

Special Government Employees Serving on Advisory Committees

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Outline

- What is a Special Government Employee (SGE)?
- Initial responsibilities before serving (paperwork)
- Key Ethics Rules
 - Financial Conflicts of Interest
 - Appearance of Bias/Loss of Impartiality
 - Representations
 - Teaching, Speaking and Writing
 - Misuse of Position
 - Gifts
 - Hatch Act/Political Activities
 - Post Employment

What is a Special Government Employee?

- 18 U.S.C. § 202(a); 5 C.F.R. § 2634.105(s)
- An officer or employee of an agency who is retained, designated, **appointed**, or employed to perform temporary duties, with or without compensation, **not to exceed 130 days during any period of 365 consecutive days**, either on a full time or intermittent basis.
- SGEs receive annual ethics training and are responsible for their own conduct (similar to full time employees).

Filing Requirements

- SGEs are required under the Ethics in Government Act to file a financial disclosure form (OGE 450).
- 5 C.F.R. § 2634.903(b)(1)
 - Required to file form no later than 30 days after assuming new position.
- 5 C.F.R. § 2634.903(b)(3)
 - SGE appointed to serve on advisory committee shall file the required report before any advice is rendered to the agency, or in no event, later than the first committee meeting.
- SGEs also required to submit the foreign activities questionnaire (HHS Form 697).

Financial Conflicts of Interest

- 18 U.S.C. § 208

- Criminal offense for any executive branch employee (including SGEs) to:
 - Participate personally and substantially in a particular matter (e.g., grant, cooperative agreement, contract) in which the employee has a personal or imputed financial interest if the particular matter will have a direct and predictable effect on that interest
 - Includes participation through decision, approval, recommendation or advice as a Government employee.

Particular Matters vs. General Matters

- Particular Matter includes:
 - Particular Matter of General Applicability (PMGA):
 - Focused on the interests of a discrete class, but does not involve specific parties (standards, procedures, etc.)
 - Specific Party Matter:
 - Proceeding or request for a ruling or other determination that affects the legal rights of identified parties (grant, contract, etc.)
- Does not include General Matters:
 - Consideration of broad policy options that are directed to a large and diverse group of persons
- If unsure, consult DFO.

Resolving Conflicts

- Several ways to resolve a conflict of interest:
 - Recusal/Disqualification (recommended method)
 - Divestiture of financial interest
 - Resignation from Committee/Board
 - **Regulatory Exemption**
 - **Agency grants permission - Waiver**

Regulatory Exemptions

- Exemptions:
 - Exemption – 5 C.F.R. § 2640.203(g)
 - Permits SGE to participate in a PMGA where the conflict arises from their non-Federal employment, provided the matter will not have a special or distinct effect on the SGE or the employer other than as part of a class.

Waivers

- 18 U.S.C. § 208(b)(3):
 - Agency may grant waiver for SGE serving on an advisory committee where the need for the individual's services outweighs the potential for a conflict of interest.

Penalties - Financial Conflicts

- Engaging in prohibited conduct:
 - Imprisonment for up to one year + fine
- Willfully engaging in prohibited conduct:
 - Imprisonment for up to five years + fine
- Civil Action
 - Preponderance of the evidence
 - Greater of \$50,000 or amount of compensation
 - Petition court for order barring further conduct
- Agency Personnel Action
 - Removal

Appearance of Loss of Impartiality

- 5 C.F.R. § 2635.502(a)
- An employee (including an SGE) shall not participate in a **specific party matter**:
 - that will have a direct and predictable effect on the financial interest of a member of the employee's household; or
 - where a person with whom the employee has a **covered relationship** is a party or represents a party.
- Also consider other circumstances where a reasonable person with knowledge of the relevant facts may question the SGE's impartiality.

Resolving Appearance Conflicts

- Several ways to resolve a conflict of interest:
 - Recusal/Disqualification (recommended method)
 - Resignation from Committee/Board
 - Agency grants permission – Authorization
 - Referred to as a 502(d) authorization
 - Agency may issue authorization to permit SGE to participate in a specific party matter
 - Authorization made when the agency determines, based on all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that the agency's programs may be questioned

Regulatory Penalties for Appearance Conflicts

- Enforced by appropriate disciplinary action
 - Counseling
 - Reprimand
 - Suspension
 - Dismissal/Removal

Representational Restrictions

- 18 U.S.C. § 203, 205
- Section 203: SGE may not receive compensation for representational services before any Federal agency/court for any specific party matter the SGE personally and substantially worked on
- Section 205: SGE may not act as agent or attorney for any other party before any Federal agency/court for any specific party matter the SGE personally and substantially worked on
- Extends to covered matters pending before HHS if the SGE worked more than 60 days in last 365 day period.

Teaching, Speaking and Writing

- Similar to regular Govt. employees, SGEs may NOT receive compensation for teaching/speaking/writing that relates to their official duties.
- SGEs may generally receive compensation for teaching, speaking and writing activities performed in a personal capacity.

Relates to Official Duties

- Done as part of official duties as a Committee/Board member
- Draws on non-public information acquired through Committee/Board membership
- Invitation was based upon SGE's Committee/Board membership
- Invitation from source that would be substantially affected by the performance of the SGE's official duties

Misuse of Position

- No use of public office for private gain
- SGE may not use position to imply that the Committee/Board or HHS endorses their private activities
- Personal fundraising: SGE may not personally solicit funds from person whose interests may be substantially affected by performance of their official duties
- SGE may not disclose non-public information

Gifts

- SGE may accept gifts NOT offered as a result of their Committee/Board membership.
- Any gift given to an SGE because of their service on an Advisory Committee or Board would raise concerns. The SGE typically should consult with the DFO if this situation occurs.
- Gifts given to an SGE because of their position or achievements in the private (non-Government) sector generally are not problematic.

Political Activities

- Hatch Act:
 - Political activity restrictions apply only during the period of any day in which the SGE actually is performing Government business.
 - Example: – If an SGE attends a Committee/Board meeting from 8:00a – 1:00p, the SGE could attend a political fundraiser at 3:00p that same day, and even solicit political contributions from the attendees.

Post-Employment

- 18 U.S.C. § 207

- Section 207(a)(1): Lifetime ban on a former SGE from representing anyone else before a Federal court/agency in a specific party matter (grant, cooperative agreement, contract) that the SGE worked on while with the Government.
- Section 207(a)(2): 2 year ban where the matter was under the former SGE's "official responsibility".
- Note – Both sections apply only to specific party matters.



The End