

# ETHICS FLASH SPECIAL GOVERNMENT EMPLOYEES

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Ethics in Government Act  
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## WE ARE ALL SPECIAL....MAYBE

Before we delve into the world of Special Government Employees (SGEs), we want to be (brutally) honest....this was a difficult Ethics Flash to write. And we are the nerdiest of ethics nerds! We (actually, only one of us) thought it would be fun to start with a little history but yeah, no.... We (including the history nerd) decided just to jump right in and get this done. So, grab some caffeine 'cause you're gonna need it!

As federal employees, we are subject to numerous prohibitions and requirements set forth under criminal and non-criminal statutes, executive orders, and federal regulations. SGEs provide a temporary service to the Government and offer an outside expertise or perspective that may benefit the agency. SGEs are employees appointed to serve for not more than 130 days during any one year period. Congress created this

category of employees to make certain ethics rules less restrictive than for other federal employees to overcome obstacles in hiring outside experts and other temporary employees for occasional services. Less restrictive, but still applicable — this is an



important point!

Outside the Department of Defense (DoD), there are two types of SGEs: (1) Those appointed under the Federal Advisory Committee Act (FACA); and (2) Non-FACA consultants. In the DoD, we like to say we have a third category — Reserve officers of the Armed Forces and officers

of the National Guard while on active duty solely for training or serving involuntarily (enlisted are not included as SGEs). Regardless of the category of SGE, the application of the ethics rules is almost the same. Almost. For SGEs serving on an advisory board under the FACA, there is a limitation on how the financial conflicts of interest laws apply compared to non-FACA consultants and Reservists.

In this Ethics Flash, we will discuss how the ethics rules apply and the importance of counting days of service. This is an overview of how the ethics rules apply to SGEs. If you have SGEs assigned to your command or department and have questions, please reach out to your local ethics officials. For SGEs at Headquarters Air and Space Force, members of the Scientific Advisory Board (SAB) or the United States Air Force Academy Board of Visitors (USAFABoV), we are your servicing ethics team.

## SGEs — THE BROAD STROKES

For the most part, SGEs serve without compensation. While it is not unusual for an SGE to be compensated, it is not the norm in the Department of the Air Force (DAF). All SGEs must file an OGE Form 450 Confidential Financial Disclosure new entrant report within 30 days of appointment. It's how we evaluate and highlight potential conflicts of interest.

The DAF has three FACA advisory boards: (1) the SAB;

(2) USAFA BoV; and (2) Air University BoV. Members of these boards are subject matter experts (SMEs) in their field, Congressional representatives, or other Federal government employees. The DAF also appoints non-FACA SGEs to myriad departments within the DAF. For example, the Secretary or Chief of Staff's Office. Their purpose is no different than FACA SGEs — they are SMEs who offer unique, outside perspectives.

Included in the non-FACA SGE category within the DoD are Reservists and members of the National Guard (NG). The ethics rules that apply to regular government employees apply the same. The extent of their application as well as the how they apply varies, depending on the issue. So, let's go down the SGE rabbit hole.....Caffeine boost would be appropriate right about now!

# FINANCIAL CONFLICTS OF INTEREST AND SGEs

Federal criminal statute, 18 USC § 208, prohibits an employee from participating personally and substantially in any particular matter that would have a direct and predictable effect on the employee's financial interests or interests imputed to the employee (e.g., financial interests of a spouse, minor child, or outside business activities). Sound familiar? If it does, yay! We previously talked about this law in other Ethics Flash-es. And guess what? The general prohibition applies to SGEs as well. As do the subsections in Section 208 that authorize waivers. However, what is different is how those waivers apply to Non-FACA SGEs and FACA SGEs.

**Non-FACA SGEs.** The same authorization to waive the prohibition that applies to regular government employees applies equally to Non-FACA SGEs. This waiver is either by regulation or by individual agency determination. A waiver under regulation may be appropriate when the financial interest is too remote or inconsequential to affect the integrity of an SGE's service. An agency determination waiver may occur when the financial interest is not so substantial to be

deemed to likely affect the integrity of the SGE's service.

**FACA SGEs.** A waiver under regulation for FACA SGEs is the same as described above. It's the agency determination

that is different. A waiver may be appropriate if the agency determines the need for the FACA SGE's services out-

weighs the potential for a conflict of interest posed by the financial interest involved. This is more liberal than waivers for regular employees and Non-FACA SGEs. FACA SGEs also have additional regulato-

ry exemptions in the Code of Federal Regulations. For example, a FACA SGE may participate in any particular matter of **general** applicability where the disqualifying financial interest arises from the FACA SGE's non-Federal employment **provided that** the matter will not have a special or distinct effect on the employee or employer other than as a class.

Divestiture of disqualifying financial interests would allow an employee to participate; however, please note: **SGEs are not eligible to receive a Certificate of Divestiture** if required to sell the disqualifying financial interest to resolve the conflict.



## A BIT MORE ON SGE AND OGE FORM 450s

Before reading any further, this section **does not** apply to Reserve or National Guard members, to include O-7 and above. Grab an energy drink....Moving on!

Like regular government employees, SGEs are responsible for managing their own conflicts of interest. Ethics officials will assist with identi-

fying actual or potential conflicts of interest. Previously, we stated all SGEs must submit an OGE Form 450 within 30 days of appointment. In addition, the 450 must be submitted before providing advice to the agency or the first meeting of an advisory board. Per DoD policy, reports are submitted in the Financial

Disclosure Management (FDM) system. Access to FDM is via LOGINGOV and is facilitated by the SGE's POC or the Designated Federal Officer of the advisory board. Due to the temporary nature of their appointments, SGEs file new entrant reports for each appointment or reappointment.

An ethics official reviews

the report and identifies potential conflicts. Cautionary memorandums issued to SGEs provide guidance on managing potential conflicts and how to keep outside business or other activities separate from an SGE's official government duties. Wait, how can an SGE's "real" job be a conflict? Well, read on!

## BEING AN SGE ≠ SPECIAL ACCESS

Two more criminal statutes limit representational activities of federal employees. These statutes impose restrictions related to outside activities. 18 USC §§ 203 and 205 prohibit employees from representing another, with or without compensation, in connection with a particular matter in which the United States has an interest. Section 203 applies not only to representational services provided by an employee personally, but also to services provided by another from which the employee will benefit. Sections 203 and 205 are limited in their application to SGEs, depending on the number of days an SGE serves per

calendar year.

**Service of 60 days or less:** SGEs are subject to the prohibitions of sections 203 and 205 for those matters in which the SGE participated **personally and substantially** as an SGE. In other words, the SGE was directly involved and the participation was significant even if not determinative of the outcome. It includes approving, disapproving, providing recommendations, investigating, or rendering advice.



However, where sections 203 and 205 are not applicable, SGEs may inadvertently implicate 5 CFR § 2635.702, which prohibits the use of public office for private gain.

SGEs must refrain from abusing their inside position for the benefit of others. Even if the representation is completely unrelated to

the subject matter of the SGEs official duties, there is an appearance the SGE is using their official position to gain special access that is

unavailable to the general public.

**Service of more than 60 days during the immediately preceding period of 365 consecutive days:** SGEs are subject to the full restrictions of sections 203 and 205 in connection with **any** covered matter that is pending within the DAF.

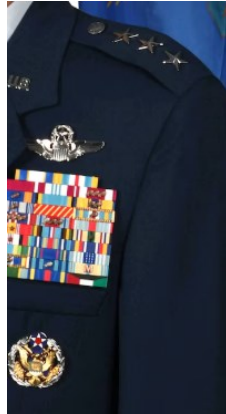
Counting days of service is important! It is the responsibility of the SGE and their agency POC to properly account for their time. So, how does an SGE count days? We have a detailed memorandum for SGEs and their POCs setting out the requirement along with examples. Please contact us for a copy.

## RESERVE & NATIONAL GUARD OFFICERS SGEs

The conflicts of interest rules discussed above apply the same to all Reserve & National Guard officers, but not to enlisted personnel. There are a few distinctions. First, Reserve or National Guard Officers voluntarily serving over 130 days extended active duty, are considered Officers of the United States for purposes of the conflicts of interest laws discussed above. Serving over 130 days? Ignore this Flash.... Okay, don't ignore it, but the rules apply to you the same way they apply to the regular component. However, if a Reserve or National Guard Officer serves 60 days or less, or more than 60 days but less

than 130 days, the rules discussed above apply to you.

Another important distinction is financial disclosures. The JER only requires Reserve component officers in the pay grade of O-6 or below to file an OGE Form 450 **if** they serve on active duty for more than 30 consecutive days during a calendar year **unless** the position they support has duties that impact the financial interests of a non-Federal entity. Second, the DAF has an additional requirement for **all General**



**Officers.** Reserve or National Guard General Officers must file public financial disclosure reports (OGE Form 278e) regardless of the number of days they serve on active duty. So why the OGE Form 278e instead of the OGE Form 450 as discussed above? Simple. Rank.

The Code of Federal Regulations defines public financial disclosure filers.

Included in the definition are military members in the pay grade of O-7 and above. By order of the Secretary of the Air Force, the Designated Agency Ethics Official

for the DAF implemented a policy requiring all Reserve and National Guard General Officers to file an OGE Form 278e each year. The filings are the same as the regular component. Newly promoted Generals file a new entrant report within 30 days of promotion to O-7 and then annually thereafter until retirement. At that time, a termination report is due within 30 days of retirement.

Pop Quiz — Can anyone name the General to the left? No prize for guessing right (c'mon, we're the ethics team!) but how about bragging rights and a shout out in the next Ethics Flash?

## MISUSE OF POSITION, GIFTS, PGE & MORE

Time to switch to decaf...To wrap up this Ethics Flash, we will briefly address additional ethics rules that apply the same to **all** SGEs. Like regular government employees, SGEs are prohibited from using their public office for their own private gain, including the private gain of friends and those with whom they are affiliated, to include other non-federal entities. SGEs may not use nonpublic information to further their own private interest or that of another, and SGEs may only use government property for authorized purposes.

Federal criminal law prohibits accepting compensation for performing official acts —

No bribes or illegal gratuities! SGEs also may not receive compensation for teaching, speaking, or writing that relates to their official duties.

SGEs may not accept a gift from a prohibited source or offered because of their official position unless an exception applies. For most SGEs, when a gift is offered by a prohibited source, the exception for gifts based on outside business or employment relationships will apply to allow acceptance.

And then there are the post-Government employment (PGE) laws. Depending on an SGE's duties, there may be any one of the following:

1. Lifetime ban on particular

matters involving specific parties in which you participated personally and substantially;

2. Two-year ban on a particular matter involving specific parties which was under an SGE's official responsibility during their last year of service;
3. Potential for trade or treaty negotiation restrictions; and,
4. For the more senior SGEs (ahem....Generals), a one-year cooling off period in which the SGE may not contact their former agency.

There are a few more PGE restrictions that may apply to more senior SGEs, but these

are the ones to pay the most attention. As we said above, an Ethics Flash is not a substitute for legal advice, so always reach out to your local ethics official with any questions. We also refer you to our two-part PGE Ethics Flash series available on our website.

If you made it this far, congratulations! You did better than some of our editors... not a joke! The federal ethics rules and their application to SGEs can be difficult to navigate. Have a question or a topic recommendation or questions? Reach out to us at our Workflow provided below. Until next time, keep it ethical!

*The Air Force Ethics Office directs the daily activities of the Department of the Air Force ethics program. We serve as legal counsel to the Secretariat, Air, and Space Staff. While we are always happy to assist with any ethics issues, individuals outside of Headquarters should consult with their local ethics counselor.*

*Should you have any questions, please contact us at [SAF.GCA.Ethics.Workflow@us.af.mil](mailto:SAF.GCA.Ethics.Workflow@us.af.mil)*