

NOTE; Among other changes to the Standards of Conduct effective August 15, 2024, an employee has a covered relationship under 2635.502(b)(1)(iii) with any person with whom their child has certain employment or business relations; previously, only the relations of dependent children were covered in this provision. See 89 FR 43686 and LA-24-06.

# Issues Associated with Using the Service of Special Government Employees (SGEs)

2014 OGE National Government Ethics  
Summit

Large Agency Invitational Day

September 10, 2014

# Agenda

- Introduction
- What is an SGE?
- The Ethics Officer and advisory committee management
- SGE vs. representative of industry
- Financial disclosure and the use of alternative disclosure forms
- Training
- SGEs and lobbying
- Political Activities
- Conflict of interest and appearance issues for SGEs
- Emoluments Clause issues for SGE
- Questions and Answers

# Federal Employee or Non-Federal Employee?

Three criteria for Federal employment are identified in 5 U.S.C. §§ 2104 and 2105:

- (1) appointment by an authorized official;
- (2) performance of a Federal function; and
- (3) supervision by a Federal official

# Special Government Employee

Defined in 18 U.S.C. § 202(a) as an officer or employee who is retained, designated, appointed, or employed by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days.

# SGEs Your Agency May Employ

- Expert/Consultant Appointments
- Personal Service Contractors
- Members of boards, commissions, advisory committees (FACA and non-FACA)
- Other forms of “employment” – IPA appointments if service <130 days/year.

# Member Designations for Boards, Commissions, Advisory Committees

- Regular Government Employees (RGEs)
- Special Government Employees (SGEs)
- Representatives of Industry (Non-employee)

# SGE or Representative of Industry?

- Legislation establishing board, commission, or advisory committee
- Presidential Executive Order
- Agency Directive or Advisory Committee Procedures
- Charters and Bylaws – e.g., FACA committees
- OGE Guidance

# OGE GUIDANCE

- 1982 – 82x22 (Appointments)
- 2000 – DO-00-003 (Ethical Requirements)
- 2004 – DO-04-022 (Best Practices)
- 2005 – DO-05-012 (Appointments)
- 2007 – DO-07-002 and -005 (Counting of Days)
- 2007 – DO-07-006 (Waivers)
- 2008 – DO-08-006A (Book Deals)



# The Ethics Officer's Role in the Creation and Management of Advisory Committees

- 2004 GAO Report (GAO-04-328)
- OGE guidance (DO-04-022)
- GSA regulations on committee management (41 CFR 102-3, Subpart C, App. A) – DAEOs “should be consulted prior to appointing members to an advisory committee in order to apply Federal ethics rules properly.”

# OGE's Best Practices for Advisory Committee Status Designations – DAEOs Should:

- Maintain lines of communication with committee management officials
- Ensure systematic approach for making status designations (SGE or representative) at time of appointment
- Be involved in appointment process
- Provide advice and counsel on status designation issues
- Ensure that committee management officials know agency guidance and procedures on SGEs
- Provide ethics program points of contact for designation and members' ethics issues
- Periodically review status designations
- Ensure that committee members know their status

# SGE vs. Representative

## Some General Principles

- Compensation is paid = SGE
- Members exercise own individual best judgment on Government's behalf = SGE
- Members expected to provide points of view of non-USG groups with financial or other stake in matters before the advisory committee = Representative

# SGE vs. Representative

## Other OGE Factors

- Does lack of compensation for members always equal representative status?
- Using outside recommendations in appointment process
- Acting as a spokesperson
- Use of “represent” in committee’s authorizing legislation or other enabling documents
- Use of charter information in status designations

# National Science Foundation

- Independent federal agency
- Supports fundamental research and education across all fields of science and engineering
- 50,000 proposals each year
- 11,500 new funding awards

# Merit Review Process

- Approximately 15,249 SGE advisory committee members evaluate the proposals
- NSF Program Officer makes a recommendation regarding the proposal
- Next level review
- National Science Board (also SGEs)

# Financial Disclosure

- Current employment at the institution as a professor, adjunct professor, visiting professor, or similar position.
- Other current employment with the institution (such as consulting).
- Previous employment with the institution within the last 12 months.
- Being considered for employment at the institution.
- Formal or informal reemployment arrangement with the institution.
- Ownership of securities of firms involved in the proposal or application.
- Current membership on a visiting committee or similar body at the institution. (This is a conflict only for proposals or applications that originate from the department, school, or facility that the visiting committee or similar body advises.)
- Any office, governing board membership, or relevant committee chairpersonship in the institution. Ordinary membership in a professional society or association is not considered an office.)
- Current enrollment as a student. (Only a conflict for proposals or applications that originate from the department or school in which one is a student.)
- Received and retained an honorarium or award from the institution within the last 12 months.

# Financial Disclosure

- Known family relationship as spouse, child, sibling, or parent.
- Business or professional partnership.
- Past or present association as thesis advisor or thesis student.
- Collaboration on a project or on a book, article, report, or paper within the last 48 months.
- Co-editing of a journal, compendium, or conference proceedings within the last 24 months.
- Other relationship, such as close personal friendship, that you think might tend to affect your judgment or be seen as doing so by a reasonable person familiar with the relationship.



# Alternative Disclosure Form

## CERTIFICATION

### **Potential Conflicts.**

I have read the list of affiliations and relationships (on the back of this form) that could prevent my participation in matters involving such individuals or institutions. To the best of my knowledge, I have no affiliation or relationship that would prevent me from performing my panel duties. I understand that I must contact the NSF program officer if a conflict exists or arises during my service. I further understand that **I must sign and return this Conflict Statement to the program officer before I may serve.**

### **Maintaining the Confidentiality of Others.**

I will not divulge or use any confidential information, described above, that I may become aware of during my service.

### **Your Identity as a Reviewer will be Kept Confidential.**

I understand my identity as a reviewer of specific proposals will be kept confidential to the maximum extent possible, except that copies of written reviews that I submit will be sent to the principal investigator(s) without my name and affiliation.

# Training

## **Ethics Law Summary for NSF Panelists**

As an NSF proposal review panel member, you are considered to be a "special" Government employee while serving on a panel or site visit team. This is a summary of the major conflict-of-interest rules that apply to you as a special Government employee. Some rules will inevitably be less relevant to your duties than others, but your careful adherence to the rules should foster public confidence that NSF review processes are not tainted by improper influences.

This Summary assumes that you will not perform work for NSF on more than 60 days in any 365-day period. If you work for more than 60 days during any such period, you will become subject to additional restrictions; and you should contact the General Counsel's Office about them.

# Lobbying

- Direct Lobbying
  - Personal
  - Dean, President of Scientific Society
  - Representing NSF
- Grass Roots Lobbying

# Federally Registered Lobbyist

## CERTIFICATION

I HEREBY certify that I am NOT a Federally registered lobbyist, or I have ceased active lobbying as reflected in a filed bona fide de-registration, or I have been de-listed by my employer, or I have been absent from a quarterly lobbying report for three consecutive quarters

- A Presidential memorandum dated June 18, 2010 (<http://www.whitehouse.gov/the-press-office/presidential-memorandum-lobbyists-agencyboards-and-commissions>) directed Executive agencies, including NSF, not to appoint or re-appoint Federally registered lobbyists to advisory committees, review panels, or other similar groups. A Federally registered lobbyist is any individual who is subject to the registration and reporting requirements of the Lobbying Disclosure Act of 1995, as amended, 2 U.S.C. 1605. An individual cannot be a Federally registered lobbyist at the time of appointment or reappointment to an NSF advisory committee, review panel, or other similar group.
- In order to comply with the Presidential memorandum, individuals are required to certify that they are NOT a Federally registered lobbyist, or that they have ceased active lobbying as reflected in a filed bona fide de-registration, or that they have been de-listed by their employer, or that they have been absent from a quarterly lobbying report for three consecutive quarters.

# Political Activity

- Not while on duty – the period of any day in which the SGE is actually performing Government business
- Review panel meets 8:00 am - 3:00 pm
- Can attend a political fundraiser at 5:00 pm
- Even solicit political contributions from the attendees

# Prohibited Activities

Engaging in political activity while on duty:

- in any room or building occupied in the conduct of government business;
- wearing official insignia identifying the office or position of the employee;  
or
- Using official authority or influence to interfere with or affect the result of an election.
- May not solicit political contributions from the general public.
- Running for a partisan political office.
- Soliciting or discouraging the political activity of any person who has business before the Foundation.

# Conflict of Interests (18 U.S.C. § 208)

Employees are prohibited from participating in official matters that would have a direct and predictable effect on their own financial interests or those imputed to the employee.

- Spouse, minor child or partner.
- An organization in which they are serving as officer, director, trustee, partner or employee.
- A person or organization with which they are negotiating for prospective employment.

# Appearance Considerations

## (5 C.F.R. § 2635.502)

Employees should not participate in a particular matter involving specific parties that would likely have a direct and predictable effect on the financial interests of a member of his household or knows that someone with who he has a “covered relationship” is or represents a party to such matter and where the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.

### Covered Relationship:

- A person with whom employee has a business, contractual or other financial relationship other than a routine consumer transaction.
- A person who is a member of the employee’s household, or relative with whom the employee has a close personal relationship;
- A person for whom the employee’s spouse, parent, or dependent child is serving or seeks to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, employee.
- A person for whom the employee has within the last year served as officer, trustee, general partner, attorney, agent, consultant, contractor, or employee.
- Organization in which the employee is an active participant



# Framework for Ethics Determinations

**Conflict of Interest  
(18 U.S.C. § 208)**

Participate in a particular matter involving specific parties **AND** particular matters of general applicability affecting a discrete and identifiable class of persons

Direct and predictable effect on financial interest of

- “Imputed Interests”:**
- Spouse
  - Dependent Child
  - Partner
  - Organization where serving as officer, director, employee, or general partner
  - Negotiation employment.

Employee

**Appearance Standard  
(5 C.F.R. § 2635.502 )**

Participate in a particular matter involving specific parties

Direct and predictable effect on financial interest of

member of employee’s household

A person with whom the employee has a “covered relationship” is or represents a party to the matter

- “Covered Relationship”:**
- Business, contract, financial relationship
  - Relative with close personal relationship
  - Spouse/parent/dependence child serves as officer, director, trustee, general partner, agent, consultant, employee, contractor
  - Employee w/in last year served as director, trustee, general partner, agent, contractor, consultant, employee
  - Organization where he is an active participant

AND circumstances would cause a reasonable person with knowledge of the relevant facts to question the employee’s impartiality in the matter

# Resolving Conflicts and Appearance Concerns

## Standard for Authorization under section 2635.502(d)

Interest in the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors include:

- 1) Nature of the relationship involved
- 2) Effect that resolution of the matter would have upon the financial interest of the person involved in the relationship
- 3) 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) Sensitivity of the matter
- 5) Difficulty of reassigning the matter to another employee
- 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

# Resolving Conflicts and Appearance Concerns

## Regulatory Exemptions (Securities)

- Diversified Mutual Funds
- Sector Mutual Fund – Aggregate value is less than \$50,000
- Specific Party Matters:
  - Affecting Parties – Stocks valued < \$15,000
  - Affecting Non-parties – Stocks valued < \$25,000
- Matters Involving General Applicability – Individual stock value is less than \$25,000; Aggregate value is less than \$50,000

# Resolving Conflicts and Appearance Concerns

## Regulatory Exemptions (Miscellaneous)

### **Multi-campus institutions of higher education**

May participate in a particular matter affecting one campus of a State multi-campus institution of higher education if the employee's disqualifying financial interest is employment in a position with no multi-campus responsibilities at a separate campus of the same multi-campus institution

### **Employment interest for SGEs serving on FACA committees**

SGE may participate in particular matter of general applicability where the disqualifying financial interest arises from his non-Federal employment or prospective employment provided that matter will not have a special or distinct effect on the employee or the employer other than as part of a class.

### **Medical products for SGEs serving on FACA committees**

May participate in FACA committee matter concerning medical products if the disqualifying financial interest arises from employment with a hospital or other similar medical facility whose only interest in the medical product or device is purchase of it for use by or sale to its patients or the prescription of medical products for patients.

# Waivers: § 208 (b)(1) vs. § 208(b)(3)

<u>§ 208(b)(1) Waiver</u>	<u>§ 208(b)(3) Waiver</u>
<ul style="list-style-type: none"><li>• <u>Must Meet Standard</u>: Determine that the financial interest affect integrity of employee's services</li></ul>	<ul style="list-style-type: none"><li>• <u>Must Meet Standard</u>: Determine that the need for employee's services outweighs potential conflict</li></ul>
<ul style="list-style-type: none"><li>• Must be issued in writing</li></ul>	<ul style="list-style-type: none"><li>• Must be issued in writing</li></ul>
<ul style="list-style-type: none"><li>• Must be issued prior to participation</li></ul>	<ul style="list-style-type: none"><li>• Must be issued prior to participation</li></ul>
<ul style="list-style-type: none"><li>• All employees except FACA SGE's</li></ul>	<ul style="list-style-type: none"><li>• FACA SGE's</li></ul>
<ul style="list-style-type: none"><li>• No exemption for employer</li></ul>	<ul style="list-style-type: none"><li>• Partial exemption for employer</li></ul>
<ul style="list-style-type: none"><li>• Must disclose disqualifying financial interest</li></ul>	<ul style="list-style-type: none"><li>• Must review SGE's financial disclosure report before issuance</li></ul>
<ul style="list-style-type: none"><li>• Consideration of additional factors in context of (b)(1) standard</li></ul>	<ul style="list-style-type: none"><li>• Consideration of additional factors in context of (b)(3) standard</li></ul>

# Waivers: Additional Factors to Consider

- Type of financial interest involved
- Individual's qualifications
- Difficulty finding replacement w/o conflict
- Dollar value of potential gain or loss
- Value of asset in relation to total assets
- How will financial interest be effected by employee/agency actions

# Emoluments Clause

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 of any present, emolument, Office, or Title of any kind whatever from any King, Prince, or foreign State.

United States Constitution Art. I, § 9, Cl. 8.

# Employee in Office of Profit or Trust

## STANDARD

Must exercise some governmental authority. Relevant factors:

- 1) Delegation of a sovereign function
  - 2) Possess enforcement authority or power to bind the government
  - 3) Exercises any significant Executive authority pursuant to the laws of the US
  - 4) Merely has the power to investigate a particular topic and make recommendations without otherwise having authority to exercise governmental authority in the matter.
- Strictly advisory committee in nature does not exercise governmental authority
  - Another significant factor is the committee's access to sensitive national security related information because the authority to control and safeguard classified information (not proprietary or trade secrets) does amount to the exercise of governmental authority sufficient to render employment with the federal government a public office.
  - See NIH website for list of foreign entities: <http://ethics.od.nih.gov/topics/foreign.htm>



# Application

- Does not affect the agency's ability to interact , through employees acting officially, with foreign governmental entities.
- Only limits employee's ability to personally accept any "present, emolument, Office, or Title...from a King, Prince, or foreign State."

# Present, Emolument

- Anything of value
- Awards and Decorations
- Educational scholarships
- Travel
- Indirect payments
- Salary, honoraria, or other form of compensation
- Grants, contracts

# Office, Title

- Any position or title from a foreign state, whether compensated or not
- Positions that predate appointment are not a problem as long as no service required during federal appointment
- Titles that are honorary in nature and/or activity having no “durational quality” are permissible e.g., honorary faculty appointment for a one-time lecture, or honorary title that has no associated duties or responsibilities

# King, Prince, or foreign State

- Foreign diplomatic, military, and political arms, including any subdivision such as State or local government
- International organizations of which the United States is NOT a member
- Corporations wholly owned and controlled by the foreign government
- Foreign public universities
- Any entity acting at the behest of or based upon the influence of a government

# Not from a King, Prince, foreign State

- Awards and associated gifts – permitted provided selection of recipient sufficiently independent of government influence (Nobel, Göteborg)
- Academic Appointments – from foreign, public Universities acting without government influence in selection of appointee
- Other “employment” – employees acting as representative of employer may receive pay and other benefits from funds paid by foreign State, provided employer is not mere conduit

# Foreign Gifts and Decorations Act

Congressional consent for an employee to accept:

- Medals, badges, awards, orders of merit from chivalric codes
- Tangible **gifts** valued at amounts up to \$375 from a foreign government

# Foreign Gifts and Decorations Act

- This Act does NOT address employment, salary, positions, etc.
- It DOES authorize employee acceptance of gifts exceeding \$375 consisting of:
  - 1) travel expenses for travel originating and taking place entirely outside of the United States (not applicable to official travel)
  - 2) educational scholarships
  - 3) medical treatment