R. 2634.307)

k. Personnel have no official protection from liability stemming from their 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 2-301b)

(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 rare. See DoD General Counsel memo of May 7, 1999 (http://www.dod.mil/dodgc/defense_ethics/dod_oge/AdvDefContractors.htm) for more specific guidance.

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 boards 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” (3/9/00) 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.

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.

   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.

3. **Implied statutory authority**: 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), cognizant ethics counselors may submit a written request to the DoD General Counsel, through their chain of command, for authorization for such participation.

   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 April 2007, 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)

3. 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.

4. **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. Reference Supplement on Conference Sponsorship and Conference Planning for additional information.

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)).


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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, http://comptroller.defense.gov/fmr/index.html.

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. See, e.g., Chapter 4, Part C of the JFTR.

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) 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 5400.18)
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 2015”) 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 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, \( \text{i.e.}, \) 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 1430.04, Civilian Employee Training) Appropriated (O&M) funds may be used to pay expenses.

2. Such participation must meet the fiscal requirements of agency interest.

3. 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.

4. 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;
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(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)


(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; DoDD 1000.11 (6/9/00))


(17) Combined Federal Campaign (E.O. 12353; 5 C.F.R. part 950; DoDI 5035.01 (3/1/08) (DoD fundraising); DoDI 5035.5 (10/12/99)(CFC overseas))

(18) USO (36 U.S.C. 220101; MOU to Reference I.A.12)

(19) Fire Protection Agreements (42 U.S.C.1856a)


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.

(5) Specific guidance and application for approval by DoD are available on DoD Reserve Affairs website at http://ra.defense.gov/programs/rtm/irt.html.
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: (a) means performing a community relations function by providing speakers -- only because the DoD organization was asked by an NFE, while (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.

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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 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 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 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. Solicitation of Speaking Opportunities: DoD personnel are prohibited from using appropriated funds to solicit speaking invitations from non-Federal entities. Every DoD Appropriations Act includes the restriction: “No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress.” The DoD General Counsel has interpreted this restriction as preventing the Department from asking private parties if they would be interested in hearing a particular DoD speaker, if that party had not previously requested any speakers from the Department. When the private party has issued an open invitation to the Department, however, it is permissible to advise the party at a later date that a speaker is available.

e. Security Review: Speech text and subject matter may require review and clearance for security and policy by proper authority. (E4.3.1.7 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 (1/8/09), 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.

f. Non-public Information: DoD personnel may not disclose non-public or privileged information. (5 C.F.R. 2635.703)

g. 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.

h. 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.

i. **Gifts:** See Deskbook Chapter on Gifts. In a personal capacity, personnel may not accept gifts from prohibited sources or offered because of their official positions. Note that political and non-career appointees incur additional restrictions on gifts for entities or individuals registered as lobbyists (most defense contractors) as signatories to the Administration’s Ethics Pledge. The most common bases for acceptance of gifts by officials not subject to the Ethics Pledge in connection with speaking at NFE events are:

1. **Speaker Memento:** If DoD personnel in their official capacity are offered a gift thanking them for speaking at a non-Federal entity (whether or not a prohibited source) event, they may accept in their personal capacity if the item has little to no intrinsic value, such as a plaque or certificate, and is intended solely for presentation, or is valued at $20 or less. (5 C.F.R. 2635.203(b)(2) & 2635.204(a))

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.** (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.

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(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 $335 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))

j. 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!


k. 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

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1. 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. 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) DoD organizations may accept offers of travel expenses for DoD personnel in the local area pursuant to a DoD gift acceptance statute. (e.g., 10 U.S.C. 2601)

(5) Appropriated funds may also be used for preparation of speeches, materials, and other items involved in participation in the event.

(6) 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 $675 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 ongoing 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 $26,955 in outside earned income (in CY 2011). 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 3-221.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 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 purposes, the $699 would exceed the $675 “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.

Next make a JER 3-211 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 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 H

FUNDRAISING

I. REFERENCES.


C. 5 C.F.R. Part 950, Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations (Combined Federal Campaign)

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, Soliciting, Vending and Debt Collection (General Services Administration building regulations – management of buildings and grounds)

I. 32 C.F.R. Part 234, Conduct on the Pentagon Reservation

J. 5 C.F.R. § 735.201, Employee Responsibilities and Conduct (Standards of conduct: What are the restrictions on gambling?)

K. 41 C.F.R. § 102-74.395, Public Contracts and Property Management (Conduct on Federal Property; What is the policy concerning gambling?)

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)


P. OGE DAEGRAM, DO-94-013, Fundraising Activities (March 22, 1994) (collection of nonmonetary items such as food and clothing does not require OPM permission)

Q. OGE DAEGRAM, DO-09-032, A Reminder about Holiday Gifts & Fundraising (December 10, 2010)

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 Center (19 September 2007 with “Rapid Action Revision” date of 21 Dec 10) [Appendix J, para. J-7 for limitations on fundraising for family readiness groups]
   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, Fundraising and Solicitation of Department of Navy (DON) Personnel, Military and Civilian, in the National Capital Area (NCA) (23 September 1999)
   3. SECNAVINST 5720.44B, Department of the Navy Public Affairs Policy and Regulations (1 November 2005)

T. Marine Corps Guidance:
2. Standard Operating Procedure for Toys for Tots Program

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]


4. Summary of the Fundraising Rules: Information Paper For Air Force (AF) Employees (Military & Civilian) on Support of Fundraising (FR) for or by an Off-Base Non-Federal Organization (NFO):
   http://afmcethics.wpafb.af.mil/updates/index.htm#FUNDRAISING

V. DoD General Counsel:

1. DoD Military Ball Guidance (Participation in Military Balls Sponsored by Non-Federal Entities and Fundraising) (Revised April 14, 2004)

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)

W. Internet Locations of Referenced Materials:


2. JER: http://www.dod.mil/dodge/defense_ethics/


5. Executive Orders:


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).


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

b. “Prior to the 1950’s, on-the-job fundraising in the Federal workplace was an uncontrolled free-for-all.” http://www.opm.gov/cfc/html/cfc_hist.asp

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).

c. 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).

d. 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).

e. 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.

f. 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.

g. 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. 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.

3. 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).

4. 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.

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c. Fundraising events such as car washes, bake sales, and races are permitted by 5 C.F.R. § 950.602. If a special fundraising event is approved, the donor must be given the option of designating a participating organization or the donor must 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, when in compliance with gambling regulations and approved by agency head in accordance with agency regulations. (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. 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...

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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.

5. 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: (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.


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). 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.

   Director, OPM, Special Solicitation for Haitian Earthquake Relief, January 14, 2010 (http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalId=27890)

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)


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) (The Navy
Department permits lotteries in support of Navy-Marine Corps Relief Society,
if in accord with local law and site regulations.)

   (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. 10758 (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. (DO-93-24 (August 25, 1993); 93x19; 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 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;
The DoD component command or organization is able and willing to provide the same support to comparable events sponsored by other similar NFEs; and

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

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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/dodc/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 I

POLITICAL ACTIVITIES

I. REFERENCES


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.


F. 5 C.F.R. Parts 733, 734, Political Activities of Federal Employees


H. DoD 5500.7-R, Joint Ethics Regulation, Chapters 2, 3, 5 & 6.


J. DoD Instruction 1334.01, Wearing of the Uniform, October 26, 2005.
II. CONFLICTS OF POLITICAL INTERESTS

A. General Statutory Restrictions Involving Elections and Political Activities.

1. Limitations on amount of political contributions. 2 U.S.C. § 441a.

3. No contributing to any other Federal employee who is the contributor’s employer or employing authority. 18 U.S.C. § 603.


5. 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.

6. No paying/receiving of pay to vote or withhold vote. 18 U.S.C. § 597.

7. No promising of benefits that depend on an Act of Congress, as reward for political activity. 18 U.S.C. § 600.


B. Political Activities by Members of the Armed Forces (DoD Directive 1344.10)
1. **Applicability.**

a. Most provisions apply only to 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 include retirees and members of the Reserve Components not on active duty including, for paragraph 4.3., members of the National Guard even when in non-Federal status.

c. Includes enlisted members and officers.

2. **Spirit and intent:** “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.” Paragraph 4.1.5.

3. **Permitted political activities** (paragraph 4.1). Very limited “private citizen” standard. A member of the Armed Forces on active duty may:

a. Register, vote, and express personal opinions.

b. Encourage other military members to exercise voting rights.

c. Join a political club (even if partisan) and attend political meetings when not in uniform. (See DoD Instruction 1334.01 (Reference J)).

d. Serve as an election official, if such service is not as a representative of a partisan political party, does not interfere with military duties, is performed while not in uniform, and the Secretary concerned has given approval.
e. Sign petitions for specific legislative action or to place a candidate’s name on the ballot.

f. 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.

g. Make monetary contributions to a political organization, party, or committee.

h. Display normal-sized bumper stickers on one’s private vehicles.

i. 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.

j. Participate fully in the Federal Voting Assistance Program.

4. **Prohibited political activities** (paragraph 4.1.2). A member of the Armed Forces on active duty shall not:

a. 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. (Participation includes more than mere attendance as a spectator).

b. Use official authority to influence or interfere with an election or to solicit votes or contributions for a particular candidate or issue.

c. 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 in paragraph 3.f..
d. Serve in any official capacity with or be a sponsor of a partisan political club.

e. Speak before a partisan political gathering.

f. Participate in any radio, television, or other program or group discussion as an advocate for or against a partisan political party, candidate, or cause.

g. Serve in official capacity/sponsor a partisan political club.

h. Conduct a political opinion survey or distribute partisan political literature.

i. Work for a partisan political committee or candidate during and while closing out a campaign.

j. Solicit or otherwise engage in fundraising activity for any political candidate or cause in Federal offices, facilities, or on military reservations.

k. March or ride in partisan political parades.

l. Display a large partisan political sign, banner, or poster (as distinguished from a bumper sticker) on a private vehicle.

m. Display a large partisan political sign visible to the public at one’s residence on a military installation (even if in privatized housing).

n. Participate in organized efforts to provide voters transportation to polling places if the effort is associated with a partisan political party.

o. Sell tickets for or actively promote partisan political dinners and similar fundraising events.
p. Attend partisan political events as an official representative of the Armed Forces, except as a member of a joint Armed Forces color guard at the opening ceremonies of the national conventions, or as otherwise authorized by the Secretary concerned.

q. Make a campaign contribution to or receive or solicit a campaign contribution from any other member of the Armed Forces on active duty.

5. Subject to any other restrictions in law, a member of the Armed Forces not on active duty may take the actions or participate in the activities permitted in paragraph 4.1.1, and may take the actions or participate in the activities prohibited in paragraph 4.1.2, provided that the member is not in uniform and does not otherwise act in a manner that could reasonably give rise to the inference of official sponsorship, approval, or endorsement.

6. Nonpartisan political activity. Participation in local nonpartisan political activities is allowed, so long as:

   a. Not in uniform.

   b. No use of Government property or resources.

   c. No interference with duty.

   d. No implied Government position or involvement.

7. Nomination or candidacy for covered civil offices set out in paragraph 4.2.1.

   a. 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.

   b. 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.

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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 remain or become a candidate or nominee for covered civil office provided there is no interference with the performance of military duty.

d. 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.

8. Additional limitations on nomination or candidacy and campaigning.

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 political issues or 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.

b. 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:
(a) Take affirmative, documented 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.

(b) 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.

c. 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):

(1) Use or mention their military rank or grade and military service affiliation, but they must clearly indicate their retired or reserve status.

(2) 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.

(a) Use of photographs, drawings, and other similar media formats of the member in uniform cannot be the primary graphic representation in any campaign material.

(b) Depictions of the member in uniform cannot misrepresent their actual performance of duty.

9. Holding and exercising the functions of public office (citations refer to DoDD 1344.10).
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<th>Regular</th>
<th>Reg Ret / RC Less than or = 270</th>
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<tr>
<td>Hold Fed Office</td>
<td>NO (4.4.2.)</td>
<td>YES, provided no interference w/ duty (4.4.3.)</td>
<td>NO (4.4.4.)</td>
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<td>Execute Fed Office</td>
<td>NO (4.4.2.)</td>
<td>YES, provided no interference w/ duty (4.4.3.)</td>
<td>NO (4.4.4.)</td>
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<tr>
<td>Hold non-Fed Office</td>
<td>NO (4.5.2.)</td>
<td>YES, provided no interference w/ duty (4.5.4.)</td>
<td>NO, unless Secretary grants permission after determining no interference w/duty (4.5.3.2.)</td>
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<tr>
<td>Execute non-Fed Office</td>
<td>NO (4.5.2.)</td>
<td>YES, provided no interference w/ duty (4.5.4.)</td>
<td>NO (4.5.3.)</td>
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a. Federal Civil Office.

(1) 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.

(2) 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.

(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 hold and exercise the functions of a covered Federal office provided there is no interference with the performance of military duty.

b. Non-Federal Civil Office.

(1) 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.

(2) A regular member may not hold or exercise the functions of a covered non-Federal office.

(3) 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.

(a) This is a change from the 2004 directive.

(b) The 2004 directive established the presumption that the Service member could hold the office unless the Secretary concerned prohibited it.

(c) 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 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 subparagraph 4.1.2.

C. 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.

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).

c. Coverage by the Act. 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 (NGA). 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.”

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<td><strong>Less Restricted</strong></td>
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<td>Schedule C Appointments</td>
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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;

   (i) 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.

   (ii) 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.  
   (http://www.osc.gov/documents/hatchact/federal/Obama%20email.pdf)

   (iii) 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).
   (http://www.osc.gov/documents/hatchact/federal/2011-04-
(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 – “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. “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; including attending and being active at political rallies and meetings, distributing campaign literature, writing speeches, joining and holding office in a political party or political organization, endorsing a candidate for partisan political office in a political advertisement (may not use DoD title), organizing and working at a fundraising event (no soliciting), serving as a delegate to a state, local or national political party convention and working to get out the vote on Election Day.

b. Participate in election-related activities such as voting, serving as an election judge (for a political party or the city or county) driving voters to a polling place.

D. **Role of U.S. Office of Special Counsel (OSC)**

6. 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.

7. OSC retains exclusive jurisdiction to rule on matters affecting the political activities of civilian personnel.


E. **Policy Guidance for Use of DoD Resources and Visits to Installations by Candidates for Political Office**

i. Guidance is contained in USD(P&R) Memorandum, subject: Policy Guidance for Visits to Installations by Candidates for Political Office, November 4, 2008, as modified by SECDEF Message dated April 27, 2010, DoD Public Affairs Policy Guidance Concerning Political Campaigns and Elections. *(These policies are currently in revision and will be rescinded upon publication of the 2012 DoD Public Affairs Guidance for Political Campaigns and Elections).*

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ii. Applies to political campaigns only: Begins when candidate makes formal announcement, or files with election commission. Campaign ends one week after election.

iii. Command newspapers—no campaign news or partisan discussions, cartoons, editorials, or commentaries.

iv. Access to installation by candidates. See attached USD (P&R) memorandum noted above (Reference K – these policies are currently in revision and will be rescinded upon publication of the 2012 DoD Public Affairs Guidance for Political Campaigns and Elections).

v. Off-installation political events—no support, except joint color guards at national political conventions.

vi. Speeches, articles, and public comments of military personnel in capacity as service representatives must not contain political material.

vii. DoD may not prohibit the use of a military facility for an official polling place for local, State, or Federal elections if that facility was designated as a polling place as of 31 December 2000 or had 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))

b. Lobbying

i. Anti-Lobbying Act, 18 U.S.C. 1913, prohibits grass roots lobbying efforts, i.e. encouraging citizens to contact their elected representatives about an issue. It does not prohibit agency officials expressing personal views regarding merits or deficiencies of legislation.


1. No use of appropriated funds for “publicity or propaganda purposes not authorized by the Congress.”
2. No use of appropriated funds to “influence congressional action on any legislation or appropriation matters pending before the Congress.”

F. CONCLUSION

a. For military personnel, use current version of DoDD 1344.10: February 19, 2008.

b. For civilian personnel, use DEPSECDEF Memorandum “Civilian Employees’ Participation in Political Activities,” May 31, 2006, Section III).

c. “Any activity that may be viewed as directly or indirectly associating the Department of Defense . . . with a partisan political activity or is otherwise contrary to the spirit and intention of [DoDD 1344.10] shall be avoided.” Paragraph 4.1.5.

d. Members and employees shall give full time and attention to performance of official duties.
April 4, 2012

Frequently Asked Questions Regarding Social Media and the Hatch Act

In light of the many questions the Office of Special Counsel (OSC) has received concerning the Hatch Act’s application to social media activity, OSC provides the following guidance on the issue, in the form of frequently asked questions concerning less restricted and further restricted federal employees (see Questions 1 through 8) as well as federal agencies (see Questions 9 through 11).

Note: The following guidance refers primarily to Facebook and Twitter due to the popularity of those sites for social networking, but the advice provided in response to these questions applies equally to all other social media platforms, such as Tumblr, Myspace, LinkedIn, etc. Please contact OSC at hatchact@osc.gov or (800) 854-2824 if you have a question not addressed by the following scenarios.

For Individual, Federal Employees:

1. If a federal employee has listed his official title on his Facebook profile, may he also fill in the "political views" field?

   **Answer (All Employees):** Yes. Although the Hatch Act and its attendant regulations prohibit federal employees from using their official titles while engaging in “political activity,” that is, activity directed toward the success or failure of a political party, partisan candidate, or partisan political group, simply identifying political party affiliation on their social media profiles, which also contains their official title or position, without more, is not "political activity."

2. May a federal employee advocate for or against a political party, partisan political group, or candidate for partisan public office in posts on a blog, Facebook, Twitter, or any other social media platform?

   **Answer (Less Restricted Employees):** Yes, but subject to the following limitations. The Hatch Act does not prohibit federal employees from expressing their opinions concerning partisan political candidates and political parties. However, the Act prohibits them from engaging in “political activity,” that is, activity directed at the success or failure of a political party, partisan political candidate, or partisan political group, while they are on duty or in a building occupied in the discharge of official duties by a federal officer or

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1 This advisory opinion supersedes the social media advisory that was previously published on August 10, 2010, and contains revised responses concerning further restricted employees’ use of social media while maintaining compliance with the Hatch Act (see Questions 2, 3 and 5).
employee. Thus, federal employees are prohibited from advocating for or against a political party, partisan political group, or candidate for partisan public office through a blog, Facebook, Twitter, or any other social media platform while they are on duty or in the federal workplace. However, doing so off duty and away from the federal workplace would not violate the Hatch Act.

The Hatch Act also prohibits federal employees from using their official authority or influence to affect the result of an election. Therefore, although employees may advocate for or against political parties, partisan political groups, or candidates for partisan public office while off duty and away from the federal workplace, they may not refer to their official titles or positions with the government while engaged in such efforts. Note, however, that OSC would not consider the inclusion of a federal employee’s official title or position on one’s social media profile, without more, to be an improper use of his official authority to bolster the statements he posts.

Finally, federal employees are prohibited from soliciting, accepting, or receiving political contributions at any time. Thus, at no time should they suggest or ask anyone to make contributions to a political party, partisan political candidate, or partisan political group. Further, they should not provide links to the contribution page of any of those entities’ websites.

**Answer (Further Restricted Employees):** Yes, but with an added limitation. In addition to the guidelines set forth above for less restricted employees, the Hatch Act prohibits further restricted employees from taking an active part in partisan political management and partisan political campaigns. This means further restricted employees may not engage in political activity on behalf of or in concert with a political party, partisan political group, or candidate for partisan public office. For instance, taking an “active part” would include: distributing material created by a partisan candidate, political party, or partisan political group; speaking at a political rally organized or sponsored by such entities; or serving as a campaign volunteer. It also would include engaging in political activity through a medium sponsored or controlled by a political party, partisan political group, or partisan candidate, such as by endorsing a candidate in a commercial sponsored by one of these entities.

Thus, the Hatch Act would prohibit a further restricted employee from posting or linking to campaign material or the website of a political party, partisan candidate, or partisan political

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group. In addition, a further restricted employee may not “share” or “re-share” these entities’ Facebook pages or any posts on those pages, or “retweet” posts from these entities’ Twitter accounts. OSC views these activities as active participation in partisan political campaigning because the employee is disseminating these entities’ partisan political material.

Moreover, a further restricted employee may not post or comment on these entities’ Facebook pages or “tweet” at their Twitter accounts because OSC would consider such activity to be engaging in political activity through a medium sponsored or controlled by a political party, partisan political group, or partisan candidate.

3. May federal employees who are “friends” with their subordinate employees or have “followers” who are subordinate employees advocate for or against a political party, partisan political group, or candidate for partisan public office on their Facebook pages or Twitter accounts?

Answer (Less Restricted Employees): Yes, but subject to the following guidelines. Although the Hatch Act prohibits using one’s official authority or influence to affect the result of an election, OSC does not view this activity as violating the Hatch Act, provided the supervisor’s statements are directed at all of his Facebook “friends” or Twitter “followers,” e.g., if he posted his opinion concerning a candidate in his Facebook “status” field.

On the other hand, such statements would violate the Hatch Act if the supervisor specifically directed them toward his subordinate employees, or to a subset of friends that includes subordinates, e.g., by sending a Facebook “message” to a subordinate employee, posting a partisan political comment on a subordinate employee’s Facebook “wall,” “direct messaging” a subordinate employee, or sending a “tweet” directed at (containing the twitter handle of) the subordinate employee. In this situation, OSC would view the supervisor’s actions as purposefully targeting subordinates with the message, as opposed to the scenario described above, in which the subordinates see the supervisor’s opinions by chance.

Similar to the guidance above concerning Facebook and Twitter’s messaging functions, a supervisor may never send to subordinate employees an e-mail that is directed at the success or failure of a political party, partisan political group, or partisan candidate. OSC would view such an e-mail as one that purposefully targets subordinates, and thus, it would be an improper use of the supervisor’s official authority or influence to affect the result of an election.

Answer (Further Restricted Employees): Yes. The same answer applies to further restricted employees but subject to the following caveat. Specifically, the Hatch Act prohibits further restricted employees from taking an active part in partisan political management or partisan political campaigns. Thus, the guidance provided to further restricted employees in response to Question 2, above, also applies here.
4. What should a federal employee do if someone posts a comment on the employee’s social media page, such as his Facebook page or Twitter feed, that solicits contributions to a political party, partisan political group, or partisan candidate, posts a link to the contribution webpage for such entities, or otherwise solicits political contributions?

Answer (All Employees): Although the Hatch Act prohibits federal employees from soliciting, accepting, or receiving political contributions at any time, they are not responsible for the acts of a third party, even if the third party’s actions appear on their social media webpage. Thus, if a federal employee’s “friend” posts a link to the contribution page of a political party, partisan candidate, or partisan political group, or otherwise solicits political contributions, the employee does not need to take any action. The same advice applies to any tweets directed at a federal employee. However, the federal employee should not “like,” “share,” or “retweet” the solicitation, or respond in any way that would tend to encourage other readers to donate.

5. May a federal employee become a “friend” of, or “like,” the Facebook page, or “follow” the Twitter account of a political party, partisan political group, or partisan candidate?

Answer (Less Restricted Employees): Yes, but subject to the following limitations. Specifically, the Hatch Act prohibits federal employees from engaging in political activity while on duty or in a federal building. Thus, if they are a “friend” of, or “like,” a political party, partisan political group, or partisan candidate on Facebook, or “follow” such entities on Twitter, they should not engage in activities with respect those entities’ social media accounts that would constitute “political activity” during duty hours or while in the federal workplace. Political activity is defined as any activity directed toward the success or failure of a political party, partisan political group, or candidate for partisan political office. This would include, for example, suggesting that others “like,” “friend,” or “follow” the party, group, or candidate, accepting an invitation to a partisan political event, or forwarding the invitation to others.

In addition, the Hatch Act prohibits federal employees from soliciting, accepting, or receiving political contributions at any time. Thus, if an employee receives an invitation from the party, group, or candidate to a fundraising event via Facebook or Twitter, the employee would be prohibited from sharing that invitation with others.

Answer (Further Restricted Employees): Yes, but with an added limitation. In addition to the guidelines set forth above for less restricted employees, the Hatch Act prohibits further restricted employees from taking an active part in partisan political management and partisan political campaigns. Therefore, the guidance provided to further restricted employees in response to Question 2, above, also applies here.
6. May a federal employee continue to “follow” the official White House Twitter account, or be a “friend” of, or “like,” the official White House Facebook page, after the President has become a candidate for reelection?³

**Answer (All Employees):** Yes, a federal employee may continue to follow the official White House Twitter account, *i.e.*, the account the President uses to comment on his official functions, even after the President begins his reelection campaign. The same is true for being a “friend” of, or “liking” the official White House page on Facebook.

7. May a federal employee use an alias to create a blog, Facebook page or Twitter account and “friend,” “like,” or “follow” a political party, partisan political group, or partisan candidate?

**Answer (All Employees):** Yes; however, be advised that employees remain subject to the Hatch Act even when they act under an alias. Therefore, the advice provided in response to all other questions herein, particularly Questions 1 through 6, apply regardless of whether or not the federal employee is acting under an alias.

8. May a federal employee create a Facebook or Twitter page in his official capacity and advocate for or against a political party, partisan political group, or partisan candidate on the page?

**Answer (All Employees):** No. Any page created in an employee’s official capacity (*e.g.*, a Cabinet member) must be limited to official business matters and remain politically neutral. Thus, the Hatch Act would prohibit a federal employee from posting on his or her official Facebook or Twitter account information directed at the success or failure of a political party, candidate for partisan political office, or partisan political group, including providing links to webpages that contain such information. The Hatch Act also would prohibit a federal employee from becoming a “friend” of, “liking,” or “following” political parties, partisan political campaigns, or partisan political groups on their official social media accounts. Moreover, advocating for or against a political party, partisan group, or partisan candidate on such a page would constitute a violation of the Hatch Act’s prohibition against using one’s official authority to interfere with or affect the result of an election. Therefore, such advocacy must be confined to the employee’s personal Facebook page or Twitter account, subject to the limitations described in response to Questions 2, 3 and 5 above.

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³ Note that neither the Twitter account @barackobama nor the Facebook page found at www.facebook.com/barackobama is an official Presidential account. Both of these are maintained by Obama for America, the 2012 campaign of President Obama. Thus, with respect to the @barackobama Twitter account and the “Barack Obama” Facebook page, please see OSC’s responses to Question 5, “May a federal employee become a ‘friend’ of, or ‘like,’ the Facebook page, or ‘follow’ the Twitter account of a political party, partisan political group, or partisan candidate.”
For Federal Agencies:

9. May a federal agency have a Facebook page or Twitter profile that includes information or links to information concerning a political party, candidate for partisan political office, or partisan political group?

**Answer:** No. An agency's Facebook or Twitter account, like its official website, should only be used to share information about the agency's official business and mission and should remain politically neutral. Thus, the Hatch Act would prohibit an agency from posting on its Facebook or Twitter account information directed at the success or failure of a political party, candidate for partisan political office, or partisan political group, including providing links to webpages that contain such information. The Hatch Act also would prohibit an agency from becoming a “friend” of, “liking,” or “following” political parties, partisan political campaigns, or partisan political groups.

10. May a federal agency's Facebook page or Twitter account include information or links to information concerning the President's reelection campaign?

**Answer:** No. An agency's Facebook page or Twitter account should only be used to share information about the agency's official business and must remain politically neutral. When the President is engaged in campaign activity to support his bid for reelection, he is not acting in his official capacity as the nation’s Chief Executive Officer. Thus, while the agency’s Facebook page or Twitter account may include news about the President when he is acting in his capacity as the Chief Executive, it may not display information or links to information concerning his candidacy for reelection.

11. May a news article about a federal agency official's (e.g., Secretary or Administrator) speech at a political fundraiser or a rally for a partisan political candidate be posted on the agency’s Facebook page or Twitter account?

**Answer:** No. An agency's Facebook page or Twitter account, like its official website, should only be used to share information about the agency's official business and must remain politically neutral. When an agency official engages in political activity, that is, activity directed toward the success or failure of a political party, partisan candidate, or partisan political group, he is acting in his personal, and not his official, capacity. Thus, while the agency may post news concerning the official's efforts to carry out the agency's mission on the agency's Facebook page or Twitter account, an article about the official's speech or attendance at a partisan political event should not be posted on the agency's Facebook page or Twitter account.
CHAPTER J

GIFTS

I. REFERENCES.

A. Statutes:

1. 5 U.S.C. § 7342 (Foreign Gifts and Decorations Act).

2. 31 U.S.C. § 1353 (Acceptance of Travel and Travel Related Expenses from Non-Federal Sources).

3. 10 U.S.C. § 2601, 2608 (General Gift Funds)

4. 5 U.S.C. § 7351 (Gifts to Superiors)

5. 5 U.S.C. § 7353 (Gifts to Federal Employees)

6. 5 U.S.C. § 4111 (Gifts of Training to Federal Civilian Employees)

7. 10 USC 2601a (New Gift Statute)

B. Regulations:

1. Government-wide

   a. 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch (Office of Government Ethics Rules).

   b. 41 C.F.R. Chapter 304, Payment of Travel Expenses from a Non-Federal Source.
II. DOD-WIDE

a. DOD 5500.07-R, Joint Ethics Regulation (JER)  

b. DODD 1005.13, Gifts and Decorations from Foreign Governments, 19 Feb 2002, w/ Ch. 1, Dec. 6, 2002.

   http://www dod mil/dodgc/defense_ethics/resource_library/Contractors_in_Workplace.doc

d. DOD SOCO Holiday Guidance for Federal Personnel, November 19, 2010  

e. DOD General Counsel Information Paper on Gifts Intended Solely for Presentation, November 2003.  

f. DOD SOCO Gifts to Service Members and Their Families from Non-Federal Sources, August 28, 2008.  
   http://www dod mil/dodgc/defense_ethics/2008_Advisories/ADV_0806.htm

   http://www dod mil/dodgc/defense_ethics/2008_Advisories/ADV_0805.htm

2. Army

a. AR 1-100, Gifts and Donations, Nov. 15, 1983.

b. AR 1-101, Gifts for Distribution to Individuals, May 1, 1981.  
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3. Navy


d. Marine Corps Order P5800.16A, w/Ch. 1-5, Marine Corps Manual for Legal Administration (Chapter 12), Aug. 31, 1999.

4. Air Force


III. 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).

IV. GIFTS FROM OUTSIDE SOURCES.

A. Basic 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(a).

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).

   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 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).
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.


   c. 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. Coffee, donuts, and similar modest items of food and refreshments 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;


   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-99-017 (April 26, 1999) http://www.usoge.gov/pages/daeograms/dgr_files/1999/do99017.txt. 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.

   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.

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

f. 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.” OGE DAEOGRAM DO-99-001 (January 5, 1999) http://www.usoge.gov/pages/daeograms/dgr_files/1999/do99001a.txt

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

PRACTICE TIP: Market value should not include private or membership clubs, or limited access purchases.

(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) http://www.usoge.gov/pages/daeograms/dgr_files/2007/do07003.txt

h. Anything accepted by the Government in accordance with agency gift acceptance statutes. Examples include:


(8) Army Specific Gift Statutes:


(9) Navy Specific Gift Statutes:


(c) Gifts to Vessels – 10 U.S.C. § 7221.


(10) Air Force Specific Gift Statutes: None.

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).

**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 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;


**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. Gifts with an aggregate market value in excess of $200 and awards of cash or investment interests require a written determination from agency ethics official that the award is part of an established plan 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. § 1141(a) with agency ethics official determination that timing would not cause reasonable person to question employee's impartiality in a matter affecting the awarding institution;

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

**Gifts**

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(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;

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).

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 is established by Deputy Secretary of Defense Memo dated Oct. 12, 2010. This guidance is discussed in the chapter on political activities in this deskbook.

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.
(a) Since the employee’s participation in the event is part of his official duties, the agency may pay the employee’s travel expenses.

(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 $350 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.”


(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 “integral part of the event” and therefore may not be accepted as part of free attendance. See DoD SOCO Advisory 02-12, Jul. 10, 2002.

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.

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.

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 to the President and Vice President (5 C.F.R. 2635.204(j)).

k. 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 2-202a);

   (2) Educational scholarships and grants for DOD employees or their dependents (JER 2-202b); and

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

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. 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 http://www.usoge.gov/pages/daeograms/dgr_files/1999/do99024.txt

(3) Accept a gift in violation of statute (e.g., 18 U.S.C. §§ 201(b) and 209); 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;

(5) Accept Vendor Promotional Training (i.e., training provided by any person for the purpose of promoting its products or services) contrary to applicable rules governing procurement of supplies and services.

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.

D. Reporting Gifts from Outside Sources. Employees, who file financial disclosure reports, must report travel-related cash reimbursements or other gifts totaling more than $350 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.
V. 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.

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 $350 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.

2. See implementing DOD guidance at DoDD 1005.13 (Gifts and Decorations from Foreign Governments), 19 February 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, ATTN: Ms. Jennifer Brown, Army Gift Program Coordinator, 105 Army Pentagon, Washington D.C. 20310-0105; telephone: 703-697-3067; e-mail: jen.lynn.brown@conus.army.mil. 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 02-04, Feb. 21, 2002, for discussion of retention of personal use items (e.g., watches and jewelry).

4. Calculation of "minimal value" (JER 2-300b).

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. JER provision, 2-300.b.2., which allows individuals to keep some of those gifts with an aggregate of less than minimal value, is superseded.

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.
VI. 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 are personal friends who 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 any 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 consumed at the office;

   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 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. See DOD SOCO Advisory 09-03 (March 23, 2009).

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 2-203b.

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;

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 and 5.6.

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 4-100d; *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 and 6.6;

L. **Format for obtaining approval.** The website of the DOD Standards of Conduct Office (DoD-SOCO) and Army Standards of Conduct Office have Fact Sheets 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: [https://www.jagcnet.army.mil](https://www.jagcnet.army.mil) (Click on Ethics Tab, Click on Library, Click on Travel and Forms Tab) and www.dod.mil/dodge/defense_ethics/resource_library/1353_FactSheet_Memo_Revised.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. The SF 326 and 326A are available on the website of the GSA at: www.gsa.gov/forms/pdf_files/sf326.pdf

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 are considered gifts to the Federal agency, not gifts to the individual employee. Thus, such payments to the employee (or the employee's spouse) do not have to be reported on the employee's Public Financial Disclosure Report (SF 278) or Confidential Financial Disclosure Report (OGE Form 450). 41 C.F.R. § 304-3.17.


VIII. 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 $350. 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).
C. The Foreign Gifts and Decorations Act is implemented by DOD Directive 1005.13, Gifts and Decorations from Foreign Governments, 19 Feb 02.

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, 16 Feb 05, 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.

**IX. OTHER GIFTS TO THE AGENCY**

A. 10 U.S.C. § 2601

B. (a) authorizes the Secretary concerned (including the Secretary of Defense) to “…accept, hold, administer, and spend any gift, devise, or bequest of real or personal property, 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 his department.” [Underline emphasis added].

1. 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.

2. 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.

C. 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.


1. May not be accepted if gift would violate any prohibition or limitation otherwise applicable.

2. May not be accepted if conditions of gift are inconsistent with applicable law or regulations.

3. 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.

4. 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.

E. For purposes of Federal estate, gift, or income taxes, gifts are considered to be gifts to the United States.

F. 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.

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. Voluntary services as a member of a funeral honors detail.

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 or 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


5. Army Guidance:
   b. AR 1-101, Gifts for Distribution to Soldiers:
      (1) Not applicable to 10 U.S.C. §§ 2601 and 1588.
      (2) Specific limitation for gifts that promote health, comfort, convenience, and morale, e.g. reading materials and writing paper

X. 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:

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, 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.

XI. GIFTS TO INJURED OR WOUNDED SOLDIERS - NATIONAL DEFENSE APPROPRIATIONS ACT FOR FISCAL YEAR 2006, P.L. 109-148, § 8127

A. JER, Para. 3-400, Personal Acceptance of Gifts from Non-Federal Sources

1. Limitation $350/$1000 per source per calendar year

2. Retroactive to Sept 11, 2001

3. Must be unsolicited

4. Covered DoD employees – AD Soldiers with combat-related wounds or illnesses.

B. Joint Ethics Regulation Section 4 (see below):

SECTION 4. PERSONAL ACCEPTANCE OF GIFTS FROM NON-FEDERAL ENTITIES

3-400. Acceptance of Gifts by Injured or Ill Service Members and Their Family Members. Pursuant to the authority at section 8127 of P.L. 109-148, the FY 2006 Defense Appropriations Act,(reference (dd)), and notwithstanding 5 U.S.C. 7353 (reference (b)), 5 C.F.R. 2635 (reference (h)), and paragraph 1-300.b., above, covered DoD employees, described at subsection 3-401, below, and the family members of such employees may accept unsolicited gifts from non-Federal entities subject to the following limitations:

a. This authority does not apply to gifts from foreign governments and their agents.

b. This authority does not apply to gifts that

(1) are accepted in return for being influenced in the performance of an official act;
(2) are solicited or coerced; or
(3) are accepted in violation of any other statute, including 18 U.S.C. sections 201(b) and 209, (reference (i)).

c. For gifts with an aggregate market value in excess of "minimal value," as adjusted by the General Services Administration in accordance with 41 C.F.R. 102-42.10 (reference (ee)), per source per occasion, or with an aggregate market value exceeding $1000 received from any one source under the authority of this subsection in a calendar year, an agency ethics official must make a written determination that:

(1) The gift is not offered in a manner that specifically discriminates among covered DoD employees merely on the basis of type of official responsibility or of favoring those of higher rank or rate of pay;

(2) The donor does not have interests that may be affected substantially by the performance or nonperformance of the covered DoD employee’s official duties; and

(3) Acceptance would not cause a reasonable person with knowledge of the relevant facts to question the integrity of DoD’s programs or operations.

An agency ethics official may issue a blanket determination to cover all or any category of gifts or all or any group of DoD covered employees.

3-401. Covered DoD Employees. For purposes of this section, covered DoD employees are

a. active duty members of the Armed Forces, as described at paragraphs 1-211.b, 1-211.c., 1-211.d., and 1-211.e. for the purpose of title 10 authority, above, who

b. while on active duty on or after September 11, 2001 incurred an illness or injury as described below:

(1) as described in 10 U.S.C. 1413a(e)(2), reference (f), currently

   (a) as a direct result of armed conflict;
   (b) while engaged in hazardous service;
   (c) in the performance of duty under conditions simulating war; or
   (d) through an instrumentality of war; or
(2) in an operation or area designated by the Secretary of Defense as a combat operation or a combat zone. The Secretary designates the following as combat zones under this subparagraph.

(a) any area designated by the President of the United States by Executive Order as an area in which U.S. Armed Forces are engaging or have engaged in combat;

(b) any area designated for treatment as a combat zone by Public Law, including P.L. 104-117, reference (ff)); and

(c) any area certified by the Secretary of Defense for combat zone tax benefits for directly supporting military operations in combat zones.

3-402. Definitions


b. Gift. Gift shall have the meaning at 5 C.F.R. 2635.203(b), (reference (h)).

c. Market value. Market value shall have the meaning at 5 C.F.R. 2635.203(c), (reference (h)).

3-403. Acceptance of Gifts by Certain Reserve and National Guard Members. Notwithstanding paragraph 1-300.b., above, enlisted members of the Reserve on inactive duty for training and all members of the National Guard, defined at paragraph 1-211.e. and subsection 1-233., above, who meet the criteria at subsection 3-401.b., above, and family members of such members, may accept unsolicited gifts from non-Federal entities in accordance with paragraph 3-400, above.

3-404. Retroactivity. This section shall apply to acceptance of such gifts beginning on September 11, 2001.

3-405. Delegation. To the extent not included in current delegations, DoD DAEOs and Deputy DAEOs may delegate authority to make the written determination required by paragraph 3-400.b., above, to any agency ethics official, including such officials outside the DoD Component, located at the duty station of covered DoD employees or cognizant of the conditions and circumstances of the covered DoD employees and the offered gifts.
3-406. Relationship to illegal gratuities statute. Unless accepted in violation of subparagraph 400.b.(1), above, a gift accepted under this section shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B), reference (i)).

XI. NEW GIFT STATUTE

A. Sec. 591 of the FY 2011 NDAA codified sec. 8127 of the FY 2006 Defense Appropriations Act, the statutory authority for paragraph 3-400 of the JER, at 10 USC 2601a. It added civilian employees, their family members, and survivors of members or civilian employees to the list of covered personnel. Survivors were added to the extent they are also Federal personnel and subject to the gift rules. It made changes to the earlier language, mainly deleting combat operation and combat zone to define covered DoD personnel, but added “other circumstances” warranting analogous treatment, as determined by each Service Secretary.

B. Bottom line: NOTHING CHANGES until implementing regulations are issued.

XII. FREQUENT FLYER MILES.


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. JFTR para. U1200A; JTR para. C1200A; 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.

XIII. 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.*
XIV. 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 to 41 CFR Sec. 301-10.123. Federal employees may use their personal frequent flyer bonuses to upgrade to first class or business class while on official travel. See note 41 CFR Section 301.123, Air Force Instruction 24-101, Passenger Movement, 27 Oct 04, 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.


XV. THE INVOLUNTARILY BUMP.


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).
XVI. 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. JFTR para. U1200B1; JTR para. C1200B1; JER para. 4-202d; Matter of Charles E. Armer, 59 Comp. Gen. 203, 206 (1980); Matter of Edmund 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.). JFTR para. U1200B1; JTR para. C1200B1.

C. Reporting the compensation. If the employee is required to file either a Public Financial Disclosure Report (OGE Form 278) 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, in Part I of the form.

XVII. BENEFITS RESULTING FROM INCONVENIENCE TO THE EMPLOYEE WHO IS ON OFFICIAL TRAVEL.

A. In Matter of Elizabeth Duplantier – Use of Bonus Lodging Certificates, 67 Comp. Gen. 328 (1988) (B-228696), an employee who was traveling on official business was denied lodging the first night at the selected hotel due to overbooking. The hotel gave the employee a bonus lodging certificate for one free night of lodging. The Comptroller General ruled that the certificate belongs to the Government because of the general rule that employees are required to account for any gift, gratuity, or benefit received from private sources incident to the performance of official duty.
B. In Matter of Dwight Davis, Comp. Gen. Dec. B-257704, Nov. 14, 1994, an employee who was traveling on official business experienced a 5-hour flight delay, and the airline gave him a complimentary round-trip ticket as a "gesture of concern." The Comptroller General ruled that the airline ticket is Government property and may not be retained by the employee. The decision states that an involuntary delay is analogous to an involuntary “bump” from a flight. Note: The decision does not indicate whether the employee made a complaint to the airline about the flight delay. In Matter of Deborah E. White, GSBCA 13879-TRAV, 97-2 BCA 29,213, September 8, 1997, an Air Force employee was traveling on official business. The hotel where she stayed was less than satisfactory. The room had a slow plumbing leak that resulted in a damp odor and growth of airborne mold spores. The employee paid her bill in full, but complained while departing the hotel. The employee submitted a travel voucher seeking reimbursement for the maximum allowable lodging expenses (the actual rate paid by the employee exceeded the allowable rate). Sometime thereafter, the hotel manager and the employee agreed to reduce the room rate by approximately 50% because of the unsatisfactory condition of the room. The reduction was effected by a credit to the employee's American Express account. When the Air Force learned of the credit, it recouped the difference between what it paid and the amount actually paid by the employee (i.e., the regular rate less the credit). The GSBCA upheld the Air Force recoupment. This case is on the web at: http://www.gsbca.gsa.gov/travel/t138790.txt

C. Luggage. An employee may keep payments received from a commercial carrier as compensation for accompanied baggage that has been either lost or delayed by the carrier. JTR para. C1200(C); JFTR para. U1200(C).

XVIII. 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.

XIX. MISCELLANEOUS ISSUES.


B. **Life insurance proceeds.** In Comp. Gen. Dec. B-222234, Dec. 9, 1986, the Comptroller General ruled that the Government may enter into contracts for travel management services that provide incidental life insurance benefits for Federal employees who travel on official business and purchase their tickets through the contractor-travel agent. The Comptroller General also ruled that life insurance benefits paid under these circumstances may be accepted by the employee’s beneficiaries or estate.

C. **Use of appropriated funds to purchase membership in a travel club.** There are three authorities on this issue.

1. In 57 Comp. Gen. 526 (1978) (B-103315), the Comptroller General ruled that individual travel club memberships in the name of a Federal agency and for the exclusive use of named Federal employees could be purchased with appropriated funds, where the purchases will result in the payment of lower overall transportation costs by the Government.

2. 41 C.F.R. § 301-53.3 is a GSA regulation that is written in the plain-English, question-and-answer format. Section 301-53.3 reads as follows: “Question. May my agency reimburse membership fees in a frequent traveler program? Answer. Yes, if the benefits of membership are expected to exceed the cost of membership.”
3. In Matter of Donald Leavitt, GSBCA 15062-TRAV, Sep. 28, 1999, the General Services Board of Contract Appeals (GSBCA) ruled that an Army employee was entitled to be reimbursed for the cost of joining a travel club, where the cost of joining the club was $40.00, and the employee, as a member of the club, was able to obtain a discounted fare that was $378.00 less than the contract carrier’s fare for the travel. This case is on the web at: http://www.gsa.gov/gsbca/travel/t1506228.txt
CHAPTER K

TRAVEL AND TRANSPORTATION

I. REFERENCES

A. Government/Executive Branch


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.


7. Federal Acquisition Regulation¹

8. 41 C.F.R. Part 102-34 (Motor Vehicle Management)


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 Defense (and Higher Executive Agencies)


C. Joint Publications

The Joint Federal Travel Regulation (JFTR) (Uniformed Service Members) and Joint Travel Regulation (JTR) (Department of Defense Civilian Personnel).  

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 Army\(^5\)


2. AR 58-1, Management, Acquisition, and Use of Administrative Use Motor Vehicles (10 August 2004).

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 (15 September 2000).

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 (1 September 1995).

2. AFPD 24-3, Operation, Maintenance, and Use of Transportation Vehicles and Equipment (6 September 2006).


F. Department of the Navy

1. OPNAVINST 4610.8F, Transportation and Traffic Management (19 March 2007) (implementing DoDD 4500.9E).

\(^5\) All listed Army regulations are available at http://www.apd.army.mil/.
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.


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.

Rank, grade, or position alone is not sufficient to justify support of MilAir requests.

-- 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 (when acting as the Chairman)

c. The following officials are “required use” passengers only for official travel.

(1) Vice Chairman of the Joint Chiefs of Staff (unless acting as the Chairman, in which case, a “required use” passenger for both official and unofficial travel)

(2) The Secretaries of the Military Departments;

(3) Chiefs of the Military Services;

(4) Commander, International Security Assistance Force – Afghanistan (US Only);

(5) Commander, Multi-National Force – Iraq;

(6) Commander, United States Forces Korea;

(7) Commanders of the Combatant Commands;

(8) Under Secretary of Defense for Acquisition, Technology, and Logistics;

(9) Under Secretary of Defense for Intelligence;

(10) Under Secretary of Defense for Policy.

d. Within the Army, required use is not restricted to only the Secretary of the Army and the Chief of Staff, Army. The SecArmy Travel Policy makes 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.

   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. 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/JFTR, 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/JFTR, 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 basis 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

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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.
(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.

(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/JFTR, 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/JFTR, 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/JFTR, 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/JFTR, 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:

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OFFICIAL AGENCY LETTERHEAD

TO: Participating Vendor
SUBJECT: Official Travel of Government Contractor

(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.

SIGNATURE,
Title and telephone number of Contracting Officer
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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.

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

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

⁸ Travel and Transportation 10th Ethics Counselor's Course K-15
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.

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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.

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2. Other Contractors as an Exception to Policy may be Approved by:


   (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) \textbf{Army}. Commanders, and heads of activities in the grade of major general, or above.

   (b) \textbf{Navy}. Type Commanders as designated by the Chief of Naval Operations.

   (c) \textbf{Air Force}. Major Commanders.

   (d) \textbf{Marine Corps}. Authority remains with the commandant, unless specifically delegated to individual commanders in the grade of brigadier general, or above.

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\(^9\) Within the Army Secretariat, this authority is delegated to the Under Secretary of the Army.
(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/JFTR 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 air accommodations, the employee may request and be authorized to use first-class air accommodations.
accommodations, and the employee certifies this circumstance on the travel voucher.\footnote{This is the only instance where first-class accommodations may be used without prior approval.}

(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;
(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/JFTR 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 JFTR/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)


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 (JFTR¶ U3200 and JTR¶ C2050).

(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.


   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.)


(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).


(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:


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 Colombia, 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 home or place of duty and commercial or military terminals only when:

(a) Used by principal diplomatic officials or the Secretary of the Army or the Chief of Staff, Army.

(b) Required for emergencies or for security.

(c) Terminals are located where other means of transportation are not available or cannot meet mission requirements.

(d) Justified by cost analysis and approved by the Secretary of the Army.

(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);
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: (JFTR, para. U3200 A; JTR, para. C2050; 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 C2208.C.2 and JFTR U3135.C.2.

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). Chufo 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


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 L
OUTSIDE ACTIVITIES

I. REFERENCES

A. 5 U.S.C. § 5515 (jury duty), § 5534a (military member dual employment and pay during terminal leave), § 5536 (extra pay), Appx § 501 (outside earned income)

B. 10 U.S.C. § 974 (Military musical units and musicians: performance policies; restriction on performance in competition with local civilian musicians) § 1060 (service with newly democratic nations)

C. 18 U.S.C. § 201-209 (compensation for representational services), § 205 (3rd party agent in front of Government), § 219 (foreign principals), § 798 (disclosure of classified info), § 1905 (disclosure of confidential info)

D. Executive Order 12674, as modified by Executive Order 12731 (outside earned income)

E. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, Subparts G (Misuse of Position) & H (Outside Activities)

F. Limitations on Outside Earned Income, Employment and Affiliations for Certain Noncareer Employees, 5 C.F.R. Part 2636, Subpart C

G. 48 C.F.R. § 3.601 (no contracts to Government employees)

H. DoD Instruction 5525.08 (military jury duty on state and local juries)

I. DoD Instruction 5410.20 (commercial use of DoD material)

J. DoD Financial Management Regulation, Volume 8, Chapter 5, § 0517 (civilian jury duty)

II. INTRODUCTION

A. This chapter overviews the rules affecting outside activities, such as working, teaching, writing, and speaking by active duty and civilian DoD personnel. The first section discusses outside employment. The second section discusses some “special case” paid and unpaid outside activities. The third section cites and briefly discusses several miscellaneous provisions concerning other outside activities.

B. This chapter does not discuss certain outside activities that are covered elsewhere in this publication. In particular, it does not discuss elected positions with federal, state, and local government, positions and roles with more traditional non-federal entities, procurement integrity, or post-government employment. When reviewing outside activities, please cross-reference these chapters as applicable.

C. The general rule for outside activities is permissive: Executive branch employees, subject to some limitations, are allowed to participate in outside activities. An employee may not have outside employment or be involved in an outside activity that conflicts with the official duties of the employee's position. An activity conflicts with official duties --

- if it is prohibited by statute or by the regulations of the employee's agency, or
- if the activity would require the employee to be disqualified from matters so central to the performance of the employee's official duties as to materially impair the employee's ability to carry out those duties.

Employees of some agencies may be required by their agency's own supplemental conduct regulations to obtain prior approval before engaging in certain outside employment or activities. These details follow.
III. OUTSIDE EMPLOYMENT

A. Overview: This section discusses the rules affecting full and part-time employment for DoD personnel.

NOTE: PAS Officials are generally barred by SASC and White House policy from participating in outside employment.

B. Federal Government Positions:

1. Active Duty Military Members may not accept compensation for holding another Federal position because their military duties make them “on call” 24 hours a day. JER 5-404. Military personnel on terminal leave pending separation under honorable conditions may accept a Federal position. 5 U.S.C. § 5534a.

2. Civilian Employees may hold separate and distinct federal positions. 5 U.S.C. § 5536. JER § 5-405.

3. DoD personnel may receive retirement and/or similar payment from a former employer, even if the former employer is the Federal Government. JER 5-404.

4. No compensation for official acts or duties. Federal employees may not receive compensation for performing official acts or completing their official duties from any source other than their Federal Government employer. JER 5-404 (But see Gifts) Further, 18 USC 209, a criminal provision, prohibits employees from receiving any salary or contribution to or supplementation of salary from any source other than the United States as compensation for services as a government employee.

5. For senior officials serving in 10 USC 601 positions (O-9 and O-10 level) special rules apply. See the SASC guidance contained at the end of this outline.

C. Outside Positions / Self-Employed: DoD personnel may engage in outside employment or be self-employed outside the work place. 5 CFR 2635.801-804. There are, however, several limitations that should be kept in mind.
1. No interference with official duties. Generally, you can not be on both sides of the equation.

(a) Interference Generally. A DoD employee may not engage in outside activities that interfere with his performance of military duties, are prohibited by statute or regulation, or would require the employee’s disqualification from matters critical to the office. 5 C.F.R. § 2635.802; JER § 5-406. (Cross reference with the Procurement Integrity Act.)

(b) Security and Agency Specific Requirements. Agencies may require employees to seek approval for outside employment and may prohibit such activities if they will detract from readiness or pose a security risk. This authority is derived from the authority of the Secretary of Defense, under title 10, United States Code, to maintain military readiness and must be tied to a legitimate military mission requirement. JER § 2-303.

(c) Financial Disclosure Filers. Within DoD, financial disclosure filers 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 regulation. 5 C.F.R. § 2635.803; JER §§ 2-206, 3-306, Senate Armed Forces Committee guidance on specific restrictions for 09/010 Officers (see memo at conclusion of outline).

3. No representing to the Federal Government. Note – these are criminal provisions. Employees may not act as agent or attorney for anyone before any agency 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. § 205. Other than in the performance of official duties, employees may not receive compensation for representational services rendered either personally or by another. 18 U.S.C. § 203. Further, 18 USC 208 bars any employee from participating personally and substantially in an official capacity in any particular Government matter that would have a direct and predictable effect on his own (or imputed) financial interests. (Cross-reference with discussion on Conflicts of Interest in chapter and note references in 18 U.S.C. § 201 - 209 and 5 C.F.R. 2637.)

4. Appearance of Impropriety. In addition to the limitations described above, Federal Employees are prohibited from taking positions when to do so would create an appearance of a conflict of interest with his or her federal employment. 5 C.F.R 2635.802
III. SPECIAL CASE PAID / UNPAID OUTSIDE ACTIVITIES

A. **Teaching, Speaking, or Writing Related to Official Duties.** A Government employee may not use his public office for private gain. There are several common pitfalls and things to Reflecting this restriction is 5 C.F.R. § 2635.807, which precludes the acceptance of compensation from a non-Federal source for teaching, speaking, or writing when:

1. The activity is undertaken as part of the employee’s official duties; or

2. The invitation was extended because of the employee’s official position rather than his expertise; or

3. The invitation is from a person whose interest may be affected by the employee’s official duties; or

4. The presentation is based on nonpublic information; or

5. The topic deals with the employee’s current duties or those during the previous year, or the topic deals with a policy, program, or operation of the employee’s agency;

6. “Compensation” is defined at 5 CFR 2635.807(a)(2)(iii). It does not include gifts that could be accepted from prohibited sources under 5 C.F.R. § 2635.204, free attendance at the event in which the speaking or teaching takes place, or publications that provide a record of the activity. When an employee who is required to file a financial disclosure report is authorized to and does accept travel expenses from a source other than the United States Government, travel and travel reimbursements must be reported on the financial disclosure report if the travel or travel reimbursements exceed $335. 5 C.F.R. § 2635.807(a)(2)(iii).

7. Political Appointees have special rules limiting their outside earned income. These restrictions are contained in 5 C.F.R. 2636.304, which places a 15 percent limitation on outside earned income of PAS officials ($26,550 for CY10).

8. Service as an expert witness. 5 C.F.R. 2635.805 provides the general rule that prohibits federal employees from serving as an expert witnesses, with our without compensation, in any court proceeding in which the United States is a party, or has a direct interest. This section places additional restrictions on certain types of special government employees. This section also contains some exceptions which usually require significant coordination between the individual, the designated agency ethics official, and the party representing the United States (typically DOJ).
9. Exceptions:

(a) The prohibition on accepting compensation does not apply to matters within the employee’s discipline or expertise based on education or experience. 5 C.F.R. § 2635.807(a)(2)(i)(E) note. It applies differently to non-career employees and special government employees than it does to other Executive Branch employees.

(b) As an exception, an employee may accept compensation for teaching a course of the regularly established curriculum of an elementary school, high school, or institution of higher education. 5 C.F.R § 2635.807(a)(3).

(c) 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; Secretary of the Navy Instruction 5720.44B, Department of the Navy Public Affairs Policy and Regulations, 1 Nov 05, Chapter 2; Air Force Instruction 35-101, Public Affairs Policies and Procedures, 29 Nov 05, Chapter 15.

10. Disclaimers. DoD employees who permit the use of their military grade, title, or position while teaching, speaking, or writing regarding DoD policies, programs, or operations shall indicate that the views are those of the speaker and not DoD or its components. Where a disclaimer is required for a writing, the disclaimer must be prominently printed in the presentation. Where a disclaimer is required for a speech, the disclaimer may be given orally at the beginning of the presentation. JER § 2-207.

B. Honoraria. An honorarium is payment to an individual in recognition of a special service for which custom or propriety forbids any fixed price to be set. Honoraria services may include, but are not limited to, speeches, panel participation, reviewing manuscripts, and leading group discussions. The ban on accepting honoraria set out in 5 C.F.R. Part 2636, subpart B (now deleted), was struck down by the Supreme Court in National Treasury Employees Union v. United States, 115 S. Ct. 1003 (1995). The Office of Legal Counsel, Department of Justice, issued an opinion on February 26, 1996, that the honoraria prohibition cannot be enforced against any Government employee. Honoraria may only be accepted, however, if it is not for speaking, teaching, or writing related to official duties.

(1) C. Military Band Members. 10 U.S.C. § 974 places restrictions on all military bands and other musical units from performing in their official capacity when the performance competes with employment of local civilian musicians. However, it does allow military band members and other musical units from performing in their personal capacity regardless of competition with local civilian musicians. 10 U.S.C. § 974, as amended. See paragraph 4.8 of DoDD 5410.18 and Enclosure 8 to DoDI
5410.19. Note that DoDD 5410.18 specifically finds that bands are not appropriate logistical support and may not perform at 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.

D. **Participation in media productions.** The (exceptionally welcome) rise of reality television in the past several years combined with the increased appreciation of our military members’ efforts and sacrifices has resulted in many efforts by various media productions to make one or several of our military members the focus of a reality television life-improvement program (e.g., Extreme Home Make-Over, Pimp My Ride, Underage and Engaged, etc.) These are primarily Public Affairs events; PA will take the lead (with legal support) on production assistance agreements, use of the base, etc. Note that in most cases DoD has determined that the items received by the military member of focus (e.g., the wedding for the engaged minor, etc.) are payment for appearance and participation in the event, in their personal capacity, and not a gift from the source.

E. **Letters of Recommendation.** There are two main issues with respect to Letters of Recommendation: (1) Can the government employee sign the letter of recommendation using his or her official title? And (2) can the government employee put the letter of recommendation on the official stationery of his or her Federal agency?

1. 5 CFR 2635.702(b). [Note: This provision, including the example, applies to all Executive Branch employees.]

   (b) Appearance of governmental sanction. Except as otherwise provided in this part, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another. When teaching, speaking, or writing in a personal capacity, he may refer to his official title or position only as permitted by Sec. 2635.807(b). He may sign a letter of recommendation using his official title only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment or whom he is recommending for Federal employment.

2. It is important to remember that while DoD employees may write a letter of recommendation supporting an employment application, they cannot use their official title and position or DoD letterhead to endorse either their own personal activities, services, or products, or those of another. Furthermore, DoD employees cannot state or imply that DoD or the Government endorses or sanctions their personal activities or those of another.
IV. MISCELLANEOUS PROVISIONS

A. **Use of Nonpublic Information.** Employees may not use nonpublic information to further their own private interests or those of another. 5 C.F.R. § 2635.703. Nonpublic information is information that is not available to the general public. It includes information not releasable under FOIA, protected by Privacy Act, classified (18 U.S.C. § 798, 50 U.S.C. § 783(b)), protected by the procurement integrity law (41 U.S.C. § 423), or protected by the Trade Secrets Act (18 U.S.C. § 1905).

B. **Solicited Sales.** DoD employees shall not make solicited sales to DoD personnel who are junior in rank, grade, or position, or to the family members of such personnel. JER §§ 2-205, 5-409.

1. Includes solicited sales of insurance, stock, mutual funds, real estate, cosmetics, vitamins, or house wares.

2. Does not prohibit sale or lease of employee’s non-commercial property.

3. Does not prohibit commercial sales solicited and made in a retail establishment during off-duty time.

4. Absent coercion or intimidation, sales made because the junior approaches the senior are not prohibited.

5. Note: JER 2-205 and 5-409 have regularly been interpreted to permit "one-time" sales of cars and similar property as well as rental of real estate, etc. Ethics Counselors should take care, however, to avoid advising senior officers to take actions that may create the appearance of fraternization, favoritism, etc. (e.g., the direct rental of property to subordinates, etc.). Best practice of using a rental agent, for example, may avoid situations where one DoD member is attempting to collect a disputed payment from another.

6. **Solicitations by Spouses.** Personal commercial solicitations by the spouse or other household member of a DoD employee to those who are junior in rank, grade, or position to the DoD employee, may give rise to the appearance that the DoD employee himself is using his public office for private gain. In such circumstances, the DoD employee’s supervisor must consult with an ethics counselor and counsel the employee that such activity must be avoided where it may cause actual or perceived partiality or unfairness, involve the actual or apparent use

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of rank or position for personal gain, or otherwise undermine discipline, morale or authority. JER § 5-409(c).

C. Use of the Uniform and Title:

1. Military personnel may not wear the uniform in connection with furthering political activities, private employment, or commercial interests or when participating in activities such as unofficial public speeches, when Service sponsorship or sanction may be implied. DoD Instruction 1334.01. JER 3-209. Other commercial use of DoD material, including uniforms and insignia, must be approved by OASD (PA). Permission to use or reproduce military emblems or insignia for unofficial purposes other than commercial advertising or promotion may only be given by the Military Department responsible for the insignia. DoD Instruction 5410.20.

2. Employees may not use or permit the use of their Government positions, titles, or authority in a manner that could be reasonably construed to imply official endorsement or sanction of personal activities or non-Federal entities. 5 C.F.R. § 2635.702; JER § 3-209.

(a) Specific authority exists to endorse some types of organizations like the military relief societies. JER § 3-210a.

(b) Rank and branch of service are considered terms of address and do not imply official endorsement. (“Pvt. J. Jones, U.S. Army”). JER 3-300a(1).

Expert Witness. Employees may not appear as expert witnesses, other than on behalf of the United States, in any proceeding before a Federal agency or court in which the United States is a party or has a direct and substantial interest. 5 C.F.R. § 2635.805.

An employee may testify without compensation with DAEO approval.

The prohibition does not apply to fact witnesses when subpoenaed by appropriate authority.

D. Outside earned income limitation for covered non-career employees. 5 U.S.C. Appx. §§ 501, 502; 5 C.F.R. 2636, subpart C. “Covered non-career employees” include non-career employees whose basic pay equals lowest level of SES. Does not include career SES, admirals, or generals. 5 C.F.R. § 2636.303.

1. Limits annual outside earned income to 15% of Executive Level II ($25,830 in 2008). 5 C.F.R. § 2636.304.
2. No outside earned income for Presidential appointees. Executive Order 12674 as modified by Executive Order 12731.

3. No compensation from activities involving a fiduciary relationship (e.g., outside law practice). 5 C.F.R. § 2636.305.

4. No compensation for serving as officer or member of the board of directors of any entity. 5 C.F.R. § 2636.306.

5. DAEO authorization required for compensation for teaching. 5 C.F.R. § 2636.307.

E. **Use of Government property.** See Use of Government Resources.

F. **Contract Awards to Government Employees.** The Government may not award appropriated fund contracts to Federal employees or businesses substantially owned or controlled by them, unless the needs of the Federal Government cannot reasonably be otherwise met. 48 C.F.R. § 3.601; JER § 5-402. For guidance on the award of non-appropriated fund contracts to Air Force personnel, see Air Force Manual 64-302, Nonappropriated Fund (NAF) Contracting Procedures, 3 Nov 00, para. 11.11.

G. **Assignment of Reservists.** See Ethics for Reserve Personnel.

H. **Job Search Expenses.** Employees negotiating for employment may receive some forms of compensation to defray the expenses of job hunting. An employee may accept travel benefits, including meals, lodging and transportation, if customarily provided by a prospective employer in connection with bona fide employment discussions even if tendered by a DoD contractor. 5 C.F.R. § 2635.204(e)(3). However, if the prospective employer has an interest that could be affected by the performance or nonperformance of the employee’s duties, payment for expenses may only be accepted after complying with the disqualification requirements. 5 CFR 2635.604; JER 2-204c. See Post Government Employment and The Procurement Integrity Act.

I. **Employment by a Foreign Government / Employment by a Foreign Principal.** See Post-Government Employment and Procurement Integrity.

J. **Limitations on contracting officials and related personnel.** See Post-Government Employment and Procurement Integrity.

K. **Jury Duty.** Civilian Federal employees are authorized court leave with pay when serving as a juror in a judicial proceeding to which the United States, District of Columbia, or State or local

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government is a party. Civilian Federal employees may accept jury duty fees when serving on a jury in State or local court. Civilian Federal employees may not accept fees for jury duty or witness fees in Federal or District of Columbia courts. If such fees are paid, they must be turned in to the customer service representative at the employing activity. An employee may keep reimbursements for expenses. 5 U.S.C. § 5515; DoD Financial Management Regulations, Volume 8, Chapter 5, § 0517. Military members are exempt from State or local jury duty when it would interfere unreasonably with performance of duties or adversely affect command readiness. Military members who do serve on State or local juries shall not be charged leave, and all fees accrued to active duty members are payable to the U. S. Treasury. Members are entitled to keep reimbursement for travel or other actual expenses. DoDD 5525.08; Secretary of the Navy Instruction 5822.2; Air Force Instruction 51-301.

L. **Fundraising.** For information on the Girl Scout Cookie Police and other fundraising restrictions, please see the fundraising outline.
CHAPTER M
POST-GOVERNMENT SERVICE EMPLOYMENT RESTRICTIONS (INCLUDING PROCUREMENT INTEGRITY ACT)

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I. REFERENCES.

A. Statutes.


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. See also, Office of Government Ethics Proposed Post-Employment Conflict of Interest Restrictions Regulation which supersede 5 C.F.R. part 2637 when that rule became final. 68 FR 7844 (February 18, 2003), 2003 WL 345140; SEE NUMBER 11 BELOW.

3. 5 C.F.R. Part 2641, Post-Employment Conflict of Interest Restrictions. (JER 9-200, See “C” below)

5. OGE Memorandum, Revised Materials Relating to 18 U.S.C. § 207 (February 17, 2000, see D(1) below).

6. GENERAL SERVS. ADMIN. (GSA), FEDERAL ACQUISITION REG. 48 C.F.R. Part 3 (10-1-07) (referred to in the outline as 48 C.F.R. or as FAR).


D. Miscellaneous:


   a. Seeking Employment Restrictions (Rules When You Are Looking For a New Job)

   b. Employment Restrictions (Rules Affecting Your New Job After DoD)

   c. For Military Personnel E-1 through 0-6 and Civilian Personnel Paid at less than 86.5% of the rate for Executive Schedule Level II
d. For Civilian Personnel Paid at or above 86.5% of the rate for Executive Schedule Level II and Flag and General Officers

e. Disqualification Statement

f. Procurement Integrity Act Restrictions (Rules When You Are Looking For a New Job & Rules Affecting Your New Job After Leaving DoD)


8. Memorandum of the Deputy Secretary dated October 25, 2004 regarding Joint Ethics Regulation changes to include post employment issues in annual training found under the ethics resource library, DoD Guidance, at http://www.dod.mil/dodgc/defense_ethics/dod_oge/OSD_15517-04.pdf. Also, at the same web site is the annual certification required to be signed by all public financial disclosure filers.


12. January 21, 2009 Executive Order and Pledge and OGE interpretation:

13. Change in the Simplified Acquisition Threshold:

14. Change in the “minimal value”:  http://www.gpo.gov/fdsys/pkg/FR-2011-07-

II. INTRODUCTION. THIS OUTLINE COVERS:

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 if the advice is accurate.

VI. SEEKING EMPLOYMENT

A. Conflicts of Interest

B. Gifts from Prospective Employers

C. Working on Terminal Leave
VII. 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 statute specifically defines negotiating for employment as a financial interest. Thus, negotiating for employment is the same as owning stock in a company.

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. 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.
D. This statute does not apply to enlisted members, but the Joint Ethics Regulation (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, Chapter 2 and Chapter 5.

E. Options for employees with conflicting financial interests.

1. Disqualification. With the approval of his or her supervisor, the employee must disqualify to eliminate any contact or actions affecting that company. 5 C.F.R. § 2635.402(c); 5 C.F.R. § 2640.103(d).

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.)


1. Any discussion, however tentative, is negotiating for employment.

3. Negotiating for employment is the same as buying stock in a company. 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 an employee could own stock in a company without creating a conflict of interest with his official duties (i.e. the company does not do business with the Department, or, the stock is below the threshold to create a conflict), then that person may negotiate for employment with that company. No special action is required. Note the current threshold for de minimis stock holding is found at 5 C.F.R. § 2640.202(a)(2).

4. 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.

5. 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, with the goal of reaching an agreement for employment. This term is not limited to discussing specific terms and conditions of employment. 5 C.F.R. § 2635.603(b)(1)(i).

   b. Made an unsolicited communication to any person or that person’s agent, 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 about possible employment. 5 C.F.R. § 2635.603(b)(1)(iii).

6. An employee has not begun “seeking employment” if he or she makes an unsolicited communication for the following reasons:

   a. For the sole purpose of requesting a job application. 5 C.F.R. § 2635.603(b)(1)(ii)(A).

   b. For the sole purpose of submitting a résumé or employment proposal only as part of an industry or other discrete class. 5 C.F.R. § 2635.603(b)(1)(ii)(B).
7. 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).

   
   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.

G. 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.


A. Background Information about the former Procurement Integrity Act (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 3.104-2.
   
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. Interference with duties. 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).

4. Coverage. Applies to “persons,” “agency officials,” and “former officials” as defined in the PIA.

5. Department of Defense Guidance Regarding Procurement Integrity Law.
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 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.

3. Contractor Bid or Proposal Information. 41 U.S.C. § 2101 (2)(A-D). 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)(2A) or


         (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.
2. Both officials and bidders 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)).


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.

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 Head of the Contracting Activity (HCA) or designee. Take further action in accordance with HCA’s instructions. FAR 3.104-7.
F. Private Employment Restrictions


IX. GIFTS FROM PROSPECTIVE EMPLOYERS. 5 C.F.R. § 2635.204(e)(3)

A. 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 5 C.F.R. § 2635.204(e)(3). (Note the need for disqualification by the employee if the prospective employer has interests that could be affected by performance or nonperformance of the employee’s duties). Personnel who file financial disclosure reports (SF 278 and OGE Form 450) must report such payments on their subsequent financial disclosure report.

X. TERMINAL LEAVE

A. May work while on terminal leave.

B. Financial Disclosure form filers (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. http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2147483803.

D. Cannot hold a civil office during Terminal Leave.

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 Directive 1344.10, section 4.2.4.1 which 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 of representing their new employer to the Government. This makes problematic the increasingly common practice of contractor personnel physically working in Government offices. Being present in Government offices on behalf of a contractor inherently is 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. Enlisted members are not subject to 18 USC §§ 203 or 205.
XI. DUAL COMPENSATION LAWS


B. No reduction in retired or retainer pay for retired members of the Armed Forces who are employed in Federal civilian positions.

XII. 6-MONTH COOLING OFF PERIOD

A. No civilian employment within DoD for 6 months after leaving military. 5 U.S.C. § 3326.

B. Applies to all retired military members

C. Waivers available from Secretary of hiring component


XIII. REPRESENTATIONAL PROHIBITIONS. 18 U.S.C. § 207.

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. 5 C.F.R. § 2637.101.
2. 18 U.S.C. § 207 does not bar a former employee from working for any public or private employer after government service. The regulations state that 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.” 5 C.F.R. § 2637.101.

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. § 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.

4. Note that when the term “lifetime” is used, it refers to the lifetime of the particular matter. To the extent 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.

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.

E. 18 U.S.C. § 207(b) prohibits former officers and employees for one year 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. 207(b)(2)(B). The trade negotiations covered are those that the President undertakes under 1102 of the Omnibus Trade and Competitiveness Act of 1988. 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 test.

F. 18 U.S.C. § 207(c) prohibits, for one year after leaving federal service, “senior employees” (military personnel 0-7 and above, and civilian personnel whose rate of basic pay exceeds 86.5 percent of the rate for level II of the Executive Schedule (EL II) ($155,440.50 in 2011) (see National Defense Authorization Act for Fiscal Year 2004, section 1125) 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 communication or appearance involves the department or agency the officer or employee served during his last year of Federal service as a senior employee;

2. The communication or appearance is on behalf of any other person (other than the Government);

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 section 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, with Navy officials. However, the officer may communicate with representatives of other services and OSD provided that the officials are not Navy officials and OSD is not the agency that the Admiral was detailed.

5. Note that (S.1, P.L. 110-81), amended 18 U.S.C. 207(d) that specifically bans the Secretary of Defense from communicating or appearing for two years before (a) any officer or employee of any Department or agency in which such person served in such a position within a period of 1 year before such person’s service or employment with the United States Government terminated, and (b) before all employees listed by position on the Executive Schedule in all agencies of the executive branch. (18 U.S.C. 207(d)).

6. Speaking before Department during 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 under the following conditions: the sponsoring entity for the panel or seminar is not the Federal Government including Congress and Judicial branches or a Federal corporation; if the sponsor of the event is private, then there still must be a large number of attendees, and a significant portion cannot be U.S. Government personnel 5 C.F.R. 2641.201(f)(3). http://edocket.access.gpo.gov/2008/pdf/E8-13394.pdf

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.
1. The statute does not bar behind the scenes involvement. But see January 19, 2001 opinion from the Department of Justice to the Office of Government Ethics 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/olc/207cfinal.htm](http://www.justice.gov/olc/207cfinal.htm).

2. A former employee may ask questions about the status of a particular matter, request publicly available documents, or communicate factual information unrelated to an adversarial proceeding.

H. 18 U.S.C. § 207(f) prohibits former senior employees (Admirals, Generals, personnel whose rate of basic pay exceeded 86.5 percent of the rate for level II of the Executive Schedule (EL II), for a period of 1 year after leaving office 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. 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.

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. The OLC opinion concludes that section 207(f) does cover representational contacts with Members of Congress.


The OLC Opinion can be found at: [http://www.justice.gov/olc/oge_op2_22jun04.htm](http://www.justice.gov/olc/oge_op2_22jun04.htm).

I. State and Local Governments and Institutions, Hospitals and organizations.
1. The restriction in 18 U.S.C. § 207(c) does not apply to appearances, communications, representation by a former senior employee who is 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).

J. Special Knowledge. This exception provides that the restriction in section 207(c) does not apply to a former 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).

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). 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 9-400 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).

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. Military officers on terminal leave are still on active duty. While they may begin a job with another employer during this time, their exclusive loyalty must remain with the government until their retirement date. Two restrictions apply to non-government employment during terminal leave:
1. Section 205 of title 18, United States Code, is a criminal statute that prohibits a military officer (not enlisted personnel) or Federal civilian employee from representing any entity other than the United States before any Federal court or agency. Similarly, 18 U.S.C. § 203 prohibits officer and civilian employees from “directly or indirectly” receiving compensation for representation services rendered “either personally or by another” before the U.S. Government. These provisions apply while a military officer remains on terminal leave. They no longer apply to a military officer after his retirement. 18 U.S.C. § 206.

2. 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. JER § 9-901(b); 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.

P. Executive Order 13490 (January 21, 2009 and the 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, a senior official may not communicate with, lobby back to, or represent another before his or her former DoD 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 rate of Executive Schedule Level II ($155,440.50 in 2011).
- This restriction applies only to the official’s former DoD component; it does not apply to the entire DoD or other Executive Branch agencies.
- This restriction does not apply to “behind the scenes” assistance.
- E.g., as a former senior OSD official, the 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 they are not a Presidential appointee confirmed by the Senate, could communicate and represent his or her new employer back to the Department of Navy, Department of Army, Department of Air Force, DISA, DIA, DLA, NGA, NRO, DTRA or NSA.

Post-Government Service Employment Restrictions
10th Ethics Counselor’s Course
For all political appointees, once leaving Federal service, they may not lobby back to any Flag/General officer or political appointee in the Federal Government for the duration of President Obama’s Administration.

XIV. 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 from being employed by Foreign Governments, without the consent of Congress. Congress has given consent.

1. 37 U.S.C. § 908 allows foreign government employment with approval of the Service Secretary. Note that these waivers often take 3 or 4 months to be approved, so plan accordingly.

   a. U.S. Army Human Resources Command
      ATTN: Army Personnel Records Division AHRC-PDR-RCR
      1600 Spearhead Division Avenue DEPT #420
      Fort Knox, KY 40122-5402
      Telephone 1-800-833-6622

   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: HQ AFPC/DPPTF, 550 C Street West, Randolph AFB, Texas 78150-4739. Telephone number is COM 210-565-2451 or DSN 665-2461. Point of contact is Gail Weber.


   d. For the Marines, a retired Marine Corps member should write the Commandant of the Marine Corps, Headquarters, U.S. Marine Corps (Code JAR), Washington, DC 20380-3000. Telephone number is 703-614-1513.
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) 514-1219, 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.


XV. MISCELLANEOUS PROVISIONS.

A. Use of Title. Retirees may use military rank in private, commercial, or political activities 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, para. 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. Navy Uniform Regulations, Chapter Six, Section 10: Reserve/Retired
C. SF 278s. Termination Public Financial Disclosure Reports must be filed within 30 days of retirement.

D. Inside Information. All former officers and employees must protect "inside information," trade secrets, classified information, and procurement sensitive information after leaving federal service. 18 U.S.C. § 794.

E. Gifts from Foreign Governments. Military retirees and their immediate families may not retain gifts of more than $350 in value from foreign governments. 5 U.S.C. § 7342.

G. Memorandum of the Deputy Secretary dated October 25, 2004, regarding Joint Ethics Regulation changes that require post employment and disqualification issues be included in annual training. This memo and the JER changes can be found under the ethics resource library, DoD Guidance, at http://www.defenselink.mil/dodgc/defense_ethics/. Also, at the same web site is the annual certification required to be signed by all public financial disclosure filers that they are aware of the post-Government service restrictions and the procurement integrity law post-Government service restrictions. The JER change also requires that ethics officials provide post-Government service employment guidance during out processing.

H. The National Defense Authorization Act of 2008, Public Law 110-181, section 847, requires that the following officials must request, and the ethics officials must provide a post employment opinion under circumstances described below. The ethics officials must maintain a database of the post government service opinions for SES, general or flag officers paid at 0-7 or above, Procurement Officials set forth in 41 U.S.C. 2101, and those officials in an Executive Schedule position under subchapter II of chapter 53 of title 5, United States Code who, personally and substantially participated in an acquisition in excess of $10,000,000 during their Federal tenure, and within two years after leaving service in the Department, expect to receive compensation from a defense contractor. These opinions must be rendered within 30 days. They must be retained for five years. The Inspector General shall conduct periodic reviews to ensure opinions are provided and retained. The Central Database is now AGEAR, After Government Employment Advisory Repository. Requesting employees enter information (no CAC required) into a form at: https://www.fdm.army.mil/AGEAR. Ethics counselors access AGEAR at: https://www.fdm.army.mil/AGEAREO.

A sample opinion is posted on the SOCO web site so that it can be provided to the persons occupying the positions described above when they receive their post-employment counseling prior to terminating Government service. The sample will be posted at: http://www.dod.mil/dodgc/defense_ethics/resource_library/pubhandout.htm.
I. **Reserve Officers.** Reserve Officers are subject to the post 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.doc](http://www.dod.mil/dodgc/defense_ethics/resource_library/Reserve_Matrix.doc).

J. **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-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 they can include this information in their notice.

XVI. CONCLUSION.
JOB HUNTING AND
POST-GOVERNMENT EMPLOYMENT
RESTRICTIONS

APPENDICES

1. Format for Written Notice of Disqualification
2. Sample Post-Government Employment Ethics Questionnaire
3. Format for Written Ethics Advice
MEMORANDUM

TO: [Employee’s Supervisor’s Name, Title]
FROM: [Employee’s Name, Title]
DATE:
SUBJECT: Disqualification – Employment Discussions

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 [Screener’s Name, Title] 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 [Screener’s Name] to consult an ethics counselor if there is any uncertainty as to whether I am disqualified from participating.

(2) If [Screener’s Name] determines that a matter directly or indirectly involves a covered party, the matter will be referred to [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:

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.

[Employee’s Signature]
[Employee’s Name, Title]

cc: Standards of Conduct Office, Office of General Counsel
(Room , Pentagon) [or Agency Ethics Counselor]

[Screener’s Name]
[Name and Title of person with authority to act on behalf of Employee]
[Additional supervisors or subordinates, as appropriate]

(This document may be downloaded from our website at :

REV: 2/15/06
POST-GOVERNMENT SERVICE ETHICS QUESTIONNAIRE

DD Form 2945 at
The Department of the Army has a required format for Post Government Service advice. The format for opinions is found at: http://ogc.hqda.pentagon.mil/EandF/Documentation/guidance.aspx#P.
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)):]

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[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.

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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
e, 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 Deputy Secretary of Defense. You stated in your Questionnaire that you approved contracts in amounts exceeding $10 million.

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.

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Since you have been involved personally and substantially in an acquisition with a value in excess of $10 million which serving as the Under Secretary of Defense, 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

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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. 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
Office of the General Counsel
Department of Defense

Encl:
Post-employment restrictions 2012
Procurement Integrity Act Restrictions
CHAPTER N

ETHICS OF 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)
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
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
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
EE. 41 U.S.C. §§ 2101-2107: 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. (FAR 37.703)
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. 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

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))

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)).
(ii) Direct support of DoD intelligence component; or

(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 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 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 sources\(^4\)) 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

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\(^4\) 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)
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))

**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 neither a gift to the individual or to the agency.

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.

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.
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.

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 go substantially beyond that specified or implied within the terms of the contract or if it is clearly in the public interest (DOD 1400.25-M, SC451.15.2.2).

D. Recognition of a contractor employee may only take the form of honorary awards of little intrinsic value such as certificates. Use of appropriated funds outside the limits of the contract is not appropriate. Reminder: Officials may choose to use personally-funded Commander’s Coins for such an occasion.

E. Before deciding to give a presentation, award, or recognition to a contractor employee, check with the contracting officer, 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. 3) 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 is a personal gift to the personnel, and therefore may not occur on official time or as part of official duties.

**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: The government employee should coordinate with the contracting officer before sending the reference letter to ensure the letter will not affect the government’s business relationship with the contractor, or contradict the government’s position relative to the contractor employer.

**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 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 restrictions including 18 U.S.C § 207, 41 U.S.C. §§ 2101-2107 (commonly called the Procurement Integrity Act), and Section 847, which are not fully discussed here. Please see the Post Government Employment Tab in the Deskbook.)

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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. §§ 2101-2107, 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)
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 restrictions set forth at 41 U.S.C. §§ 2101-2107 do prohibit contractor employees from obtaining and disclosing proprietary information.

G. Privacy Act, 5 U.S.C. § 552a


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. § 203 and 18 U.S.C. § 205 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 its opinion 99x19. See http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=1457. 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. INTRO TO DEPLOYMENT ETHICS

A. Role of the SJA and Ethics Counselor.

1. Advisor to the Commander.
   a. Standards of Conduct issues.
      (1) Contractors frequently attempt to offer soldiers gifts under the misperception that the Standards of Conduct and JER do not apply in theatre.
      (2) Foreign officials also frequently provide gifts to soldiers and senior officials.
   b. Fiscal law issues and proper use of government resources.
   c. Proper relationships with civilian and contractor support personnel.

2. Ethics Counselor.
   a. Gifts from prohibited sources and foreign governments.
   b. Post Government Employment:
      (1) Soldiers may be on final tour before retirement
      (2) Seek employment or entertain offers from CONUS activities or DOD Contractors.
      (3) Make relationships with contractors in theatre and soldier desires to return as in theatre support contractor.
   c. Outside Activities:
      (1) Soldiers desire to create in theatre businesses, such as video game, music, video or electronic supply related.
      (2) Soldiers create or already have outside business interest in CONUS and continue to run the business.
      (3) Writing and selling their stories.
         (a) Coordinate with PAO and Intelligence.
         (b) Learn and understand the soldier’s duties.
         (c) Get copies of the manuscripts and read it.
   d. Political Activities.
      (1) DOD 1344.10.
      (2) 10 U.S.C. § 973: A regular member 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.
      (3) Reserve officers currently holding elected office.
      (4) Campaigning from theatre.
3. Investigator and Litigator.
   a. Preserve evidence and protect the record.
   b. Document inappropriate behavior.
   c. Litigate or participate in protests, disputes or criminal cases.
   d. Investigate crimes or review investigation reports for crimes punishable under Military Extraterritorial Judicial Act (MEJA) and forward to theatre Commander, for delivery to the Domestic Security Section, Criminal Division, US Department of Justice and designated US Attorney representative.

4. Defender against Fraud, Waste and Abuse.
   a. How to prevent, detect, and correct fraud, waste, and abuse.
   b. Provide litigation support for fraud cases.
   c. Ensure the commander and contracting officer exercise sound business judgment.
   d. Do not be afraid to tell a Commander “no” or to point out inappropriate behavior.
   e. Be aware of “we need it now” or “it’s good for the operation” mentalities when statutes and/or regulations direct another course of action.
   f. Know and assess contract/fiscal/ethics risks.
   g. If not already, document and preserve the records.

5. “Know It All”. Walk the base/camp and know what is going on, beyond ethics, procurement and fiscal.
   1. Get SIPRNET access.
   2. Read intelligence and operational reports.
   3. Attend contract officer’s meetings/DFAS meetings.
   4. Attend commander’s meetings.
   5. Understand emergent needs or trends before they land on your desk.
   6. Understand politically sensitive issues, especially if your commander does not!

XXII. 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 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, 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 0

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


K. AF Form 3902 (Application and Approval of Off-duty Employment).

L. Army Regulation 27-1, Judge Advocate Legal Services, paragraph 4-3c.

M. Army Regulation 600-20, Army Command Policy, 4 August 2011.
N. DoD SOCO Advisory Number 02-21 December 16, 2002, What Constitutes Holding a "Civil Office" by Military Personnel.

O. DoD SOCO Advisory Number 03-01 9 January 2003, Uniqueness of Reserve Assignments Require Special Attention.

P. DoD SOCO Advisory Number 03-11 20 October 2003, When Civil Officeholders are Mobilized for Military Service.

Q. DoD SOCO Advisory Number 03-13 19 December 2003, Effect of Recent Amendment to 10 U.S.C. 973, Political Activities by Members of the Armed Forces.


II. INTRODUCTION

A. Reservists are an integral and vital part of the total military force. Mobilization of reservists, 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 to ongoing operations in the Middle East and elsewhere.

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 reservists. The issues become more important and pronounced when reservists 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 reservists.

4. Whether reservists can continue to hold civil offices.

5. Supplementation of salary.


7. Gifts.

F. Commanders have an affirmative obligation under the JER § 5-408 to refrain from assigning reservists 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 reservists to ensure that no actual or apparent conflict exists between their private interests and their duty assignment.

2. Reservists 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 reservists 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 reservists for other purposes unrelated to a conflict of interest analysis.

III. CONFLICTS OF FINANCIAL INTERESTS

A. The mobilization/activation of reservists dramatically increases the potential for conflicts of interest because reservists 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 reservists 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 reservists, 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 US Code § 798, 50 US Code § 783(b)), protected by procurement integrity law (41 US Code § 423), or the Trade Secrets Act (18 US Code § 1905).
D. Organizational conflicts of interest. Reservists 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 reservists. 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 reservists 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 reservists – dependent upon their rank, position, number of days serving on active duty and responsibilities.

B. SF 278, 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.

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 reservist 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 SF 278 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.
On 5 February 2011, the Secretary of the Air Force directed that all Reserve Component Air Force General Officers file SF278s 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 reservists on active duty for less than 30 consecutive days during a calendar year.

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 reservists’ orders – reservists who are ordered to Extended Active Duty (EAD) 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 Reservists 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.

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

1 Even though the threshold amount for micropurchases has been raised to $3,000.00, the JER still reflects the amount as $2,500.
C. Supplemental regulation may be helpful in outlining the responsibilities of reserve component (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. Reservists 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.

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

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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 reservists 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. Reservists are subject to the same restrictions regarding post-government employment as their active duty counterparts. Accordingly, reservists 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 reservists 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 reservists 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 reservists 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 Reservists. 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
CHAPTER P

DOD INSPECTOR GENERAL

I. INTRODUCTION

The position of Inspector General (IG) has a long history in the Federal government. The IG concept originated in the military services. The Army IG was created in 1777. However, the functions and responsibilities of each service IG have never been uniform. Generally, the IGs have served in the role of ombudsman, mediator or general problem solver. Over the years the role of each service IG evolved slightly differently. Today the roles and number of personnel assigned vary among the military service IGs. While the Department of Defense Inspector General has some similar responsibilities, the core responsibilities and authorities are set out in the United States Code.

The French Army provides us with the first examples of IGs in Western culture. In 1668, an inspector general of infantry and an inspector general of cavalry were appointed, with the principal duties of reviewing the troops and reporting to the king. Louis XIV expanded the system to include geographical inspectors. They examined everything within their sphere of influence. Soon, military inspection became an essential aspect of all modern armies.

In the United States, an Inspector General is a type of investigator charged with examining the actions of a government agency or military organization as a general auditor of their operations to ensure they are operating in compliance with general established policies of the government, to audit the effectiveness of security procedures, or to discover the possibility of misconduct, waste, fraud, theft, or certain types of criminal activity by individuals or groups related to the agency's operation, usually involving some misuse of the organization's funds or credit.

There exist numerous Offices of Inspectors General (OIG's) at the federal, state, and local levels. Federally, there exist 57 different and autonomous OIG's, a significant increase since the statutory creation of the initial 12 OIGs by the IG Act of 1978. While all of these OIGs operate separate of one another, their activities in the detection and prevention of fraud, waste, abuse, and mismanagement of government programs and operations are coordinated through a Council.
The Council of Inspectors General on Integrity and Efficiency (CIGIE) was statutorily established as an independent entity within the executive branch by the "The Inspector General Reform Act of 2008," P.L. 110-409 to:

- address integrity, economy, and effectiveness issues that transcend individual Government agencies; and
- increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of the Inspectors General.

To accomplish its mission, the CIGIE:

- continually identify, review, and discuss areas of weakness and vulnerability in Federal programs and operations with respect to fraud, waste, and abuse;
- develop plans for coordinated, Government-wide activities that address these problems and promote economy and efficiency in Federal programs and operations, including interagency and inter-entity audit, investigation, inspection, and evaluation programs and projects to deal efficiently and effectively with those problems concerning fraud and waste that exceed the capability or jurisdiction of an individual agency or entity;
- develop policies that will aid in the maintenance of a corps of well-trained and highly skilled Office of Inspector General personnel;
- maintain an Internet website and other electronic systems for the benefit of all Inspectors General;
- maintain 1 or more academies as the Council considers desirable for the professional training of auditors, investigators, inspectors, evaluators, and other personnel of the various offices of Inspector General;
- submit recommendations of individuals to the appropriate appointing authority for any appointment to an office of Inspector General described under subsection (b)(1)(A) or (B);
- make such reports to Congress as the Chairperson determines are necessary or appropriate; and
- perform other duties within the authority and jurisdiction of the Council, as appropriate.

The CIGIE is comprised of all Inspectors General whose offices are established under section 2 or section 8G of the Inspector General Act of 1978 (5 U.S.C. App.), those that are Presidentially-appointed/Senate Confirmed and those that are appointed by agency heads (designated federal entities). The Deputy Director for Management of the Office of Management and Budget is the Executive Chair of the Council. The Chair of the Council is elected by the Council members to serve a 2 year term. The Chair appoints a Vice Chair from other than the category from which the Chair was elected. Other statutory members of the CIGIE include: the Inspectors General of the Office of the Director of National Intelligence and the Central Intelligence Agency, the Controller of the Office of Federal Financial Management, a senior level official of the Federal Bureau of Investigation designated by the Director of the Federal Bureau of Investigation, Director of the Office of Government Ethics, Special Counsel of the Office of Special Counsel, Ethics and the Inspector General 10th Ethics Counselor’s Course.

Prior to the establishment of the CIGIE, the Federal Inspectors General operated under the auspices of two councils, The President's Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency (ECIE) from the time they were established by Executive Order 12805, May 11, 1992 until the signing of P.L. 110-409. (http://www.ignet.gov/cigie1.html last viewed on February 24, 2011)

Evidence of the coordination between federal OIGs can be seen by the public through the OIGs' shared website, www.ignet.gov, and the use of shared training facilities, such as the IG Criminal Investigator Academy (IGCIA) and the IG Audit Training Institute (IGATI). Evidence of the OIGs' return on investment to taxpayers can be seen through their Semi-annual Reports to Congress (SARC), most of which are available on each OIG's website

Since the post-9/11 enactment of the Homeland Security Act of 2002, resulting in the amendment of the IG Act of 1978, Section 6e, all PCIE OIG special agents have had full law enforcement authority to carry firearms, make arrests, and execute search warrants. Prior to this time, some PCIE and ECIE IG special agents had the equivalent law enforcement authorities as a result of other statutes or annually-required deputation by the U.S. Marshal. The 2002 amendment to the IG Act of 1978 made deputation of PCIE IG special agents no longer necessary. Some ECIE IG special agents still have full law enforcement authority today by virtue of this continued deputation. Some OIGs employ no special agents and are strictly auditing and inspection entities.

II. BACKGROUND LEADING TO THE IG ACT OF 1978

Between 1962 and 1974 the Department of Agriculture became the first executive branch department to experiment with a department-wide IG. Eventually most of the IG’s activity involved Food Stamp fraud. In the 1974 – 1975 timeframe a number of Congressional investigations examined fraud, waste and abuse in the Department of Health, Education and Welfare. Congress eventually created the first non-DoD statutory IG in Health, Education and Welfare in 1976. The following year a statutory IG was created for the Department of Energy.

Congress revisited the issue of executive branch IGs during hearings held in 1977. The following areas of concern prompted the hearings:

- Multiple audit/investigative units existed in executive agencies with little coordination and/or control.

- Auditors/investigators frequently reported to officials responsible for the programs being audited or investigated.
• Lack of investigative independence.

• No formal and/or uniform procedure for informing Congress.

• Long audit cycle times (9 to 10 years in some cases).

• Limited or ineffective staffing leading to weak oversight of major programs.

III. THE IG ACT OF 1978

As a result of these concerns; Congress passed the Inspector General Act of 1978, codified at Title 5, Appendix 3, United States Code. The Act created statutory IGs in 6 executive departments and various agencies. Note: currently there are 57 statutory IGs, 2 of whom are Presidential appointees. The Office of Management and Budget, Department of Justice and other executive branch departments and agencies were not enthusiastic about the Act’s passage. Important Components of the Inspector General Act of 1978 include:

• IGs are appointed by the President and subject to Senate confirmation. §3(a)

• IGs may be removed only by the President, with reasons communicated to the Congress – §3(b)

• IGs must report criminal violations to the Attorney General – §4

• Required Semiannual Reports to Congress – §5

• Provided for IG access to information – §6(a)(1) & (3)

• Subpoena authority -- §6(a)(4)

• IG Access to Head of the Establishment – §6(a)(6)

• Personnel and resources – §6(c)
The Inspector General Act of 1978 did not create a DoD Inspector General. Based on a Secretary of Defense recommendation, DoD was not included in the 1978 Act. The Secretary of Defense argued that due to the unique size and mission of the Department further study and additional information was necessary to make a decision regarding the advisability of creating a DoD IG.

The Secretary of Defense established a task force to conduct a study of the audit, investigation and inspection components of the DoD. The task force recommended creating a DoD IG. As an alternative, the task force recommended creating the position of “Under Secretary for Review and Oversight.” The rationale behind the proposal was that the person holding the proposed position should be solely under the supervision of the Secretary of Defense. In other words the person should be part of the “team” and not viewed as an outsider.

In response to the task force’s recommendations Congress reviewed the report, held additional hearings and determined that an IG was needed for DoD. Accordingly, Defense Authorization Act for FY83 (P.L. 97-252, September 8, 1982) contained an amendment to the Inspector General Act of 1978 adding a DoD IG, among other things.

IV. THE CREATION OF THE DOD IG

P.L. 97-252 amended IG Act of 1978 to include the DoD IG (Title 5 U.S. Code, App. 3). It added a new Section 8 to the IG Act that was applicable only to the DoD IG. That section delineates additional duties and responsibilities, and some potential limitations for the DoD IG alone which are separate and apart from those provided to all IGs by the IG Act of 1978. Examples of additional duties and responsibilities include:

- Principal advisor to SECDEF on detection of FWA – §8(c)(1)
- Initiate audits and investigations within DoD as the IG considers appropriate – §8(c)(2)
- Provide policy guidance for audits and investigations – §8(c)(3)
- Investigate fraud waste and abuse – §8(c)(4)
- Develop policy for criminal investigations – §8(c)(5)
- Develop policy on audits and monitor DoD auditors – §8(c)(6)
• Report suspected violations of the UCMJ to SECDEF or Military Department Secretary – §8(d)

• DoD IG shall process Intelligence Community Whistleblower Protection Act (ICWPA) complaints or information, §8H. IG must determine if a matter from an employee of one of the 4 Defense intelligence agencies (DIA, NGA, NRO, & NSA) is an “urgent concern” and if the complaint or information is credible. IG must complete inquiry within 14 days and forward it to the Secretary of Defense. Secretary has 7 days to forward the package to the Intelligence Committees of Congress.

• Provisions of 18 U.S.C. §1385 “Posse Comitatus” do not apply to audits/investigations of DoD IG.

Examples of additional limitations placed on DoD IG include:

• DoD IG cannot be in active/reserve military service – §8(a)

• SECDEF may prohibit IG activity in certain areas – §8(b)(1) - (1) sensitive operational plans; (2) intelligence matters; (3) counterintelligence matters (4) ongoing criminal investigations by other DoD units related to national security and (5) other matters disclosure of which would be a serious threat to national security.

• If SECDEF prohibits IG activity in any one of these five areas – DoD IG shall inform Congress within 30 days. SECDEF then has 30 days to provide reasons for prohibiting the IG activity to Congress.


The Inspector General Reform Act of 2008 amended the Inspector General Act of 1978 and among various other provisions:

• It required the President and the heads of designated federal entities to communicate to Congress in writing the reasons for removing or transferring an IG no later than 30 days before such removal or transfer.
• It set the pay for presidentially appointed IGs at Executive Schedule III plus 3%. It requires IGs of designated federal entities to be classified at a grade, level, or rank designation at or above those of a majority of the senior level executives of their entity. It prohibits IGs from receiving cash awards or bonuses.

• It required each IG to: (1) appoint a counsel to the IG; (2) obtain the services of a counsel appointed by and directly reporting to another IG on a reimbursable basis; or (3) obtain the services of the Council of the Inspectors General on Integrity and Efficiency's staff on a reimbursable basis.

• It established within the executive branch the Council of the Inspectors General on Integrity and Efficiency to: (1) address integrity, economy, and effectiveness issues that transcend individual government agencies; and (2) increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the IG offices.

• It required the Council to: (1) continually identify, review, and discuss areas of weakness and vulnerability in federal programs and operations with respect to fraud, waste, and abuse; (2) develop plans for coordinated, government-wide activities that address these problems and promote economy and efficiency in federal programs and operations; (3) develop policies that will aid in the maintenance of a corps of well-trained and highly skilled IG office personnel; (4) maintain electronic systems for the benefit of all IGs and one or more academies for the professional training of auditors, investigators, inspectors, evaluators, and other personnel; (5) submit individuals' recommendations for any IG appointment to the appropriate authority; and (6) report to Congress.

• It allowed the Council's Executive Chairperson to authorize the use of interagency funding for: (1) government-wide training of IG office employees; and (2) the functions of the Integrity Committee of the Council.

• It established an Integrity Committee for the Council to review and refer for investigation allegations of wrongdoing that are made against IGs and IG office staff members.

• It required: (1) each IG to annually transmit a budget estimate and request to the head of the entity to which he or she reports; (2) such requests to specify the funds requested for operations, training needs, and Council support; (3) the head of each entity to include in a proposed budget to the President amounts for such purposes and its IG’s comments on the proposal; and (4) the President to include in each U.S. budget submitted to Congress a statement of each IG's budget estimates, the amounts for such purposes requested by the President, and any comments of an IG who concludes that the budget submitted would substantially inhibit the IG from performing the duties of office.
It required agencies to maintain on their website homepages direct links to the website of their IG office.

VI. THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

The Chairman and the 12 Inspectors General who serve on the Recovery Board are charged in the American Recovery and Reinvestment Act of 2009 with developing a system of transparency and accountability for the $787 billion Recovery initiative. Although only 12 agency Inspectors General serve on the Recovery Board, a total of 28 federal agencies received Recovery monies, and 29 Inspectors General are involved in oversight of those agency spending programs. As a result, the Board has worked to bring the IG community together to develop initiatives that will increase prevention activities and help minimize fraud and waste in expenditure of the Recovery funds.

To fulfill its oversight mission, the Board was given specific powers and functions under the Recovery Act:

• **Powers - The Board Can:**
  - Audit and review stimulus spending either on its own or in collaboration with federal Inspectors General.
  - Issue subpoenas to carry out its audit and review responsibilities.
  - Refer instances of fraud, waste and mismanagement to federal Inspectors General.
  - Hold public hearings and compel testimony through subpoenas.
  - Enter into contracts for audits, studies, analyses and other services with public agencies and private entities.

• **Functions - The Board Shall:**
  - Review whether there are sufficient and qualified acquisition and grant personnel overseeing Recovery Act funds.
  - Submit quarterly and annual reports to the President and Congress as well as "flash reports" on potential problems that require immediate attention.
  - Make all reports publicly available through the Recovery.gov website.
  - Make recommendations to federal agencies on measures to prevent fraud, waste and mismanagement of Recovery Act funds.

VII. THE DOD IG TODAY

Currently, the DoD IG has well over 1600 employees worldwide broken into five primary substantive components plus a support component (i.e., Front Office, GC, Congressional Liaison):
• Audit – perform the primary audit functions in the Department of Defense. (750+ employees)

• Investigations – Criminal Law Enforcement involving DoD interests (Defense Criminal Investigative Service); conduct or oversee all investigations of Senior officials in the Department; and conduct or oversee investigations of allegations of reprisal made by military and civilian persons. (465+ Special Agents and other investigative personnel)

• Intelligence – Audit, monitor and evaluate the programs, procedures and functions of the Intelligence Community, Special Access Programs within the Department of Defense and perform oversight of the DoD Intelligence. Community (45+ employees)

• Policy and Oversight – Provide policy and oversight for DoD Audit, Investigative and Hotline activities; conduct inspections of DoD programs and installations; manage the Defense Hotline; provide liaison between GAO and DoD and provide technical, statistical and quantitative support to OIG projects. (100+ employees)

• Office of Special Plans & Operations - The Office of Inspector General (OIG) supports the DoD and U.S. Congress by addressing challenging issues in an increasing complex, global defense environment. To rapidly provide assessments of these key issues for senior leaders, the OIG established the Office for Special Plans and Operations (SPO) to focus on high-value, high-visibility missions. (20+ employees).

Each of the components above works closely with like units within each Military Department. For example, the DoD IG offices with responsibility for administrative investigations of senior officials and investigations into allegations of reprisal and wrongful mental health evaluation work closely with the Secretary of the Air Force Inspector General’s offices that work investigations of senior officials (general officers, SESs and political appointees) and investigations of colonels/GS-15s and below. The DoD IG will normally oversee these investigations conducted by the Services and is mandated by law to formally review and approve all investigations involving alleged reprisal and wrongful mental health evaluation.

Investigations into allegations involving potential ethics problems can be accomplished by one of the above components depending of the nature/details of the case itself. In some instances, the allegations are criminal in nature and would be the responsibility of the Defense Criminal Investigative Service or one of its Service counterparts. In other cases, the allegation could be worked in an administrative investigation or even a type of audit.

VIII. Contacting the OIG through Hotline or web site
IX. Concurrent Referral of Ethics Criminal Law Violation Cases to both the U.S. Attorney and to the Office of Government Ethics

Pursuant to 28 U.S.C. § 535, every department or agency must report to the Attorney General any information, allegations, or complaints relating to violations of title 18 of the United States Code involving Government employees, including possible violations of 18 U.S.C. § 207 by former Government employees. The Director of the Office of Government Ethics (OGE), in accordance with 5 U.S.C. App. § 402(e)(2), has promulgated regulations at 5 C.F.R. § 2638.603 requiring agencies to concurrently notify the Director when any matter involving a violation of 18 U.S.C. §§ 203, 205, 207, 208, and/or 209 is referred to the Department of Justice pursuant to 28 U.S.C. § 535. Such notification may be accomplished by providing a copy of the referral document or by submitting the OGE Form 202, unless such notification would otherwise be prohibited by law. OGE regulations also require that the department or agency subsequently notify the Director of the referral's disposition, including any disciplinary or corrective action taken by the department or agency. 5 C.F.R. § 2638.603(c). Information relating to the disposition of a referral may be communicated to the Director in writing.

X. REFERENCES


C. DoD Instruction 7050.3, “Access to Records and information by the IG DoD,” April 24, 2000

D. DoD Instruction 5525.07, “Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes,” June 18, 2007


Department of Defense,” April 10, 2006

G. Section 1034 of title 10, United States Code – “Military Whistleblower Act”


J. Section 1587 of title 10, United States Code – “NAFI Employee Whistleblower Act”


M. Federal Acquisition Regulation, “Whistleblower Protections for Contractor Employees” 48 CFR Chapter 1

N. DoD Directive 7650.3, “Follow-up on General Accounting Office (GAO), DoD Inspector General (DoD IG), and Internal Audit Reports,” June 3, 2004

O. DoD Directive 5148.11, “Assistant to the Secretary of Defense for Intelligence Oversight (ATSD(IO)),” May 21, 2004

P. SECNAVINST 5800.12B, “Investigations of Allegations against Senior Officials of the Department of the Navy,” 18 Oct 2005


R. SECNAVINST 5370.5B, “DoN Hotline Program,” 24 Nov 2004


U. Air Force Instruction 90-301 “Inspector General Complaints Resolution”, 15 May 08


CHAPTER Q

ADVANCED FINANCIAL DISCLOSURE
REVIEW OF OGE FORMS 278 AND 450

I. GENERAL INFORMATION

A. **Standard of Review** should meet the requirements of an OGE audit. Specifically, review of reports should be two-fold. First, the initial review which addresses procedural questions, including is the report complete on its face, and then substantive conflict of interest review. This strengthens programs against negative substantive findings during an OGE audit. **Best Practice (BP):** Internal DoD program review should meet the OGE standard.

B. **STOP THE CLOCK!** Meet the Ethics Program requirements. Conduct the initial review as soon as possible upon receipt of the reports to meet the 60 day review deadline. Technical deficiency review suffices. Obtaining missing information, answering questions, and substantive review of duties against filer’s interests can come later. **BP:** consider establishing a policy to promote follow up, for example, ensure IR is not considered complete until filer is notified of follow-up questions.


D. **General Information.**

1. The report should stand-alone. Annotate all revisions, corrections, and clarifications on the form, including your initials, date, and source of information. If there are numerous corrections, place the latter information in one location, preferably at the bottom of the page, and reference with an asterisk. Use Comments box for substantive comments, such as “waiver or disqualification attached.”

2. Assist filers identify where and what information is needed. Sometimes this means providing them language for their tax consultant or financial advisor, or even talking to these agents directly. Remember, filer must give you and the agent permission to discuss interests.

3. DoD recommends encouraging filers to use "/(S)" for spouse, "/(J)" for joint, and "/(DC)" for dependent child. It helps the review process, as the ownership of an asset may determine whether additional information is needed for other parts of the form (e.g., salary from DoD contractor may be listed on Part I, III, and IV if filer, but only Part I if spouse’s).
4. Educate filers on over-reporting. Filers often provide too much information, such as dependents’ names, account numbers, or their social security number. Be careful that it is not inappropriately released.

5. If there are questions resulting from the initial review, ask the filer all at once, not piecemeal.

II. **OGE FORM 450 - REVIEW THE REPORT.**

A. **Procedural Information.** IR can include review of procedural information like, is the correct form used, is it signed, is it dated etc.


2. **Signed.** If the filer has not signed the report it cannot be considered filed. Unless approved for use of electronic signatures, the ethics office must receive the report with original signatures. At DoD, Army filers must and all other may use the OGE approved e-filing system, the Army Financial Disclosure Management program (FDM), or CAC signatures may be acceptable if approval is received from organization’s CIO.

3. **Reporting Status: ** We must assume that the filer’s report covers the reporting period for the reporting status checked. Hence, if the new entrant reporting status is checked, you must assume the report covers the prior 12 months. If the annual reporting status is checked, the report covers the preceding calendar year.

a. **New entrant or Annual?** If an annual report is the first report for a filer, check to determine if this was intended as an annual or new entrant report (e.g., what reporting period did the filer use, what was the appointment date to the position). If it includes an appointment date more than 30 days from the date filed, but is marked as an annual report it will likely be an annual report, covering the reporting period January 1 to December 31. Remember a new entrant report requires information for the 365 days prior to signature, which should be made within 30 days of entry.

   (1) If the report was intended as a new entrant, confirm with the supervisor whether the determination that the filer was in a “covered position” was within 30 days; and the report covers the correct reporting period. Annotate the report that a determination was made during the annual position review that filing is now required, and treat the annual report as
new entrant report with date of appointment as the date the determination was made that they are a filer.

(2) If the supervisor indicates that the filer should have been previously identified as a filer, collect a new entrant report, even though it would be late. Annotate the report to correct the status, ensure that the report contains information for the 12-month period before the date of appointment, and write a note in the Comments section to explain what happened. OGE encourages a reviewer’s notes on the report.

4. **Dates.** Is the report timely filed?

   a. Appointment date is required for all new entrant reports.

   b. Check if the report was timely filed, *i.e.*, within filing period or before extension expired.

      (1) New Entrant reports must be received within 30 days from when the filer assumed his duties, except for SGEs (and Reservists and National Guard who meet the requirements) who file prior to assuming the duties. See JER 7-303.a.(2).

      (2) Annual reports should be filed no earlier than January 1 and no later than February 15, unless an extension is requested and granted within the filing period.

      (3) Annual OGE Form 450s signed and/or filed prior to December 31 are premature. Ethics officials have two options (depending on how premature the reports are): (i) require resubmission after January 1, or (ii) require filer clarification that there are no reportable changes after January 1 and annotate the report accordingly.

   c. Date of supervisor signature must be on or after date employee sign. This ensures supervisor reviewed the complete report.

      (1) Report fails to receive supervisory review. After conducting initial review, if substantive changes are required, make them first, then submit it to the supervisor for review and signature. Keep the original, so it does not get lost, and send a copy. File them together when the copy is returned. The database or tracking system needs to alert the reviewer if the supervisor does not return it in a timely manner. Annotate the report accordingly.

   d. **Date Received by Agency** is the filing date and is critical to start the 60 day initial review time. Some may use the supervisory review to stop the 60 day review clock, but the supervisor must note the date received on the report.
The risks include losing control over knowing when filers may be late, and ensuring that the date is entered accurately. Most use the date the report is filed at the ethics office, which gives that office control over the 60 day review. The risks include losing control over supervisors, who may hold the report, and risk a late filing date.

**BEST PRACTICE:** DoD recommends putting initial review (IR) date on the form, in the database, and preferably both to document completion of 60 day review deadline for auditors.

5. **Did filer properly complete all Steps on cover page?** Usually, the problem arises: **Is Step 2 complete?** All statements must be answered "yes" or "no," corresponding to whether there are reportable items on Parts I-V of the report. Check to make sure all required statements are answered and correctly reflect reported information in Parts I-V. Remember, if there is nothing to report for all parts, only the first page needs to be kept for six years.

B. **Part I - Assets and Income.**

1. Reportable assets: (i) Assets that had a fair market value of more than $1,000 at the close of the reporting period; OR (ii) assets that produced over $200 in income during the reporting period, regardless of asset value. Fair market value may be determined by purchase price, good faith estimate, recent appraisal, adjusted assessed value, and year-end book value.

   a. Report earned income of spouses only if it exceeds $1,000.

   b. Don’t report earned income of dependent children.

2. **Partnerships,** closely held corporations, and small business ventures (not publicly traded) – Filers need to include name, location, and nature of business. Remember that the goal is to collect information necessary to conduct a conflict review, and it is usually difficult to find public information on these types of entities.

3. **Pensions** – Make sure you ask about pensions for new entrants, filer spouses, and SGE; or anywhere the filer reports a salary. If not reported, inquire. Usually they are either a defined benefit plan, which is a corporate obligation, or a defined contribution plan, which generally allows the filer to choose the investments in the plan.

   a. Defined Benefit Plan - Report name of company and include a parenthetical that it is a “(defined benefit plan).” In a defined benefit plan, the company guarantees a set amount, usually based on actuarial calculations, and makes monthly payments based on these calculations, similar to the civil service retirement system.
b. Defined Contribution Plan - If the filer chooses the investments in the plan, such as selecting mutual funds or stocks, report the assets of the plan, which will be the options selected. This is a defined contribution plan, in which the employee receives whatever the investment portfolio has earned with no guarantee, like the TSP.

(1) **401(k)** is a type of defined contribution plan. Identify the underlying assets by identifying any sector mutual funds, specific assets such as the company's stock, or by naming the independent manager and the type of investment option selected, such as fixed, aggressive growth, etc. If the assets are all not reportable (such as non-sector, diversified mutual funds), you are not required to report 401(k)s; but it may be preferable to retain this information for future disclosures to ensure that reportable information is not later acquired.

4. **Investment Accounts (e.g., IRA)** – Filers need to identify all reportable underlying assets. If the assets are all not reportable, either because they are below the reporting thresholds or are not reportable assets, you should annotate this in a parenthetical next to the IRA entry (e.g., “(all non-sector, diversified mutual funds).” Please note where assets are all not reportable (e.g., all diversified mutual funds), you are not required to report the IRA at all, but it may be preferable to retain this information for future disclosures to ensure that reportable information is not later acquired.

5. **Mutual funds** –

a. Diversified, non-sector, mutual funds are not required to be reported. See 5 C.F.R. § 2634.907, [http://edocket.access.gpo.gov/cfr_2008/janqtr/pdf/5cfr2634.907.pdf](http://edocket.access.gpo.gov/cfr_2008/janqtr/pdf/5cfr2634.907.pdf)

b. Excepted investment funds (EIFs) are not reported. EIFs are funds that are widely held and either publicly traded or widely diversified with an inability of the investor to exercise control over the financial interests. See 5 C.F.R. § 2634.310(c), [http://edocket.access.gpo.gov/cfr_2008/janqtr/pdf/5cfr2634.310.pdf](http://edocket.access.gpo.gov/cfr_2008/janqtr/pdf/5cfr2634.310.pdf)

c. Sector funds are reportable – Ensure the full family and fund name. See 5 C.F.R. §§ 2640.201(b) and 202 (rules governing disqualification of sector fund holdings); and OGE Advisory Opinion 00 x 8 (DO-00-030) [www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2309](http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2309) (explanation and assistance in distinguishing sector funds). Remember, OGE sector fund is limited to funds concentrated in a particular industry, business, single country other than the US, or bonds of a single State (e.g., Fidelity Advisor Emerging Asia is not a sector fund for disclosure purposes but a diversified mutual fund (not reportable); however, it is a “sector” fund in investment world terminology).
6. **Managed stock/brokerage account** –
   
   a. Many employees claim that they don't control the account or know what is in the account, so they shouldn't have to report assets. Even if they give day-to-day control to a broker, they still retain ultimate control. Any reputable broker provides monthly or quarterly reports, so the employee has knowledge, even if he doesn't read the reports. Employees may attach statements that meet the regulatory requirements (indicate reportable assets sold during the year, *see* OGE DAEogram 00-007 ([www.oge.gov/DisplayTemplates/ModelSub.aspx?id=1993](http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=1993)) and white-out values and account numbers.

7. **Variable** annuities or life insurance – List the holdings, which may be invested in diversified unit investment trusts. Always ask to identify the type of annuity or insurance.

8. **Property** – identify the type of property (rental property, undeveloped land), and the city and state.

9. **Trusts** – if a trust is reported, determine whether filer is beneficiary or just a trustee. If they are a beneficiary, the reportable underlying assets of the trust must be reported. If they are the trustee only, report the trust only if they receive fees in excess of $200 (report on Part I as other income). Remember the outside position would be reportable on Part III.

C. **Over/Under-Reporting**

1. Over-Reporting – If you have the time, follow-up by informing the individual of the over-reporting.

   **BP:** Always ensure full asset name is reported and when possible include the ticker symbol, not just the family name which may indicate one of several different types of holdings: 1) stock in entity; 2) a mutual fund of the entity; 3) an investment account with the entity; or 4) annuity/insurance (*e.g.*, Prudential).

   **BP:** Put “NR” (“Not reportable”) or “OR” (“Over-reported”) or similar notation on the report.

   a. Do not report income from the Federal Government (*e.g.*, salary or benefits), dollar amounts, account numbers, cash accounts in financial institutions, money market funds, CDs, EIFs etc.

   b. Do not report the personal residence unless it is income producing (*e.g.*, a portion is rented out)

   c. Do not report the mortgage on your personal residence.
d. Do not report gifts of travel accepted by the Government in accordance with 31 U.S.C. § 1353. Make sure you have information on the travel for your travel report, but it should not be reported here!

2. Under-Reporting –

<table>
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<th>BP: for new entrants, and periodically thereafter, asks the filer to confirm there is no missing reportable information (e.g., filer isn’t married, doesn't have minor children, or life insurance etc.) and annotate report accordingly. This is also a good time to remind new entrants of their other annual ethics requirements, namely to complete an annual report and one hour of ethics training.</th>
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a. If filer thought the report was a new entrant, but it is really annual, need to determine if there are any gifts/travel to be reported. Vice-versa, if it is a new entrant, but travel reported, indicate NR or OR.

b. Inadvertently omitted information. Most often this is seen with spousal income and investments of spouses and dependent children. Without independent knowledge, this may be hard to determine.

D. Cross-Pollination – Ensure the parts of the report are consistent.

1. Make sure Step 2 statements are consistent with other parts of the report.

2. Part II – Liabilities - 2007 changes to the reporting requirements should make it extremely rare that liabilities will need to be reported.

3. Part III - Outside Positions - Reports fail to list outside positions, especially when uncompensated. Ask whether the position reported on Part III is compensated? If yes and compensation is more than $200, is it reported in Part I? If income for a position is reported in Part I, be sure that the position is also reported in Part III. This one is hard – without independent knowledge, or development during questioning on other problems, it may be impossible.

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<th>BP: annotate the entry with “(paid)” or “(unpaid).”</th>
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4. Part IV – Agreements and Arrangements – Does filer continue to participate in a pension or benefit plan maintained by a former employer? Check assets listed on Part I and Part III. This is usually arises for IPA and SGE appointees.

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<th>BP: review any ethics advice the filer may have received during the reporting period for any other reportable information.</th>
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E. Substantive Review - After conducting the initial review, get answers to any questions before proceeding to substantive conflict of interest review. You may need to contact the filer’s supervisor or review a description of his office’s mission.

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<th>BP: ask filer for his position description or a brief paragraph regarding his duties.</th>
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**BP:** ask filer for his position description or a brief paragraph regarding his duties.

1. Check the filer’s interests against any available local list for DoD contractors, or alternatively the $25K list on the DoD SOCO website ([www.dod.mil/dodgc/defense_ethics/resource_library/contractor_list.pdf](http://www.dod.mil/dodgc/defense_ethics/resource_library/contractor_list.pdf)), if appropriate. As the list is generally updated annually, check that you have the most up-to-date version. Remember that the list is not a comprehensive list of possible prohibited sources. For example, many universities are prohibited sources but are not listed on the contractor list.

2. DoD SOCO recommends a more expansive review be performed. It is misleading to only look at the $25K list for prohibited sources. Ethics officials need to know their filer’s duties and current activities.

3. Besides investment assets, substantive conflicts of interest most often arise from: (a) former employers during the filers first year at DoD; (b) spousal employment; and (c) outside positions. Check also that filer is not accepting gifts from prohibited sources, or at least accepted them after receiving ethics guidance.

4. If an actual or possible conflict arises (e.g., filer holds stock in a DoD contractor), the filer should receive a letter of warning (LOW), with a copy to their supervisor, which identifies any conflicts of interests, recites the legal standards, and reminds of any required recusals, as well as reminding them of their interests that may be or become possible conflicts of interest. OGE has cited letters of warning as a best practice in its Program Review Guide. The LOW should be kept with the report, but not attached directly to the report.

**BP:** where filer has significant changes/revisions to their report, consider attaching the edited report with any LOW. This can assist them in future reporting.

5. If an actual or potential conflict is revealed, ensure filer takes required remedial steps, like completing a written disqualification statement. Annotate the report with any information about action taken (e.g., LOW sent). Finally, the reviewer certifies the report.

III. **OGE FORM 278 - REVIEW THE REPORT.**

A. **Review Standard** – The same as for the 450 reports.

1. This section discusses and highlights differences between the 450 and 278 reports. Except where noted, the 450 section is applicable to the 278 reports. Assets and income that are more complex are discussed in the 278 section, although such discussion is applicable to the 450 reports.

2. **STOP THE CLOCK!** – The same as for the 450 reports.
3. *Must* compare the current 278 with the prior one. There should be a seamless flow from one year to the next. It is recommended for 450 review, but mandatory here. Also recommend using a worksheet to help compare and record questions.

**B. Preliminary Information.**


2. *Must* collect reports for each requirement – new entrant, annual and termination.

3. Appointment date is included on new entrant reports and termination date is included on termination reports. It is advisable to include the appointment date on each report.

4. Filer should include the calendar year which covers the interests reported for all incumbent reports. *E.g.*, a 2012 incumbent report covers calendar year 2011 (the reporting period), so the calendar year should say 2011 not 2012. If the calendar year is wrong, you should verify with filer that the report covers the correct reporting period and annotate the report accordingly.

5. Signature of filer should be dated after January 1 and no later than May 15, or if later, an extension should be annotated in the comment box. If not the report is late. Likewise, the supervisor’s signature should be dated on or after the date the filer signs the report.

6. If the report does not have the required supervisor certification label, located in the comments box (automatically included on the version on the DoD SOCO website version), supervisors should sign in as “Other Reviewer.” Supervisory review is not required for termination reports (JER 7-206.a). This box may also be used to annotate the date of initial reviewer.

7. **Date received** – There is no box on the report, but this date is critical to start the 60 day review time. Recommend putting it in the “Agency Use Only” box.

8. Put initial review (IR) date on the form, in the database, or both to make it easy to document for auditors that the 60 day review deadline is met (JER 7-206(c)(7)).

9. OGE Form 278s require DoD DAEO or Deputy DAEO certification, unlike a 450, where an Ethics Counselor may sign.

**C. Schedule A, Assets and Income.**
1. Reportable information for an OGE Form 278 is more detailed than a 450. It requires reporting the value of the asset by range, as well as the type and range of income. Also, more information is reportable on the OGE Form 278. For example, a diversified mutual fund that meets the reporting thresholds must be reported as an asset on a 278 even though it is not required to be reported on a 450. Otherwise, the discussion in the 450 section on how to correctly report assets generally applies here.

2. Check that each reported asset has an entry in one of the blocks in B, value range, and C, type and amount of income ranges. Reportable asset thresholds are the same as for the 450.

   a. If asset is an Excepted Investment Fund (EIF), and the EIF box is checked (between blocks B and C), filer need not identify type of income received.

   b. If “None (or less than $201)” is checked for the income amount, the type of income need not be identified.

   c. If filer, spouse and/or dependent child have the same security, aggregate all value and income to determine if they meet the reporting threshold. E.g., if filer has $800 in X stock, and spouse has $300, these amounts would be aggregated and X stock would be reportable.

   d. Aggregate different types of income from securities to determine if they meet the reporting threshold. E.g., if Y stock, valued at $800, earned both dividends ($175) and capital gains ($215), these amounts would be added to determine if it exceeded $200 as reportable income.

   e. Filer must indicate the actual amount of any of his non-investment reportable income in “Other Income” block in Block C, instead of providing a range. Most common examples of this include salary from former or outside employer, partnership income, or honoraria. Report benefits and severance separately from salary.

   f. Spousal income does not require reporting of actual amounts in Block B or C, however, the entry should annotate “spousal salary” either in Block A or under “Other Income” in Block C.

   g. Spouses and dependent children may use the “Over $1,000,000” category for their sole assets that meet the category, but the filer must use whichever of the higher categories applies.
h. Check changes to value and income. Where values jump more than one value or income range, reviewer should check for a transaction or obtain an explanation. See Reviewer Assumptions (p. 4-6) of Public Financial Disclosure: A Reviewer’s Reference (www.oge.gov/Financial-Disclosure/Docs/Financial-Disclosure-Guide/).

3. Unlike the 450, filer must report **cash accounts**, if they aggregate more than $5,000 in one financial institution. These include certificates of deposit, money market accounts, or other forms of deposit in banks, credit unions or similar financial institutions.

4. If stock that produced more than $200 income during the reporting period is completely sold, report value as “None (or less than $1,001)” and include capital gains in the type of income, if applicable.

**BP**: include a parenthetical in block A to record sales, e.g.,“(sold)” for complete sales or “(partial sale).”

5. **Stock Options** – are tricky and reviewers should refer to OGE guidance. See “Guide to Reporting Selected Financial Instruments” (www.oge.gov/Financial-Disclosure/Docs/Guide-to-Reporting-Selected-Financial-Instruments/, page 12) For example, options that are exercised and immediately sold are usually considered ordinary income and not capital gain, and therefore actual amount realized should be reported in “Other Income” box.

6. **Retirement Assets and Income.**

   a. The interest/dividends earned by **IRAs** must be reported, even if not taxable.

   b. Detailed disclosure of reportable underlying assets in a personal IRA is required, so show the value of the underlying assets, as well as interest/dividends/capital gains.

   c. **Defined benefit pensions** – The shorthand method of reporting for the 450 does not apply to the 278 report. Report the name of the employer, and the category of value (cash surrender) or if the value cannot be determined include a parenthetical noting “(value not readily ascertainable).” Do not complete block C type and amount of income. For block C, provide a description of the benefit to be received in “Other Income” box (e.g., “at age 65, $3,750/monthly”). If filer receives payments, this is actual income, and the actual amount received must be reported in “Other Income” box.

   d. **Defined contribution plans** - Report the name of the employer, type of plan (e.g., 401K, 403B, SEPs, Keogh or TIA-CREFF) and all reportable underlying assets as separate entries. Income from these assets is not ordinary income to the filer, so complete type and amount of income boxes in block C. Where
the interests are in boutique funds, OGE recommends evaluating whether the independently managed investment might qualify as an EIF before requiring reporting of all underlying assets.

7. **Limited Partnerships** – If publicly traded, they are usually EIFs, so simply identify the name and values. If they are not publicly traded, report the name, location and describe the trade or business. If it is an investment LP that does not meet the criteria for an EIF, the reportable underlying holdings must be reported. The types of income and amounts should match the information provided by a broker or on a K-1 schedule (of IRS Form 1065).

8. **Managed Accounts** – Where a new entrant filer identifies a managed account, notify them that each transaction (sale or purchase) over $1,000 will be reportable on Schedule B, even if they do not make the decision.

9. **Use of Brokerage Statements** – Filers should not be attaching brokerage statements or the like, as they usually are not in the required format, fail to cover the required period of time, or are overly onerous for reviewers. Remember, filers are obligated to complete the form rather than attach a brokerage statement or tax forms, except in very rare instances. See DO-00-007 ([www.oge.gov/DisplayTemplates/ModelSub.aspx?id=1993](http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=1993)).

D. **Schedule B, Part I, Transactions.** This is not required on the 450. This section helps to explain changes from year to year concerning Schedule A assets.

1. Report a transaction of real property, stocks, bonds, EIF shares or other securities when it exceeds $1,000. This section provides most of the explanation of changes that appear on Schedule A from one year to the next. Reviewers should check transactions against Schedule A, to ensure all new or sold assets are properly captured and reported.

2. Be sure that the filer provides the month, day, year, and value range of each transaction.

3. Report transactions made by non-public businesses or investment pools in which there is a direct proprietary or general partnership interest.

4. Remember, assets reported as sold on Schedule A may not be reportable on Schedule B, Part I, where transaction does not meet reporting threshold, but where capital gains are reportable (e.g., X stock sold with capital gains/dividends in excess of $200, but value was less than $1,000). Likewise, sold assets, may not meet reporting thresholds on Schedule A (e.g., where sold at a loss). Where there is a new asset on Schedule A and no corresponding transaction, confirm whether this new asset was previously held but newly reportable, inherited, or gifted. For each of the above scenarios, reviewer should annotate the explanation on the report.
5. Exchanges are rare. This transaction type should be used for stock re-issuances (e.g., Company X acquires Company Y, and Y stock is reissued as X stock), or where filer sells and purchases stock from the same fund family (e.g., Vanguard High-Yield to Vanguard Emerging Markets).

E. **Schedule B, Part II** – Gifts, Reimbursements, and Travel Expenses – Review material in the 450 section.

F. **Schedule C, Part I** – Liabilities – More items are reportable on the OGE Form 278 than the 450. For example, a mortgage on a rental property is required to be reported as a liability on a 278 even though it is not required to be reported on a 450, even if the mortgage is from a financial institution on terms generally available to the public.

   1. Credit card debt in excess of $10,000 at the end of the reporting period is reportable, but filer need not otherwise report credit card debt which exceeded $10,000 during the reporting period.

   2. Be sure that the filer provides the date, interest rate, term and value (the highest amount owed during the reporting period) of the liability. The date for credit cards is "continuing," and the term is "until paid."

G. **Schedule C, Part II** – Agreements and Arrangements – The most common reportable items in this section are retirement plans, sabbaticals, and arrangements for post-government employment, usually on new entrant and termination reports.

H. **Schedule D, Part I** – Outside Positions – The most common positions reported are fiduciary positions as officers, employees, or representative, such as trustee, limited or general partnerships, and professional associations. Make sure that the filer received supervisor approval for positions that appear to relate to his official duties, and the proper recusal is implemented where appropriate.

I. **Schedule D, Part II** – Compensation in Excess of $5,000 – This is not required on the 450. It is only for nominees and new entrants. Filers must provide the names of clients and customers for whom they provide direct, personal services requiring a fee of over $5,000, even when paid to the filer’s employer. When paid directly, there should be a corresponding entry on Schedule A.

J. **Under/Over-reporting** - Remind filers that this is a public report and educate them on their mistakes to reduce over-reporting. Under-reporting can also be an issue like with the 450s.

   1. Income from the Federal Government, social security numbers, and account numbers should NOT be reported. This information should not be released to the public.

   2. Where spousal assets are listed, but no employer, make sure to ask.
3. If filer has dependent children, verify they do not have a college savings account.

4. Filers often fail to include insurance as an asset. Remember to ask if they have any life insurance, other than term, and if so report.

K. Cross-Pollination – Ensure that the Schedules are consistent, as discussed above and in the Cross-Pollination material in the 450 section.

L. Substantive Review: Determine if there is a conflict between duties and reported items. Unlike the 450’s this should be easier to identify because we have more information on the interest, e.g., estimated value or details about non-Federal position.

1. Disqualification – If a conflict is likely, remember to immediately have filer recuse until you have had time to assess.

2. Ethics Agreement – Can be a good practice where conflict is complicated.

3. Letters of Warning – See 450 section for application to 278 Report. You may want to explain whether an exemption might apply.

4. Other?
You are the Deputy SJA and Ethics Counselor at your command. It is your pleasant task to review all the financial disclosure reports. You have just finished reviewing for accuracy a 450 filed by John Doe, a contract specialist. You’re pretty sure you finally have all the interests reported, and the entries are complete. You proudly know that you could survive any DoD or OGE audit. Now what do you do? Breathe a great sigh of relief, sign it, and put it in the Ready for Filing pile? Nice try. You’re just beginning to explore the real purpose of reporting the information!

You know that he’s a contract specialist, so there is the potential for working on particular matters, but you don’t know exactly what contracts he may deal with. His supervisor reviewed and signed the report, and he’s the one in the know, so there couldn’t be any significant problems, could there? Well, you know that he is a new employee, and you assume that his most recent employer was GE because of the pension and continuing ties. GE is a DoD contractor. But you don’t really know when he left his previous employment, or whether it even was GE. Besides a possible past employment relationship, he also has a pension, stock, and consulting fees from GE. You could call him, but you have 900 more reports to review.

1. What action do you recommend taking?

You also note that he is a tax consultant, but you don’t know who his clients are.

2. Do you see any problems? What do you recommend?

After checking your local contractor list, you know that some of the companies that he either has stock in, or is receiving compensation from (IBM, Boeing, Merck, and Lockheed), are all on the list.

3. What do you recommend doing?

Your command has had some problems with employees trying to represent organizations that they belong to. You see that he has spoken at the national conference of NCMA. He didn’t report being an officer or active participant in Part III, but he may be a member.

4. What do you recommend doing?

You send your letter, now heave a sigh of great relief, sign the report and happily toss it into the To Be Filed pile. Three days later, you get a call from John Doe, asking you what you meant when you said he shouldn’t work on matters concerning GE because he was just offered an opportunity to serve on a source selection committee and GE is expected to be one of the bidders. He’d really like to do it, so how can that be done?

5. Now what do you have to do?
FINANCIAL DISCLOSURE - 278 - QUESTION

You are the Deputy SJA and Ethics Counselor at your command. It is your pleasant task to review all the financial disclosure reports. You have just finished reviewing for accuracy a 278 filed by Jane Doe, the Director of your Information Management Division. You’re pretty sure you finally have all the interests reported, and that the entries are complete. You proudly know that you could survive any DoD or OGE audit. Now what do you do? Breathe a great sigh of relief, sign it, and put it in the Ready for Filing pile? Nice try.

You think back to last year when she came on board. She had to make a decision to award a very important IT contract and IBM had been one of the bidders. You had to help the Commander make a 502 determination regarding her recent IBM employment and grant a 208(b)(1) waiver for her IBM pension. The really fun part was telling her she had to sell her IBM options and that she couldn’t get a Certificate of Divestiture for it. She was really thrilled by that.

Now you see that she bought into that capital venture outfit with the proceeds. It shouldn’t be a problem though, since neither of the investments is a DoD contractor. Of course, they are both in the IT business and they are both working on state-of-the-art technology that DoD may be interested in. And boy, had it been hard getting that information, as the General Partner in a non-publicly traded limited partnership does not have to divulge that information. Hmm. What about this new extra job she has teaching an IT course? Wasn’t there something about not accepting compensation if teaching related to your official duties?

1. So what do you recommend doing?

Guess what! Remember the old saying, no good turn goes unpunished? Well, your helpful phone call has resulted in a return call. She doesn’t think this will be a problem, but now she’s concerned about it. She has been asked by DoD NII to sit on a special task force to develop new DoD policy in the form of a Directive that will affect the ability of IT companies to compete for DoD IT contracts. The only interests she has in the area are as a limited partner in the capital venture’s two interests, and they aren’t even DoD contractors. So there’s no problem, right?

2. How do you advise Ms. Doe?
You are the Deputy SJA and Ethics Counselor at your command. It is your pleasant task to review all the financial disclosure reports. You have just finished reviewing for accuracy a 450 filed by John Doe, a contract specialist. You’re pretty sure you finally have all the interests reported, and the entries are complete. You proudly know that you could survive any DoD or OGE audit. Now what do you do? Breathe a great sigh of relief, sign it, and put it in the Ready for Filing pile? Nice try. You’re just beginning to explore the real purpose of reporting the information!

You know that he’s a contract specialist, so there is the potential for working on particular matters, but you don’t know exactly what contracts he may deal with. His supervisor reviewed and signed the report, and he’s the one in the know, so there couldn’t be any significant problems, could there? Well, you know that he is a new employee, and you assume that his most recent employer was GE because of the pension and continuing ties. GE is a DoD contractor. But you don’t really know when he left his previous employment, or whether it even was GE. Besides a possible past employment relationship, he also has a pension, stock, and consulting fees from GE. You could call him, but you have 900 more reports to review.

1. What action do you recommend taking?

   A. You could ask for a disqualification statement, but you have no reason to believe that there is any risk of his ever handling a GE matter; after all, his supervisor did sign the report. Out of an abundance of caution, you could send him a sample disqualification and ask him to sign one. Another option is to send a letter of warning, in which you advise him that he has a financial interest in GE, so he should not participate in matters concerning GE if any arise, and that he may check with his supervisor or ethics counselor if he has any questions. You decide to send him a letter of warning.

You also note that he is currently a tax consultant, but you don’t know who his clients are.

2. Do you see any problems? What do you recommend?

   A. Since he files a financial disclosure report, the JER, at section 2-206, requires that he get written approval from his supervisor before engaging in any business activity or employment relationship with a DoD contractor. Since he is also a new employee, he may not be vividly aware of the requirement. You may want to add it to the letter of warning.

Also, since he’s new, he may not be aware that his government employment now prevents him from representing those clients before any government agency, including the IRS. 18 U.S.C. §§ 203 and 205. You may also want to include this in the warning letter.
After checking your local contractor list, you know that some of the companies that he either has stock in, or is receiving compensation from (IBM, Boeing, Merck, and Lockheed), are all on the list.

3. What do you recommend doing?

A. Add to the letter of warning that he has financial interests in these companies, so he should not participate in matters concerning them, and that he may check with his supervisor or ethics counselor if he has any questions. Alternatively, you may send a letter listing all the assets, or attaching a copy of the edited report.

Your command has had some problems with employees trying to represent organizations that they belong to. You see that he has spoken at the national conference of NCMA. He didn’t report being an officer or active participant in Part III, but he may be a member.

4. What do you recommend doing?

A. Since he is a new employee and you’re not sure if he is aware of the requirement, you may want to add to the letter of warning that if he is a member of NCMA, he is not allowed to represent it to any part of the Government under 18 U.S.C. §§ 203 and 205. Also, if he is an active participant (and just forgot to list it in Part III), he has a covered relationship with NCMA under 5 C.F.R. 2635.502 and should not participate in matters in which they are a party, and that he may check with his supervisor or ethics counselor if he has any questions.

You send your letter, now heave a sigh of great relief, sign the report and happily toss it into the To Be Filed pile. Three days later, you get a call from John Doe, asking you what you meant when you said he shouldn’t work on matters concerning GE because he was just offered an opportunity to serve on a source selection committee and GE is expected to be one of the bidders. He’d really like to do it, so how can that be done?

5. Now what do you have to do?

A. After silently groaning, tell him that you believe that as of this moment he is disqualified from participating in the source selection, but that you need a lot of information to determine if there is a way to overcome the disqualification. What do you want to know? Review the interests separately so you don’t go nuts.

First, the consultancy. Is there an 18 U.S.C. § 208 problem? Although DoJ has prosecuted cases that involved negotiating for an independent contractor relationship, OLC (the Office of Legal Counsel, DoJ) has declined to discuss whether an employment relationship under 208 includes independent contractors or consultants. OGE has recommended that it is prudent to consider that 208 applies and seek a waiver in appropriate circumstances. (94x16) What is the extent of the consultancy? What type of work is involved? What is the value of the fees? Would he be willing to give it up? This
would be a divestment of the interest. If not, and the consultant work is not related to the source selection, would you be willing to recommend a waiver? It may depend on all the answers. What about 5 C.F.R. 502? There is also a 502 concern here, but for simplicity’s sake (!), we will discuss 502 at the next item.

Second, concerning his prior employment with GE, when did he leave GE? If it is less than a year, there is definitely a 5 C.F.R. 502 problem, which establishes a covered relationship with an employer from whom he departed within one year. But don’t breathe too easily if it’s over a year, because the catch-all provision might still cover him. It would depend on his position with GE, his length of service, the type of work he did, etc. Depending on the answers to these questions, and on whether or not he retains his consultancy, you may also need a 502 determination. You need to talk to the supervisor about whether he would be willing to make the required written determination, that the Government’s interests in John Doe’s participating on the source selection committee outweighed any concern that a reasonable person might question the integrity of the selection process. Review the factors under 502 with him.

Third, as to the stock, what is its value? If it’s under $15,000, there is the exemption at 5 C.F.R. 2640.202. If it’s over that amount, see if it’s possible for the employee to sell some of the stock to get under the de minimus value. Don’t forget to remind him not to sell before getting a Certificate of Divestiture. The stock in the 401k probably cannot be sold. If the value is still over $15,000, only a waiver under 18 U.S.C. § 208(b) would allow him to work on GE matters. You would need to find out his total net worth to determine the percentage of GE interest. A ballpark figure is 5% or less. That will give you a clue whether a waiver is even possible.

Fourth, there is his GE pension. During your review, you determined that it is a defined benefit plan. He would not be able to participate in matters that would affect GE’s ability to fund the pension or make the pension payments. If you decide that you need a waiver, and that it is feasible to grant one, try to add the pension interest to be on the safe side.

With all this, good luck. Maybe it could be done, but do you really want to?
FINANCIAL DISCLOSURE - 278 - ANSWER

You are the Deputy SJA and Ethics Counselor at your command. It is your pleasant task to review all the financial disclosure reports. You have just finished reviewing for accuracy a 278 filed by Jane Doe, the Director of your Information Management Division. You’re pretty sure you finally have all the interests reported, and that the entries are complete. You proudly know that you could survive any DoD or OGE audit. Now what do you do? Breathe a great sigh of relief, sign it, and put it in the Ready for Filing pile? Nice try.

You think back to last year when she came on board. She had to make a decision to award a very important IT contract and IBM had been one of the bidders. You had to help the Commander make a 502 determination regarding her recent IBM employment and grant a 208(b)(1) waiver for her IBM pension. The really fun part was telling her she had to sell her IBM options and that she couldn’t get a Certificate of Divestiture for it. She was really thrilled by that.

Now you see that she bought into that capital venture outfit with the proceeds. It shouldn’t be a problem though, since neither of the investments is a DoD contractor. Of course, they are both in the IT business and they are both working on state-of-the-art technology that DoD may be interested in. And boy, had it been hard getting that information, as the General Partner in a non-publicly traded limited partnership does not have to divulge that information.
Hmmm. What about this new extra job she has teaching an IT course? Wasn’t there something about not accepting compensation if teaching related to your official duties?

1. So what do you recommend doing?

A. First, there is 5 C.F.R. 2635.804 and 5 C.F.R. 2636.301, which limits the amount of outside earned income of noncareer SES officials to 15% of the basic pay of Executive Level II. Ah, but she is career, so they won’t apply. So, will 5 C.F.R. 2635.807 affect her ability to teach the course, and more importantly, accept compensation for it?

Section 807 forbids government employees from receiving compensation from a non-Government source for teaching that relates to their official duties. Of course there are the usual definitions and exceptions. Schedule C of Ms. Doe’s 278 reported that the subject of her course was Information Technology (IT), so it may relate to her duties as Director of Information Management at your agency. You immediately find the exception at (a)(3) for a course at an institution of higher education. Of course, that only applies to a few of the definitions, so you still have to plow through them.

That exception applies only to two subparts, (B) and (E), of the definition “relates to official duties” at (a)(2)(i). As the teaching is not part of her official duties, (A) won’t apply. You don’t know if (C) will apply because you don’t know if the offer to teach the course was extended directly or indirectly by someone who has interests that can be affected by how Ms. Doe does her job. Finally, (D) forbids the use of non-public information.

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2012 Ethics Counselors Deskbook
Revised March 2012
So, you call Ms. Doe and find out that the offer was extended by the Dean of the Computer School at George Mason, and that the university will not be affected by Ms. Doe’s division. In fact, the offer was made because of her reputation in the field. Whew! You remind her about the prohibition on substantial use of non-public information. But isn’t there something else? Of course! The JER. Section 2-207 provides that if an employee permits the use of her government position to identify her in connection with her teaching, she must make a disclaimer if the subject deals in significant part with any ongoing or announced policy, program or operation of the DoD agency involved. The disclaimer merely states that views presented are those of the speaker, not DoD. It should be made at the beginning of the course, and it wouldn’t hurt to include it in any written material describing the course, with a reminder from time to time.

Guess what! Remember the old saying, no good turn goes unpunished? Well, your helpful phone call has resulted in a return call. She doesn’t think this will be a problem, but now she’s concerned about it. She has been asked by DoD NII to sit on a special task force to develop new DoD policy in the form of a Directive that will affect the ability of IT companies to compete for DoD IT contracts. The only interests she has in the area are as a limited partner in the capital venture’s two interests, and they aren’t even DoD contractors. So there’s no problem, right?

2. How do you advise Ms. Doe?

A. First, this is obviously not a particular matter that involves specific parties, but that doesn’t quite answer the question. Is this a particular matter of general applicability? The OGE regulation granting generic exemptions, at 5 C.F.R. 2640.102, defines it as a “particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties.” Helpful? Well, you can’t stop there, because there are also definitions in 2640.103! Subsection (a)(1) states that a “particular matter” covers policy matters that are “narrowly focused” on the class mentioned above, but does not cover “broad policy options directed to the interests of a large and diverse group of persons.” Crystal clear. Example 3 provides that a published agency regulation that applied only to companies operating meat packing plant is a particular matter. Close. Don’t ask, the regulation at 5 C.F.R. 2635.402 doesn’t address this issue. [And if it did? OGE has orally stated that 2640 has precedence in case of conflict.] Where did this come from? The preamble to the proposed 2640 regulation, 60 Fed. Reg. 47208, 47210 (September 11, 1995), states that it comes from other conflict of interest statutes, such as 18 U.S.C. § 207. Don’t laugh – OGE includes very important information in the preambles, even in the preambles of the proposed regulations. If you will be making ethics an important part of your credentials, you may want to collect preambles as you go.

So, does the regulation under 18 U.S.C. § 207 help? It is 5 C.F.R. § 2637, which applies only to employees who left the Federal Government prior to 1991. OGE is still working on one that will apply to those who left afterwards, but at least it may help shed light on the interpretation of our troubling language. Subsection 204(d) provides that

Advanced Financial Disclosure
2012 Ethics Counselors Deskbook
Revised March 2012

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“proposed adoption of a regulation or interpretive ruling” are included as particular matters of general applicability. These are terms of art under the Administrative Procedure Act, but are probably close enough to the situation here, considering a policy change to a DoD rule that will affect the ability of all companies in the information technology area to compete for DoD contracts. We may want to consider this a matter of general applicability.

Does the de minimus exemption for matters of general applicability help? After all that work, not really! First, it appears that the two together are worth more than $50,000, but you don’t know how much more. Could she sell enough to get below that threshold? As a limited partner in a non-publicly traded LP, it is difficult. Ah, there’s the other problem. The exemption requires that the securities be publicly traded, and neither has gone public yet. So, unless she can sell her interests entirely to the general partner or the other limited partners, she can’t participate in the task force.

Just in case she can sell those interests, are you done? Think hard. She already has a waiver for the IBM defined benefit pension, and she left IBM over one year ago. There don’t seem to be any other related financial interests. What about that waiver? It applied to the particular matter of the decision to award a contract. This is a different particular matter, and yes, according to OGE, you would have to grant a new waiver.

We’re done!
Secretary of the Army Policy for Travel by Department of the Army Officials

A Briefing by the Director of Executive Travel, Office of the Administrative Assistant to the Secretary of the Army

April 2012
Today’s Discussion:

- The Directorate of Executive Travel – How we can help you!
- The Secretary of the Army’s Policy for Travel by Department of the Army Officials – Why are we waiting so long to revise?
- Focus on 2012 – President, DoD mandates to cut waste
- Let’s Talk Spouse Travel
- Two Heads are Better than One – Policy and Legal Reviews
- Why Should You Care?
- Call us!
The Directorate of Executive Travel - Introduction

The Administrative Assistant to the Secretary of the Army is the senior career civilian in the Army, equivalent to a three-star GO, and the delegated senior travel policy official within the Army.

Executive Travel, a Directorate under the AASA:

- Member, Executive Airlift Scheduling Activity (EASA)
- Validator/Scheduler for all HQDA milair and 4-star CONUS Army Commands
- Coordinator for repatriation of remains; Dover AFB
- Policy oversight of USAPAT aircraft based at Andrews AFB/Ramstein/Hickam
- Pentagon & Executive Motor Pool – over 100 authorized personnel supporting 20,000 DOD customers daily
- Policy & exception oversight for Pentagon Helipad
- Single SecArmy travel policy determination/interpretation point
- Army Directive 2007-01, Secretary of the Army Policy for Travel by Department of the Army Officials - SATP (Current: 25 Jan 07)
- Administrative Assistant’s Policy for Use of the Executive Motor Pool (Current: April 2012)
WHAT THE SATP IS NOT:

- Not a **comprehensive** Army travel policy
  - TDY entitlements not covered
  - PCS travel not covered

WHAT THE SATP IS:

- a vehicle for the SecArmy to convey to senior Army officials the travel issues that are the most cause for concern and perception of abuse by the public
  - Accompanied/Unaccompanied spouses; use of milair; “required use”; premium travel; family conferences; contractors, uniform wear while in premium accommodations, etc

- a guide that takes a myriad of policy and laws and converts them to Army-unique language for real-time usage, and in some cases, makes higher level policies more restrictive for DA officials
  - Example: Army premium-class approval authority – more restrictive than DOD allows!
The SATP’s Evolution 1989-2012

- From 1989-1998, the SATP was published as a policy letter and distributed to 32 HQDA-level agencies with “permission” to disseminate to Commands
  - a guide for “E-ring” travel

- By 1999, it became apparent that an Army-specific travel policy could help officials in the field as much as at HQDA, but needed to remain a “living document” to meet the changing requirements of a new Army

- In 2003, the SATP became an official Army Directive

- 2003-2012, the SATP is distributed world-wide, and continues to add travel concerns translated into Army-specific language

You can find the SATP on the web:
November 2011, President Obama issued an Executive Order, “Promoting Efficient Spending”

- Listed 5 specific targets for cost efficiency
  - Travel
  - IT devices
  - Printing
  - Fleet efficiencies (ground and air)
  - Promotional items

“...to ensure efficient travel spending, agencies are encouraged to devise strategic alternatives to Government travel, including local or technological alternatives, such as teleconferencing and video conferencing.”

“...agencies should limit executive transportation.”
CHANGES TO DOD AND ARMY TRAVEL-RELATED POLICIES

Army Directive 2011-20, Department of the Army Conferences

- Significantly changes requirements for Army conferences
- Focuses on cutting waste and ensuring cost effectiveness

DOD Directive 4500.56 “Use of Government Aircraft” and DOD 4500.43 “Operational Support Airlift”

- Overarching policy for military aircraft usage
- Both under revision
- Army was a major player in revision process

- Only the Secretary and CSA are still designated as “required use”
  Non-required users of military aircraft must justify for each use why commercial air and/or ground resources can not meet the mission requirements

- Four-star GO's no longer designated as “required users” of military aircraft
  - can no longer self-approve for use of milair and must be authorized “one organizational level” higher, in accordance with OMB A-126

Joint Staff and OSD-ATL create the Operational Support Airlift Steering and Working Groups

- Develop new methodology on validation of the aircraft fleet size
- Who may fly on military aircraft and when commercial air support is required
• Travel to retirements, funerals & Changes of Command:
  • typically restricted to senior most military and/or civilian formally representing Army, however:
    • Installation Commanders may designate specific personnel, such as their aide, an installation CSM or similar position, to also travel under official circumstances provided they can document the specific benefit to the Army
• COCOM Approval or Army Approval for premium-class, spouse travel?
  • When on Army business...Army policy applies
  • When on COCOM business...joint or COCOM-specific policy applies
  • It is not appropriate to “choose” the most lenient policy!
• Official commercial air travel while in uniform
• Change to reporting premium-class approvals to OSD via new web tool
• Reiterates OSD policy on restricting use of “executive” airlift assets for PCS moves
• Chapter 12, Other Spouse Travel – major revision!
  • spouse travel under Chapter 12 restricted to three specific types of travel
The Golden Rule!

When a federal official travels on business, he or she should consider this question when committing the government to expenditures and reimbursements....

“If I were paying for this from my personal funds, would it be worth it, and more importantly would I do it?”
LET’S TALK ACCOMPANIED SPOUSE TRAVEL

• Did you know??
  • Army spouses travel over 40% more than any other Service’s spouses
  • DoD examines the frequency of spouse travel to determine when periodic audits or reviews are necessary
  • That every instance of spouse travel – EVERY INSTANCE – is considered an exception to policy
  • A spouse may only collect per diem for their travel under very restrictive circumstances – (Service Endorsed Training; SME; Some volunteers)
  • When traveling on military aircraft, a spouse even when on official orders, cannot displace another DoD employee
  • In every instance of spouse travel, a spouse must have a “separate and substantive” itinerary
Many questions posed are in regards to Chapter 12 of the SATP:

- Chapter 12, Other Spouse Travel, has three primary uses:
  
  - travel to formally approved Service-endorsed training courses as a “delegate” (Army G-3 Training Directorate/SecArmy approval)
  
  - travel as a SME
  
  - “some” volunteer travel in accordance with JTR/JFTR

General Rule: If the conference in question is not Service-endorsed, or a spouse cannot qualify under very restrictive SME rules, then use Chapter 10
I have no legal objection to the CG using a government vehicle to go to the conference!

But did you know he’s taking it home tonight so he can get an early start in the morning??

DOD officials can use government owned or leased vehicles for transport to unquestionably official events.

Within CONUS Army, only the Secretary and Chief of Staff of the Army may use government vehicles between their residences and places of official business.
Policy and Legal Reviews – One Without the Other May Not Be Enough

• “I want my spouse to accompany me at government expense on a military aircraft.”
• “Can we send a government car to pick up a soldier at the airport coming back from leave?”
• “My wife is a subject matter expert, and she needs per diem.”
• “My OCONUS flight is brutal, get me upgraded to business-class.”
• “Get me space A accommodations on an aircraft to the funeral.”

“No Legal Objection” does not mean it necessarily meets policy compliance. Similarly, “No policy issues” may not take into account legal/ethics ramifications.
Policy and Legal Reviews – Why is an “NLO” not enough?

“I want my spouse to accompany me at government expense on a military aircraft.”

It’s legal to have a spouse on a military aircraft at government expense...

BUT...

DoD and Army policy require that the spouse be officially participating at an unquestionably official event, and have a separate and substantive itinerary; or the spouse’s presence must serve a public relations or diplomatic benefit.
• “My OCONUS commercial flight is brutal, get me an upgrade to premium-class.”

It’s legal for an Army official on business to be upgraded to premium-class tickets...

BUT...

DoD and Army policy require that specific – and restrictive – circumstances be in effect and an authorized official approve the upgrade prior to the flight. Only 17 Army officials hold approval authority for premium travel. An approval for the senior official does not automatically upgrade an aide or spouse.

Other than medical requirements there is no caveat for upgrades within CONUS.
Policy and Legal Reviews – Why is an “NLO” not enough?

• “I’m not the senior official at the funeral, so put me on Space A so I can go.”

It’s legal for an Army official to travel in Space A accommodations...

DoD and Army policy require that military and civilian members be in an approved leave or pass status for the entire period of the travel, and military aircraft must be opened to all Space A passengers at the terminal – and prioritized!
It’s legal for a government owned or leased vehicle to carry escorted non-government personnel...

**“I have some guests coming with me to the event downtown. Let’s use the SUV instead of a sedan.”**

**BUT...**

DoD and Army policy require that unofficial passengers not displace any official passengers, nor may the size of the vehicle be enlarged to accommodate them.
I’m not a lawyer, but I slept at a Holiday Inn Express last night. Now about that legal review...

- Legal reviews for Army officials can be performed on travel issues to weigh legal impact, but...
  
  - Should be reviewed by the local policy official to ensure that the unique circumstances of the mission do not violate Army, DoD and/or Federal travel policy.

  - Similarly, policy officials are not qualified to always know the legal ramifications of a request, therefore legal /ethics reads are essential.
Traveling in Premium-Class While in Uniform

- A Soldier, provided he or she does not initiate the request and there is no additional cost to the taxpayer, may accept an on-the-spot upgrade for premium accommodations while in uniform.
- The Secretary of the Army’s Policy for Travel includes the intent that senior military and civilian officials, authorized prior to departure to use premium-class accommodations, should travel in civilian clothes whenever possible and the “advertisement” of rank by military and civilian officials should be avoided.

You may not know this, but I happen to be a very important Army official...got First-Class?
The taxpayer cares. Given the state of the U.S. economy, more attention than ever is being paid to how we as government employees get to where we need to go to do official business.

It’s a social media thing…you need to understand!

*Just one example*.............
Why All the Policy? Does Anyone Really Care??

Congress flies to exotic locales on wings of taxpayers expense, lawmakers fly high on ‘Pentagon Air’

By Jack Friedly

The Directorate of Executive Travel receives over a dozen “concerned taxpayer” calls annually; and six major FOIA requests and/or audits were initiated in 2010.
We’re here to help, and your calls help us make policy better:

- Andy Hare: 703-545-1131, andrew.p.hare.civ@mail.mil
- Mark Millich: 703-545-1262, mark.j.millich.civ@mail.mil

The Directorate of Executive Travel’s policy office provides over 120 years of Army-specific experience in areas of travel and transportation policy, operational support airlift, and executive ground transportation.
Using Financial Disclosure Management (FDM)

Secure, professional OGE 278 & OGE 450 reporting

Office of the General Counsel
Ethics & Fiscal

April 2012
Topics

• Using FDM Fundamentals
• Keys for Success
• FDM Website & Resources

Software tool to help do job better, easier, faster—streamline the financial disclosure reporting, review, & storage process.

Simple goal—replace paper-based process with an efficient, accurate, & more secure one.
Financial Disclosure Report (FDR) Process

• Administration
  – Identify Filers
  – Notify Filers, Supervisors
  – Collect reports (e.g., OGE 278, OGE 450)
  – Due dates, deadlines, extensions
  – Records

• Report Reviews
  – Remind Supervisors
  – Ethics official Technical review – OGE’s 60-day rule
  – Report reconciliation review
  – Conflict of interest analysis
  – Certification/signature
W3IFM?

• Tool available 24 x 7 to delegate/assign helpers
  – Administration delegation, report progress monitoring
  – Remind & notify Filers, Supervisors tools
  – Supplemental information and reporting examples
  – Improved paperless reporting

• Reports
  – Comparison view for report reconciliation reviews
  – Screening capability, e.g., paralegal reviewers
  – Store notes, complete online,
  – Purge at record retention expiration
**FDM is . . .**

- Office of Government Ethics (OGE) approved, secure, web-based application that improves the financial disclosure report preparation, filing, and review process:
  - *TurboTax*-like
  - Guides filer through questions about reportable financial information
  - Flags missing and incorrect information
  - Starts each report with prior report information – “prepopulation”
  - Reduces common errors
  - Increases data accuracy
  - Report “*Compare*” for reviewers (when filer has 2 or more reports in FDM)
- Paperless report and online review with eSignature

*Software tool . . .*
Benefits

OGE recognized – Award for Excellence & Innovation (2011); Best eFiling (2011); an OGE Agency Model Practice (2009)

Efficient
Report wizard leads users through the report form filling and review process. FDM’s paperless workflow eliminates the physical hand-offs between filers and reviewers. Second time filers “prepopulate” reports from earlier ones. Reviewers have a report “Compare” for repeat filers (2 reports in FDM).

Accurate
Incorporates Office of Government Ethics (OGE) business rules ensuring accurate and consistent reports.

Secure
Only a filer and his/her review chain can see the report. All personal information is protected through the use of security features such as SSL 128-bit encryption and user authentication.

Access
Convenient access via Internet

... assist reviewers get to Conflict of Interest analysis
Vision

• DoD/Agency-wide use
• Improved Financial Disclosure Report (FDR) processing/reviewing/approval
• Extract certain statistics for annual agency report to OGE due (1 Feb), e.g.,
  – Number of Filers required to file
  – Number actually filed
  – Number required to receive training
• Record annual ethics training for Filers (*maybe integrate online training for automatic tracking*)
FDM Users

Department of Defense

- Army (Executive Agent)
- Other Military Services
- Defense Information System Agency
- Defense Contract Management Agency
- Defense Logistics Agency
- National Geospatial Intelligence Agency (2011)
- Defense Finance & Accounting Service (2011)
- Defense Intelligence Agency (2012)
- Armed Services Board of Contract Appeals (2012)

Executive Branch

- OGE (2006)
- Veterans Affairs (2006)
- Center for Disease Control (SGEs, 2007)
- Federal Bureau of Investigation (2012)
Statistics

- Army developed; has used successfully since 2004
- Over 350,000 OGE 450 reports submitted (over 104,000 so far in 2012)
- Over 7,500 SF/OGE 278 reports submitted
- Over 118,000 Confidential and Public Filers use FDM
- Historical eFiling (through 2011)
Getting Started in FDM

- Take the short, narrated FDM web site tour: https://www.fdm.army.mil/PM_Reference_Docs/GCFDMIntro/GCIntro.html
- Scan the Resources area: https://www.fdm.army.mil/helpSupport/resources.htm
  - Read the Quick Starts
  - Scan the SOPs & User Guides
- Ethics roles Frequent Task How To Guides:
  - DAEO Frequent Task How to Guide: https://www.fdm.army.mil/PM_Reference_Docs/DAEOFDMTasks.doc
- Key Features
Help – Resources

Scroll to see similar OGE 450 resources
Key Dates/Events

• **January** –
  – Annual/Incumbent Report “Assigned” automatically for registered Filers in FDM with an OGE 450 or 278 Filer role on 31 Dec
  – FDM 220 extract available; online submission of your input for Annual Army report to OGE (replaces email attachments of MS Word document)
  – 450 Certifiers/POCs Remind OGE 450 Filers to file ([My Reviews | Remind Filers tab](#))

• **February** – Annual OGE 450s due NLT 15 Feb (Filer eSign on/before that date; reviews w/in 60 days after receipt)

• **April** – Notify Incumbent OGE 278 Filers to file ([Admin | Filers tab](#))

• **May** – Incumbent OGE 278s due NLT 15 May (Filer eSign on/before that date (or obtain an extension); reviews w/in 60 days after receipt)

• **November/December** –
  – Finish ([Complete](#)) unfinished OGE 278s; OGE 450s
  – Have Org Unit POCs update their Filer lists in FDM; replace departed Supervisors
Understanding FDM

- Role based – a user has one or more “roles” that determine what that user may do/see in FDM
- OGE 278/OGE 450 “Process Flow” for reported information
- Structure – FDM “connects” reported information to filers & authorized reviewers
- FDM “org units” connect filers, reviewer/supervisors, legal community users, & report certifiers
Key FDM 278 User Roles

- **DAEOs** (& Deputy “DAEO”) – 278 certifying authority
- **SLC** – Senior Legal Counsel (e.g., General Counsel, Staff Judge Advocate) at Command, organization
  - **SLC EC** – Ethics Counselor (e.g., often an additional duty for a member of OSJA)
  - **SLC Assistant** – Assists SLC/SLC EC manage report progress
- **Supervisor** – Filer’s Supervisor (Joint Ethics Regulation (JER) requires Supervisor review the financial disclosure (except for Termination reports))
- **Filer** – files an OGE 278
  - **Filer Assistant** – optional; may draft Filer’s report; cannot eSign for Filer; cannot amend for Filer
Key FDM 450 User Roles

• **450 Certifier** – local approving authority for OGE 450
  – 450 Certifier EC
  – 450 Assistant – often Ethics paralegal who “screens” reports; assists manage organization use

• **450 POC** – organization point of contact (POC) for managing organization’s OGE 450 filers/supervisors in FDM; supports 450 Certifier

• **Supervisor** – Filer’s Supervisor (Joint Ethics Regulation (JER) requires Supervisor review the financial disclosure)

• **Filer** – files an OGE 450
  – **Filer Assistant** – optional; may draft Filer’s report; cannot eSign for Filer; cannot amend for Filer

• **SLC** – Senior Legal Counsel (e.g., General Counsel, Staff Judge Advocate) at Command, organization
  – **SLC EC** – Ethics Counselor (e.g., often an additional duty for a member of OSJA)
  – Appoints 450 Certifier for Org Unit (**Admin | 450 Certifier** tab)
Registering Other Users

• SLCs/450 Certifiers/POCs may create new “Org Unit”
• Assign roles to the Org Unit
• Add Filers – Admin | Filers
  • SLC Ethics Counselors (SLC ECs) – My Info | My ECs
  • SLC Assistants – My Info | My Assistants
  • SLCs Assign 450 Certifiers – Admin | 450 Certifiers
• See FDM User Guides
Caution

- Filer’s personal and financial information is private and sensitive in nature.
- Limits on who may see it (e.g., Privacy Act)
- Supervisors have official purpose
- Pick the right “John Smith” – avoid a Privacy Act violation
- DISA Global Directory Service (GDS), https://dod411.gds.disa.mil/, listing email address embedded on DoD CACs
**Org Unit POCs**

- Most organizations with over 20 OGE 450 Filers will assign someone to “manage” Filers and report processing
- Legal Office POC
- Use **Admin | POC** (or **Admin | Org Unit**) tab to add/delete POC
  - POC can then register Filers
  - Assign requirement to file
  - Notify Filers to file
  - Monitor report filing – remind Filers (if needed)
Organization POCs

• Orient New POCs
  – POC User Guide – narrated tutorial:
  – POC Quick Start –
    https://www.fdm.army.mil/documents/450POCQuickStart.doc

• Annual Filing Season Update (FDM Resources tab: https://www.fdm.army.mil/helpSupport/resources.htm)
  – POC Quick Start
  – 450 Certifier User Guide (updated annually)

• Remember to thank POCs after successful filing season – Certificate of Appreciation template
Key Features - Filers

- Filers can prepare the report themselves or add an assistant who can draft it
- A report Q&A “wizard” & progress bar guides the Filer through with questions and tailored help
- Pre-population simplifies the filing:
  - Filers carry forward previous report data to their next reports
  - edit changes
- FDM flags incomplete items
- Filer eSigns the report securely online
- eMail notifications go to reviewers when Filer eSigns or amends

GPS-like “progress bar” – tracks Filer location in the report.

Transferring or prepopulating the previous year’s report data to new report saves time.
Key Features - Reviewers

- e-Mail notices alert reviewers of report review readiness status
- Worklist view shows reports ready for review & tracks in-progress reports
- OGE reporting business rules applied to flagging issues requiring additional information or special attention
- Reviewers can add comments directly to a report
- Reviewer eSigns report securely online
- Audit trail records report status changes
- Compare view shows changes Filers make between reports saving Reviewers report reconciliation time
Navigating FDM

- **Tabs** Click to display the first page for the tab and any tab menu items.
- **Report Data | Add Asset Page Title**
- **Tab Menu Items** Click to display
- **Log Out** Click to exit FDM
- **Progress Bar** Use to move to different report section.
- **Instructions** Provide directions on how to enter data.

**Instructions:**
- **Asset Name:** Enter a name for the asset, for example, the company name for a stock or bond. Optionally, you can choose the owner. Then choose the type of asset, including providing any indicated additional information (e.g., Publicly traded for a Stock, Bond, Option, or Security). Provide the location. Select the appropriate Asset Value. For Assets that also provide income, choose the type(s) of income (more than one is permitted) and select the appropriate income Amount. If the asset is an underlying asset to another asset, check the appropriate box and select the parent asset.

**Common Questions**
- What should I enter for the "Asset Name"?
- Should I enter a street address for a rental property?
- What is an Exempted Investment Fund?
- What is an Exempted Trust?
- What is a Qualified Trust?
- What are publicly traded stocks or securities?
- What do I report if I own a mutual fund?
- If I have a money market account, how do I report the asset?
- When do I report underlying assets?
- How do I report a "529" or similar prepaid tuition plan?
- How do I report a "529" college savings plan?
- What are examples of the other asset type?
Using FDM 278

• SLC Frequent Tasks How To Guide, 
  https://www.fdm.army.mil/PM_REFERENCE_DOCS/SLCFDMDTasks.doc

• Resources:  https://www.fdm.army.mil/helpSupport/resources.htm
  – SLC Quick Start
  – SLC FDM 278 User Guide

• View the Using FDM 278 narrated presentation and slides:

• Monitor 278 progress on the Management Reports tab, Disclosure Report Details (Using FDM Management Reports):
  – Narrated:  
  – Management Reports Quick Reference:
**FDM 278 Pre–Filing Season**

- Read the updated SLC Quick Start in the FDM Resources area, [https://www.fdm.army.mil/helpSupport/resources.htm](https://www.fdm.army.mil/helpSupport/resources.htm)
- Review FDM 278 SOP & Enclosures: [https://www.fdm.army.mil/helpSupport/resources.htm](https://www.fdm.army.mil/helpSupport/resources.htm) (a customizable template for legal offices to adapt to use to electronically file (eFile) and manage the OGE 278, Public Financial Disclosure Report, process using FDM. It offers "get ready" type information and a review checklist)
- Early in the year
  - Finish any reviews on your 278s ([My Reviews | Review Reports](https://www.fdm.army.mil/helpSupport/resources.htm))
  - Do you see correct Supervisors ([Admin | Supervisors](https://www.fdm.army.mil/helpSupport/resources.htm) tab)?
  - [Admin | Filers](https://www.fdm.army.mil/helpSupport/resources.htm) (or [My Reviews | Filers](https://www.fdm.army.mil/helpSupport/resources.htm)) tab – right 278 Filers?
  - Do Filers have the right “Assigned” 2012 Incumbent (for CY11)?
    - Presumed “Assign” Incumbent OGE 278 Report ([My Reviews | Review Reports](https://www.fdm.army.mil/helpSupport/resources.htm) tab)
    - Remove any unneeded, not started
  - Need to register/move any 278 Filers/Supervisors? ([Admin | Filers](https://www.fdm.army.mil/helpSupport/resources.htm)) tab
278 Filing Season Tasks

• Mid to late April notify Filer to file (FDM Notify email tool available on the Admin | Filer tab)
  — Filer Quick Start link on FDM home page (SOP has sample email notice content)
• Assist Filer (as needed)
• Review reports (My Reviews | Review Reports)
  – End Initial Review and/or
  – eSign (SLC EC in place of SLC)
  – Submit to DAEO after Supervisor has eSigned
• May assist 278 Supervisor review – when eSigning, Filer will cause FDM to email Supervisor or SLC
Reviewing 278s

• Visit the FDM Learning Center for:
  – Video: Reviewing an OGE 278
    https://www.fdm.army.mil/learningCenter/tutorials.htm
  – Quick Reference: Reviewing an OGE 278
    https://www.fdm.army.mil/learningCenter/documentation.htm

• Report “Compare” view when Filer has two or more
  OGE 278s in FDM – highlights Filer’s changes

• Check the FDM 278 SOP for useful a review checklist
  https://www.fdm.army.mil/helpSupport/resources.htm

• Remember OGE 60-day review rule – agency
  complete within 60 days unless more information
  required (5 CFR § 2634.605)
Review Filer’s 278 Report

After picking a Filer’s report to review, most SLCs (or SLC ECs or Assistants) first will select **Flags** and **Comment** Tabs to confirm there are no Flags or Comments needing attention/resolution then proceed to **Compare** when available or **Report Data**.


2. Check the FDM 278 SOP on the FDM Resources page, [https://www.fdm.army.mil/helpSupport/resources.htm](https://www.fdm.army.mil/helpSupport/resources.htm), for a review checklist.
Review 278s - Compare

- Compare
  - Summary table, then scrollable page highlighting changes between Filer’s reports section-by-section
  - Quick view of what changed to help you focus on Conflict of Interest

Report Options

Report’s “Review Status” screen has role-based action buttons:

Admin Close; Request Filer Amend; End Initial Review; eSign
End Initial Review

“Review Status” screen has “End Initial Review” action button to use when you are not ready to eSign

FDM Best Practice

- The End Initial Review feature helps Ethics Officials demonstrate compliance with OGE’s 60-day report review rule.
- Not necessary to use when you will eSign or report is Completed within 60 days of Filer’s eSign.

Click the envelope icon to send an email to the Supervisor who has not reviewed.
## SLC Tasks How to Guide

https://www.fdm.army.mil/PM_Reference_Docs/SLCFDMTasks.doc

### Contents

(Click the hyperlinked topic to see a short summary and a link to a more detailed explanation of the topic with step-by-step instructions)

<table>
<thead>
<tr>
<th>Administrative/Maintenance Tasks</th>
<th>When</th>
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</thead>
<tbody>
<tr>
<td>Update my FDM contact info</td>
<td>As needed</td>
</tr>
<tr>
<td>Add SLC EC</td>
<td>As needed</td>
</tr>
<tr>
<td>See my 278 Filer(s)</td>
<td>As needed</td>
</tr>
<tr>
<td>Add a 278 Filer</td>
<td>As needed</td>
</tr>
<tr>
<td>Inform/Remind my 278 Filer(s) to eFile</td>
<td>NLT 2 weeks before 278 is due; repeat as needed</td>
</tr>
<tr>
<td>Coordinate a Filer Assistant to draft Filer's 278</td>
<td>As needed</td>
</tr>
<tr>
<td>Remove a departed Filer</td>
<td>As needed</td>
</tr>
<tr>
<td>Edit an existing FDM org unit</td>
<td>As needed</td>
</tr>
<tr>
<td>Add new/replace departed users (other than Filer) for an existing FDM org unit</td>
<td>As needed</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Report Processing Tasks</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Record an Extension</td>
<td>NLT due date being extended</td>
</tr>
<tr>
<td>Review/eSign a 278</td>
<td>As needed, generally within 30 days* after Filer eSigns</td>
</tr>
<tr>
<td>Advise Supervisor how to review in FDM</td>
<td>As needed, usually within 30 days after Filer eSigns</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Overseeing Report Processing Tasks</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Oversee FDM 450 report processing</td>
<td>As needed, starting mid-March annually</td>
</tr>
<tr>
<td>See overdue 450s</td>
<td>As needed, starting mid-March</td>
</tr>
<tr>
<td>Assign/change 450 Certifiers</td>
<td>As needed</td>
</tr>
</tbody>
</table>

*OGE regulations require final certification within 60 days of report receipt when the reports do not require additional information or remedial action. (See OGE Program Management Advisory PA-11-04, http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2147484468.)
Using FDM 278 Summary

- My 278 Filers (Admin | Filers tab, “Show My Filers”)
  - Incumbents (due in May)
  - Add New Entrants during the year
- Auto assign Reports to eFile
- Notify Filers to eFile (agency FDM DAEO or local SLC?)
- Approve Extensions (Record in FDM)
- Remind Supervisors to eReview
- Review Reports

SLC Quick Start: https://www.fdm.army.mil/documents/S LCQuickStart.doc
Filer

- Common Access Card (CAC)/PIN access*
- Main work space: My Reports tab; Reports Not Started
- May add Filer Assistant to draft report
- Help available:
  - Video tutorial/Quick Reference – Filing an OGE 278
  - Legal Advisor for report content
  - FDM Service Center
    - Telephone: 732-720-6454, 443-861-8679, DSN 848-8679 (7:00 a.m. – 5:00 p.m. Eastern M-F [during filing season])
    - Email: [usarmy.APG.cecom.mbx.FDMSpt@mail.mil](mailto:usarmy.APG.cecom.mbx.FDMSpt@mail.mil)
  - FDM 450/278 User Guides for Legal Staff

*Mention when you notify Filer to File

*Army Knowledge Online user access available
Returning FDM Incumbent 278 Filer

- Starts on FDM web site, https://www.fdm.army.mil
- Quick Start: https://www.fdm.army.mil/documents/278FilerQuickStart.doc
- Many SJAs/staff members serve as Filer Assistant to draft report
- Pre-populate in Getting Started
- Add Assets prompts for create Transactions (New Entrant Filers do not report Transactions)
- FDM 278 SLC User Guide, chapter 5
Filer eSign

View opens PDF of 278 report

Step 1: By eSigning...

I hereby certify that the report data I have entered and all files I have attached are true, complete, and correct to the best of my knowledge.

I certify that I am aware of the Annual Post-Employment Certification and Notification to Senior Officials on Post-Government Employment Restrictions under 18 USC § 207, and that I have not knowingly violated those restrictions that apply to Federal personnel while they are in Federal service.

In accordance with the Digital Signature Act of 1999, I recognize (the Digital Signature) shall be given the same legal status as a signature in writing. eSignature may not be denied legal effect, validity, or enforceability here by consent to the use of eSignature.

I understand that my eSignature is applied to the information that I have provided and not the presentation formatting of the information on the screen or printed page.

Step 2: Submit my report to...

- Asdj Sec (Senior Legal Counsel)
- Asdh Sec (Supervisor)

Step 3: eSign your report

Checking one or both names enables the eSign feature (Step 3)
Using FDM 450

- 450 Certifier Frequent Task How To Guide: https://www.fdm.army.mil/PM_Reference_Docs/450CertifierFDMTasks.doc
- Resources: https://www.fdm.army.mil/helpSupport/resources.htm
  - FDM 450 Certifier Quick Start
  - FDM 450 Certifier User Guide
- View the Using FDM 450 narrated presentation and slides:
- Best practices: https://www.fdm.army.mil/PM_Reference_Docs/BP450Certifier.doc
- Monitor OGE 450 progress on the Management Reports tab, Disclosure Report Details (*Using FDM Management Reports*):
  - Slides: https://www.fdm.army.mil/PM_Reference_Docs/SLCStatus.ppt
My ECs/Assistants

- Add (or remove) SLC Ethics Counselor (EC) ([My Info | My ECs tab]) to assist with 278 review

- Add (or remove) SLC Assistant ([My Info | My Assistants tab]) to assist with input for annual Army report to OGE
My Reviews | Remind Filers

- Notify to file using FDM (Jan) (My Reviews | Remind Filers tab)

• Initial notice to file Annual OGE 450 in Jan
• Later in Jan, remind those who haven’t started by a date you/your POC picks
• After filing deadline, search and ID those who are late and notify them/their Supervisors


In your notice you might mention the OGE 450 Filer Quick Start, https://www.fdm.army.mil/documents/450FilerQuickStart.doc
My Reviews | Remind Supervisors

- Notify Supervisors to review using FDM (My Reviews | Remind Supervisors tab)

Customary to use regularly starting 1 Feb & after the mid-Feb filing deadline to “Remind” (notify) Supervisors to review using FDM (My Reviews | Remind Supervisors tab). Filer is timely with report if filed on/by the due date.

Reviewing OGE 450s

• Check the FDM 450 SOP for a review checklist
  https://www.fdm.army.mil/helpSupport/resources.htm

• Visit the FDM Learning Center for:
  – Video: Reviewing an OGE 450
    https://www.fdm.army.mil/learningCenter/tutorials.htm
  – Quick Reference: Reviewing an OGE 450
    https://www.fdm.army.mil/learningCenter/documentation.htm

• Report “Compare” view when Filer has two or more OGE 450s in FDM – *highlights Filer’s changes*

• OGE 60-day review rule
Extensions

• Filers request outside FDM
• Ethics Officials approve outside FDM
• DAEO/SLC (& ECs) roles may record extensions in FDM
• Start on Review Status screen of Assigned, Not Started or a Draft report
• Info in FDM will be available for SLC input to annual Agency report to OGE

Management Reports

- Disclosure
  - Registered Filers
  - Details
  - Filers with no reports
- Administration (Supervisors)
- Currently Overdue (OGE 450 only)
- SLC-220 Worksheet
- Review Metrics (450 Certifier success score)


Using FDM Management Reports:
Slides: https://www.fdm.army.mil/PM_Reference_Docs/SLCStatus.ppt
## Management Reports - Disclosures

### Select Disclosure Report

1. **Registered Filers Summary**
2. **Disclosure Report Detail**
3. **Filers with No Disclosure Reports**

### Registered Filer Summary

Disclosure tab - Provides a summary of your current Filer’s submission status by Form Type and Year. Use this report to track how many Filers for the current year have or have not submitted disclosure reports in FDM.

### Disclosure Detail Report

Disclosure tab - Provides disclosure reporting and reviewing status detail by Org Unit, Form Type and Year. Use this report to track review progress of a disclosure report.

### Filer’s with No Disclosure Report

Disclosure tab - Lists any registered Filers who have not started a report, assigned or not assigned, by the specified year and report type. Use this report to track delinquent filers in FDM.

**Note:** Some Filers shown on this list who have not been assigned a report are not delinquent (e.g., they filed a New Entrant in last 60 days of prior year and do not owe the Annual or Incumbent until 2010).
Currently Overdue OGE 450s

Currently Overdue OGE 450 Annual Reports

Currently Overdue tab - The Currently Overdue report can be used by DDAEOS, Senior Legal Counsels and 450 Certifiers to view data about late annual reports for the current year. A report will display if it was assigned, has a Review Status of Not Started or draft, and the reporting due date already occurred.

“Success Score”

Scores 450 Certifier report processing time and displays agency average for comparison.
Ethics Training

- Legal official roles may notify Filers & record Ethics Training for Filers
- Tabs:
  - Not Trained
  - Trained
  - Exceptions
- Use is optional; info in FDM will be available for SLC input to annual Agency report to OGE
- Print 2012 Training Record **BEFORE** 31 Dec 2012
  - Ethics Training | Trained
  - Ethics Training | Not Trained

Annual Ethics Report

• Management Reports | SLC-220 Worksheet tab

• Click Generate Worksheet to extract FDM info on Filers, reports, & ET for your part of the annual agency ethics report to OGE

Instructions for the Legal Office Senior Legal Counsel (SLC):

1. This worksheet shows information available in FDM on disclosure reports (i.e., SF 278, OGE 450), ethics training recorded for Filers you support, and Filers in the Org Units/Subordinate Org Units where you are the SLC. It should aid you in filling out part of the annual agency report to OGE.

2. You will need to supplement this worksheet when preparing your part of the annual agency ethics report. Army will be using an online submission and separate instructions will include a link to that site.
Conclusion

• Software tool to support FDR process
• Narrated FDM web site tour: https://www.fdm.army.mil/PM_Reference_Docs/GCFDMIntro/GCIntro.html
• FDM Home page – role information area
• Using FDM 278:
  • Slides: https://www.fdm.army.mil/PM_Reference_Docs/UsingFDM278.ppt
  • Narrated: https://www.fdm.army.mil/PM_Reference_Docs/278/UsingFDM278.html
  • SLC How To Guide: https://www.fdm.army.mil/PM_Reference_Docs/SLCFDMTasks.doc
• Using FDM 450:
  • Slides: https://www.fdm.army.mil/PM_Reference_Docs/UsingFDM450.ppt
  • Narrated: https://www.fdm.army.mil/PM_Reference_Docs/450/UsingFDM450.html
  • 450 Certifier How To Guide: https://www.fdm.army.mil/PM_Reference_Docs/450CertifierFDMTasks.doc
  • Best practices: https://www.fdm.army.mil/PM_Reference_Docs/BP450Certifier.doc
• Feedback welcome: geo-hancocks@us.army.mil

Financial disclosure report program management made easy
Ethics Program Reviews
Review Measures

- Compliance
- Compliance+
Additional Documents

- Available from the Office of Government Ethics
  - Checklist of Ethics Materials
  - Tips onPreparing for an Ethics Program Review
Review Elements

▪ Enforcement
▪ Ethics Counseling
▪ Ethics Training
▪ Financial Disclosure
▪ Ethics Agreements
▪ Special Government Employees
Enforcement

- Agency’s system of enforcement
- Roles of ethics officials/OIG/other investigative offices
- Notification to OGE of referrals to DOJ/U.S. Attorney
Ethics Counseling

▪ Counseling reviewed by OGE Desk Officer

▪ Accuracy – is the analysis correct?
▪ Timeliness -- self-evident
▪ Transparency – yes/no answer vs. analysis?
▪ Accountability – written responses?
▪ Consistency – Are you ensuring multiple responses to the same question are answered in a similar fashion? Coordination?
Ethics Training

- **Initial Ethics Orientation**
  - May be many employees only exposure to the ethics program. IEO should not trivialize the importance of the ethics program.

- **Annual Ethics Training**
  - May be only continuing exposure to the ethics program that covered employees may have. Are you reinforcing criminal provisions? Highlighting recent headlines/prosecutions?
Ethics Training

- Model Practices:
  - In person initial orientation/annual ethics training
  - Tracking systems
  - Annual ethics training provided to > covered employees
Financial Disclosure

- Have written procedures been developed
- Have reports been collected and reviewed timely to ensure timely detection/prevention of ethics issues
- Have potential conflict-of-interest issues raised on reports been appropriately resolved
- Have reviewers been sufficiently trained
Model Practices:

- Tracking system to monitor collection, review, and certification of reports
- Notifying filers when their reports have been reviewed and certified
- Developing a checklist and other review aids to standardize the review process
Ethics Agreements

- System for ensuring employees have complied with ethics agreements
- Whether waivers have been properly granted
- Whether disqualifications have been properly structured
- Whether divestitures/resignations have been properly carried out
Leadership Initiative

Commitment and action by agency leadership is the keystone for:

- Ensuring the integrity of an agency's ethical culture
- Fostering public confidence in the decision-making processes of Government
Leadership Initiative

Concrete Leadership Actions:

- Inviting ethics officials to participate in senior staff meetings
- Participating visibly in ethics-related events, such as annual ethics training
- Making announcements and speeches that reinforce the importance of ethics
- More concrete leadership actions can be found on OGE’s Web site at:

OGE Initiatives

▪ Report: Elements of a Successful Financial Disclosure Program. On OGE’s Web site at:


▪ Self-Assessment

▪ Succession Planning

▪ Executive Order 13490 (Ethics Pledge)
Wrap-up

Questions?
Thank you!
Teaching, Speaking, and Writing (With Focus on Book Deals)

When may an employee receive compensation for teaching, speaking, and writing?

(Seems like such a simple question!)

LTC Art Kaff
Department of the Army
Simple Answer

- Agency Supplemental (JER)
- E.O. 12674
- 18 USC 209
- 2636.303
- SGE
- 2635.807
- ??
- CNC
- 2635.704
- Colbert Report
See Flow Chart on 5 CFR 2635.807
Book Deals
Template for Approaching Book Deal Questions:

- What category of employee is seeking compensation for writing a book?
- What is the book about?
- When is the writing performed and compensation received?
- What is the type of compensation?
- Who is offering the compensation and why?
- What other ethics rules and considerations may apply?
Category of Employee?

Regular Employees ARE:

- Officers
- Enlisted Members
- DOD civilian employees (including agency civilian employees)
Category of Employee?

Regular Employees are NOT:

- SGEs under 18 U.S.C. § 202(a), nor
- covered noncareer employees under 5 C.F.R. § 2636.303(a), nor
- employees appointed by the President to a full-time noncareer position described under 5 C.F.R. § 2635.804(c)(2).
Special Government Employees (SGE):

- are those executive branch officers or employees specified in 18 U.S.C. § 202(a).
- generally are employees who are retained to work temporarily for the Government for no more than 130 days in any 365-day period.
- includes Reserve members serving on active duty involuntarily or for training for any length of time, or serving voluntarily on active duty for training for 130 days or less.
- might or might not be paid for their work and they can work either full-time or on an intermittent basis.
Is the Book Related to Official Duties?

Two Main Classifications:

- Based on the subject matter of the writing
- Based on who is providing the compensation and why
Related To Official Duties

Based on Who Offered the Compensation & Why:
- Invitation from person affected by performance of employee’s duties;
- Invitation because of official position;

Based on the Subject Matter of the Book:
- Part of official duties;
- Draws on nonpublic information;
- Matter to which the employee has been assigned within 1 year (some SGEs treated differently);
- Deals with ongoing or announced policy, program or operation of agency (not SGEs)
Deals in significant part with an ongoing or announced policy, program or operation of the agency:

- For regular employees look to 2635.807(a)(2)(i) (Examples 3 - 6)
- For SGEs “related to official duties” look to 2635.807(a)(2)(i) (Examples 7 & 8)
- For a discussion and further analysis look to Informal Advisory Opinion 01x10 (November 13, 2001)
Timing of Writing and Receipt of Compensation?

Government service, compensation and writing must overlap at some point in order for the ethics rules to apply.

"Receive" Compensation

<table>
<thead>
<tr>
<th>Activity</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gov't Service</td>
<td>Gov't Service</td>
</tr>
<tr>
<td>Compensation</td>
<td>Compensation</td>
</tr>
<tr>
<td>Writing</td>
<td>Writing</td>
</tr>
</tbody>
</table>
Type of Compensation?

- Advance
- Royalties
- Travel Expenses

(All considered “compensation” except travel expenses under 2635.807)
Who is Offering the Compensation and Why?

- 5 C.F.R. 2635.807(a)(2)(i)(C)(invitation or offer of compensation was extended by a person or entity who may be substantially affected by the performance of the employee's official duties)

- 5 C.F.R. 2625.807(a)(2)(i)(B)(circumstances indicate that the invitation to write the book was extended to the employee primarily because of his official position, rather than his expertise in the subject)
Other Considerations

- Writing related activities
- Supplemental agency regulations (JER)
- Financial conflicts of interest
- Impartiality
- Supplementation of salary/official duties
- No classified information
- Misuse of position
  - Use of nonpublic information
  - Reference to official position
A DOD employee who uses/permits use of his/her military grade, or who includes/permits inclusion of his/her title or position as one of several biographical details given to identify himself/herself in connection with teaching, speaking or writing **shall make a disclaimer** if subject deals in significant part with any ongoing or announced policy, program or operation of agency, and employee has not been authorized to present the material as the agency's position.

Disclaimer shall state that the views presented are those of the speaker or author and do not necessarily represent the views of DOD or its Components.

Where a disclaimer is required for an article, book or other writing, the disclaimer shall be printed in a reasonably prominent position in the writing itself.

Joint Ethics Regulation, para. 2-207 and 3-305a
A lecture, speech, or writing that pertains to military matters, national security issues, or subjects of significant concern to DoD shall be reviewed for clearance by appropriate security and public affairs offices prior to delivery or publication. JER, para. 3-307b.
# TABLE 1: Timing of Writing and Receipt of Compensation Regular Employees and SGEs

<table>
<thead>
<tr>
<th>If the writing occurs:</th>
<th>And if the compensation is received:</th>
<th>Then, under the Standards of Conduct § 2635.807:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before Gov’t Service</td>
<td>Before Gov’t Service</td>
<td>Compensation permitted</td>
</tr>
<tr>
<td>Before Gov’t Service</td>
<td>During Gov’t Service</td>
<td>Compensation permitted</td>
</tr>
<tr>
<td>Before Gov’t Service</td>
<td>After Gov’t Service</td>
<td>Compensation permitted</td>
</tr>
</tbody>
</table>
| During Gov’t Service   | Before Gov’t Service*            | 1. Compensation barred if “related to official duties”  
                          |                                   | 2. Compensation permitted if not “related to official duties” |
| During Gov’t Service   | During Gov’t Service              | 1. Compensation barred if “related to official duties”  
                          |                                   | 2. Compensation permitted if not “related to official duties” |
| During Gov’t Service   | After Gov’t Service**            | 1. Compensation barred if “related to official duties”  
                          |                                   | 2. Compensation permitted if not “related to official duties” |
| After Gov’t Service    | Before Gov’t Service              | Compensation permitted          |
| After Gov’t Service    | During Gov’t Service              | Compensation permitted          |
| After Gov’t Service    | After Gov’t Service               | Compensation permitted          |

* Section 2635.807 applies to a book advance made prior to Government employment, if the payment is for a book to be written during Government employment. Because the payment is conditioned on the subsequent performance of work after Government appointment, the receipt is not completed prior to employment.

** Section 2635.807 does not apply, however, if the employee writes the book “on speculation,” without any agreement to receive compensation for the writing that occurs during Government service.
If the employee signs the contract:

The writing AND compensation occur:

Then, under the Standards of Conduct § 2635.807:

<table>
<thead>
<tr>
<th>If the employee signs the contract:</th>
<th>The writing AND compensation occur:</th>
<th>Then, under the Standards of Conduct § 2635.807:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before Gov’t Service</td>
<td>After Gov’t Service</td>
<td>Compensation permitted</td>
</tr>
<tr>
<td>During Gov’t Service</td>
<td>After Gov’t Service***</td>
<td>Compensation permitted</td>
</tr>
</tbody>
</table>

*** Section 2635.807 applies, however, if a book is based on a diary or notes kept while in Government service, if the keeping of the diary or taking of the notes are done pursuant to an agreement to receive compensation for these services.
Overview: Determining Whether a Regular Employee or an SGE May Receive Compensation for Writing a Book

I. Employee Category: Regular or SGE?

Regular: Not an SGE, CNC or PA employee
SGE: 18 U.S.C. § 202(a)

II. § 807 – “Related To Official Duties”
What is the Book About? / Subject Matter Prohibitions

Regular:
5 C.F.R. § 2635.807(a)(2)(i)(E)(1) & (2)
(E)(1) Matter in which employee assigned within previous year
(E)(2) Concerning any ongoing or announced policy, program or operation

SGE:
5 C.F.R. § 2635.807(a)(2)(i)(E)(4)
(E)(1) Applies to SGEs differently from Regular – See 5 C.F.R. § 2635.807(a)(2)(i)(E)(1)
(E)(2) Does not apply to SGEs

III. What is the timing of the Work? / Receipt of the Compensation

Regular & SGE: 5 C.F.R. § 2635.807(a)(2)(iii) & (iv) – Receipt of compensation is usually attributable to the time the writing occurs, unless written solely on speculation during Government service.

Possibilities: Before, during or after Government service
Overview: Determining Whether a Regular Employee or an SGE May Receive Compensation for Writing a Book

IV: What is the type of the Compensation?

Regular & SGE: 5 C.F.R. § 2635.807(a)(2)(iii) – All forms of consideration except travel

Possibilities: Advance; Royalties; Other Compensation or Consideration

V. § 807 - “Related To Official Duties”
Who is Offering the Compensation and Why?

Regular & SGE:
5 C.F.R. § 2635.807(a)(2)(i)(B) Invitation extended primarily because of official position
5 C.F.R. § 2635.807(a)(2)(i)(C) Invitation extended by person affected by employee’s duties

VI. What are Other Considerations?

Compensation for Writing Related Activities; Supplemental Agency Regulations (Joint Ethics Regulation; 18 U.S.C. § 208 (Financial Conflicts); 5 C.F.R. § 2635.502 (Covered Relationship - Publisher); 18 U.S.C. § 209 (Supplementation of Salary – SGEs Exempt); 5 C.F.R. § 2635.807(a)(2)(i)(A) (Writing as Part of Official Duty); 5 C.F.R. § 2635.702 (Public Office for Private Gain); 5 C.F.R. § 2635.703 (Use of Nonpublic Information); 5 C.F.R. § 2635.807(a)(2)(i)(D) (Draws Substantially on nonpublic information); 5 C.F.R. § 2635.704 (Use of Government Property); 5 C.F.R. § 2635.705 (Use of Official Time); 5 C.F.R. § 2635.807(b) (Reference to Official Position); 5 C.F.R. § 2635.802 (Conflicting Outside Employment & Activities)
Scenarios

- An Army Soldier is asked by a publisher to write a book for a publishing company about her duty experiences in Iraq.
- A Army Soldier writes a book “on speculation” about her duty experiences that occurred less than one year ago in Iraq (no deal with publisher).
- An Army civilian employee writes a book for compensation about current Army operations in Iraq.
- An Army civilian employee writes a book for compensation about the initial invasion of Iraq.
Covered Noncareer Employees (CNC) and Presidentially Appointed (PA) Employees

- For your information only
Covered Noncareer Employees (CNC):

- appointment must be one of several types of noncareer appointments.
- must be in a position classified above GS-15 in the General Schedule or, for positions not under the General Schedule,
- must be in a position for which the rate of basic pay is at least 120 percent of the minimum rate of basic pay payable for GS-15
- cannot be an SGE
- may be Senior Executive Service Member
- Not General Officer or Admiral
Appointed by the President to a full-time noncareer position (PA):

- the employee must be appointed by the President (does not include military officers);
- the employee must be a full-time employee; (i.e. no SGEs)
- the employee must not be excluded from coverage.
Different Rules Apply to Covered Noncareer Employees (CNC) and Presidential Appointed (PA) Employees

- Definition of “Related to Official Duties” under 5 C.F.R. 2635.807 (CNC)
- 15% Outside Earned Income Limitation (CNC)
- Outside Earned Income Ban (PA)
- Definition of “Compensation” under the 15% limitation and the ban (CNC & PA) (Royalties vs. Advance)
TABLE 3: Timing of Writing and Receipt of Compensation
PA and CNC Employees

<table>
<thead>
<tr>
<th>If the writing occurs:</th>
<th>And if the compensation is received:</th>
<th>Then, under the Standards of Conduct § 2635.807: PA &amp; CNC Employees</th>
<th>Then, under the Outside Earned Income Ban: PA Employees</th>
<th>Then, under the 15% Outside Earned Income Limitation: CNC Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before Gov’t Service</td>
<td>Before Gov’t Service</td>
<td>Compensation permitted</td>
<td>Compensation permitted</td>
<td>Compensation doesn’t count toward limit</td>
</tr>
<tr>
<td>Before Gov’t Service</td>
<td>During Gov’t Service</td>
<td>Compensation permitted</td>
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<tr>
<td>During Gov’t Service</td>
<td>Before Gov’t Service*</td>
<td>1. Compensation barred if “related to official duties”</td>
<td>1. Advance barred</td>
<td>1. Advance counts toward limit</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Compensation permitted if not “related to official duties”</td>
<td>2. Royalties permitted</td>
<td>2. Royalties do not count toward limit</td>
</tr>
<tr>
<td>During Gov’t Service</td>
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<td>1. Compensation barred if “related to official duties”</td>
<td>1. Advance barred</td>
<td>1. Advance counts toward limit</td>
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</tr>
</tbody>
</table>

* The rules restricting receipt of compensation by Government employees for writing do apply to a book advance made prior to Government employment, if the payment is for a book to be written during Government employment. This is the case because the payment is conditioned on the performance of work during Government service.

** The rules do not apply, however, if the employee writes the book “on speculation”.
TABLE 4: Timing of Contract, Writing and Compensation
PA and CNC Employees

<table>
<thead>
<tr>
<th>If the employee signs the contract:</th>
<th>The writing AND compensation occur:</th>
<th>Then, under the Standards of Conduct § 2635.807: PA &amp; CNC Employees</th>
<th>Then, under the Outside Earned Income Ban: PA Employees</th>
<th>Then, under the 15% Outside Earned Income Limitation: CNC Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before Gov’t Service</td>
<td>After Gov’t Service</td>
<td>Compensation permitted</td>
<td>Compensation permitted</td>
<td>Compensation doesn’t count toward limit</td>
</tr>
<tr>
<td>During Gov’t Service</td>
<td>After Gov’t Service***</td>
<td>Compensation permitted</td>
<td>Compensation permitted</td>
<td>Compensation doesn’t count toward limit</td>
</tr>
</tbody>
</table>

*** A book based on a diary or notes kept while in Government service, however, is considered writing during Government service if the keeping of the diary or taking of the notes are done pursuant to an agreement to receive compensation for these services.
Overview: Determining Whether a CNC employee or a PA Employee May Receive Compensation for Writing a Book

### 1. Employee Category: CNC or PA?

<table>
<thead>
<tr>
<th></th>
<th>CNC or PA?</th>
</tr>
</thead>
<tbody>
<tr>
<td>CNC</td>
<td>5 C.F.R. § 2636.303(a)</td>
</tr>
<tr>
<td>PA</td>
<td>5 C.F.R. § 2635.804(c)(2)</td>
</tr>
</tbody>
</table>

### II. § 807 - “Related To Official Duties”

**What is the Book About? / Subject Matter Prohibitions**

<table>
<thead>
<tr>
<th>CNC &amp; PA</th>
<th>5 C.F.R. § 2635.807(a)(2)(i)(E)(1) &amp; (2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(E)(1)</td>
<td>Matter in which employee assigned within previous year</td>
</tr>
<tr>
<td>(E)(2)</td>
<td>Concerning any ongoing or announced policy, program or operation</td>
</tr>
<tr>
<td>CNC Only</td>
<td>(E)(3) General subject matter area, industry, or economic sector</td>
</tr>
</tbody>
</table>

### III. When is the Writing Performed and Compensation Received?

<table>
<thead>
<tr>
<th>CNC &amp; PA</th>
<th>5 C.F.R. § 2635.807(a)(2)(iii) &amp; (iv) - Standards of Conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>CNC Only</td>
<td>5 C.F.R. § 2626.303(b) &amp; (c); § 2636.304(d) – 15% Limitation</td>
</tr>
<tr>
<td>PA Only</td>
<td>5 C.F.R. § 2635.804(a) &amp; § 2626.303(b) – Outside Earned Income Ban</td>
</tr>
</tbody>
</table>

- Under all these provisions receipt of compensation is usually attributable to the time the writing occurs, unless written solely on speculation during Government service.
(Continued) Overview: Determining Whether a CNC employee or a PA Employee May Receive Compensation for Writing a Book

IV. What is the Type of the Compensation?

CNC & PA: 5 C.F.R. § 2635.807(a)(2)(iii) – (Standards of Conduct) - All forms of consideration

CNC & PA: 5 C.F.R. § 2635.804(c)(1) & 5 C.F.R. § 2626.303(b) – (15% Outside Earned Income Limitation and the Outside Earned Income Ban) - Most forms of consideration except royalties and actual and necessary travel expenses

Types of Compensation: Advance; Royalties; Travel Expenses; Speakers Fee, Honoraria & Other Compensation or Consideration

V. Who is Offering the Compensation and Why?

CNC & PA:
5 C.F.R. § 2635.807(a)(2)(i)(B) Invitation extended primarily because of official position
5 C.F.R. § 2635.807(a)(2)(i)(C) Invitation extended by person affected by employee’s duties

VI. What are Other Considerations?

Compensation for Writing Related Activities; Supplemental Agency Regulations; 18 U.S.C. § 208 (Financial Conflicts); 5 C.F.R. § 2635.502 (Covered Relationship - Publisher); 18 U.S.C. § 209 (Supplementation of Salary); 5 C.F.R. § 2635.807(a)(2)(i)(A) (Writing as Part of Official Duty); 5 C.F.R. § 2635.702 (Public Office for Private Gain); 5 C.F.R. § 2635.703 (Use of Nonpublic Information); 5 C.F.R. § 2635.807(a)(2)(i)(D) (Draws Substantially on nonpublic information); 5 C.F.R. § 2635.704 (Use of Government Property); 5 C.F.R. § 2635.705 (Use of Official Time); 5 C.F.R. § 2635.807(b) (Reference to Official Position); 5 C.F.R. § 2635.802 (Conflicting Outside Employment & Activities)
Questions?
START

Does the teaching, speaking, or writing relate to your official duties?*
§ 2635.807(a)

Yes

Is the activity teaching a course, requiring multiple presentations?
§ 2635.807(a)(3)

Yes

You cannot receive any compensation.***

No

Is the course part of the regularly established curriculum of a degree granting institute or K-12 school?
§ 2635.807(a)(3)(i)

Yes

Are you a covered non-career employee?**
§ 2635.807(a)(2)(iii)(D)

Yes

You cannot receive compensation other than travel expenses (transportation, lodgings, or meals incurred in connection with the activity).

No

No

You can receive compensation!***

Is the course a program of other education or training sponsored and funded by the Government?
§ 2635.807(a)(3)(ii)

Yes

(restrictions on "2nd Federal Job" may apply)

No

No

Yes

No

Yes

No

Is the information you convey through the activity draws substantially on ideas or official data that are nonpublic information? (D)

The person extending the invitation has an interest that may be substantially affected by the performance or nonperformance of your official duties; (C) The subject deals in significant part with (1) any matter to which you have been assigned during the previous year, or (2) any ongoing or announced agency policy, program, or operation. See 5 C.F.R. § 2636.303(a)(1).

** Covered non-career employees (e.g., Presidential appointed SES) are also subject to additional restrictions. See 5 C.F.R. § 2636.303(a)(1).

*** Compensation includes any form of income, including royalties. Transportation, lodgings, and meals are forms of compensation. However, meals or other incidents of attendance such as waiver of attendance fees or course materials furnished as part of the event at which the activity takes place, and copies of materials that provide a record of the activity, are not forms of compensation. 5 C.F.R. § 2635.807(a)(3)(ii)(A)-(C).

* The activity relates to your official duties if:
(A) The activity is undertaken as part of your official duties; (B) The invitation was extended primarily because of your position rather than your expertise on the subject matter; (C) The person extending the invitation has an interest that may be substantially affected by the performance or nonperformance of your official duties; (D) The information you convey through the activity draws substantially on ideas or official data that are nonpublic information; (E) The subject deals in significant part with (1) any matter to which you have been assigned during the previous year, or (2) any ongoing or announced agency policy, program, or operation. See 5 C.F.R. § 2635.807(a)(2)(E) for additional guidelines for covered non-career employees and special Government employees.

Note: This chart is only a summary. Consult 5 C.F.R. 2635.807 for the complete rule.