

Office of Government Ethics

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Letter to a Financial Advisory Firm dated August 4, 2003

Thank you for the opportunity to review and comment on your recent publication [regarding a specific type of advisory committee]. The special Government employees (SGEs) appointed to these types of committees and the Federal officials responsible for overseeing the committee work will be well served by the guidance you provide in this publication.

I commend you on making a distinction between an appointment as an SGE and an appointment as a "representative" to one of these committees. However, I do not believe that you placed enough emphasis in the publication on the important differences between being appointed as a representative and being appointed as an SGE. As you noted in the publication, an SGE, with some exceptions detailed below, is subject to most of the Federal ethics laws and regulations, whereas a representative is not covered by these laws.

Should you revise the publication in the future, I encourage you to include more specific guidance on the financial disclosure requirements placed on SGEs as well as to discuss that SGEs are often subject to somewhat less restrictive requirements under many of the ethics laws and regulations. I am happy to provide you a very general summary of the financial disclosure requirements for SGEs as well as to highlight the areas in which the laws and regulations are limited or narrowed for SGEs.

As a general rule, all SGEs file either a public or a confidential financial disclosure report. SGEs who are expected to perform the duties of their Government office for more than 60 days in a calendar year and who meet certain pay thresholds will file a public financial disclosure report (Standard Form 278). The initial report will be due within 30 days of taking office. These SGEs may also be required to file subsequent reports annually on May 15 and a final report within 30 days of terminating the position.

SGEs who do not meet the criteria for filing a public financial disclosure report, including members of advisory committees, will file a confidential financial disclosure report (OGE Form 450). The initial confidential report is due within

30 days of assuming the position. However, for SGEs on advisory committees, the report is required prior to the SGE's rendering any advice or not later than the first advisory committee meeting. These SGEs may be required to file subsequent reports on the anniversary of their appointments or designations.

With respect to other ethics laws and regulations, many make special provisions for the treatment of SGEs. For example, [various] criminal conflict of interest statutes (Chapter 11, Title 18 §§ 203, 205, 207, 208, and 209) include some narrowing of the restrictions as they apply to SGEs. Sections 203 and 205 impose restrictions on the outside activities of Federal employees involving representation of others before the Federal Government. With regard to SGEs, the individual restrictions in this statute are narrowed depending upon the type of matter involved, the level of participation in the matter by the SGE, and whether the SGE has served the Government for more than 60 days during the immediately preceding period of 365 days.

Likewise, parts of 18 U.S.C. § 207, which imposes a number of different restrictions on the activities of former Government employees, also contain special provisions for SGEs. For example, one of the more significant restrictions is found in section 207(c), which provides for a one-year "cooling off" period for senior employees. This section prohibits former senior level employees from representing anyone before their former agency for one year after terminating their senior position. With respect to senior level SGEs, the restriction only applies to former senior level SGEs who served 60 days or more during the individual's last year as a senior employee. It is worth noting here that, while former senior level SGEs are subject to narrower restrictions on their post-employment activities before their former agencies than former regular senior level employees, all former SGEs are subject to the same restrictions as former regular employees, as set forth in the more general provisions of this statute, namely, sections 207(a) and (b).

18 U.S.C. § 208 prohibits all employees, including SGEs, from participating personally and substantially in any particular matter that has a direct and predictable effect on their own financial interest or the financial interest of others with whom they have certain relationships. Because SGEs typically have substantial outside employment and other interests often related to the subject areas for which the Government desires their services, section 208 issues arise frequently.

In certain circumstances, however, SGEs are eligible for special treatment under section 208, especially SGEs who serve on advisory committees established in accordance with the provisions

of the Federal Advisory Committee Act (FACA), 5 U.S.C. app. SGEs serving on FACA committees may be granted a section 208(b)(3) waiver by their appointing official certifying in writing that the need for the SGE's services outweighs the potential for a conflict posed by a particular financial interest. While waivers are also available in certain circumstances under section 208 for regular employees, the standard for granting a waiver to an SGE on a FACA committee is more liberal.

The Office of Government Ethics has promulgated certain exemptions from section 208 that are also available to SGEs on FACA committees. The most significant of these exemptions pertains to certain financial interests arising from the SGE's outside employment. In general, this exemption allows SGEs to participate on matters of general applicability such as development of policies or standards where the [disqualifying] financial interest arises from the SGE's non-Federal employment or prospective employment.

With regard to the last of the criminal statutes referenced above, SGEs are completely exempt from the provisions of 18 U.S.C. § 209, which prohibits Federal employees from receiving any salary, contribution, or supplementation of salary from an outside source as compensation for their Government services. However, it should be noted that SGEs may be subject to the criminal bribery and illegal gratuities statute and several provisions governing receipt of compensation in connection with their duties that are found in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), 5 C.F.R. part 2635.

Generally, under the Standards of Conduct, SGEs are treated the same as regular employees. There are far fewer provisions in the Standards of Conduct where the restrictions are limited or narrowed for SGEs than there are in the criminal statutes. Activities for which the restrictions are narrowed for SGEs include serving as an expert witness and outside teaching, speaking, and writing. Additionally, the restrictions on outside earned income applicable to Presidential appointees and other non-career employees do not apply to SGEs.

Again, thank you for the opportunity to comment on your publication. I hope that the information provided here helps you to better understand the application of the ethics laws and regulations to special Government employees. Please feel free to contact this Office or visit the OGE website at www.usoge.gov, if you need any additional information.

Sincerely,

Amy L. Comstock
Director