

Note: Executive Order 12834, referenced in this Informal Advisory Memorandum, has been revoked.

Office of Government Ethics

00 x 1

**Memorandum dated February 15, 2000,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials,
General Counsels and Inspectors General
Regarding Summary of Ethical
Requirements Applicable to Special
Government Employees**

In recent years, we have noted increasing demand from agency officials for guidance concerning the various ethical requirements applicable to special Government employees (SGE). In response, we have prepared the attached summary: "Conflict of Interest and the Special Government Employee." It is our hope that this document will become a convenient tool for all agency officials who have to counsel SGEs or otherwise deal with the unique ethical issues posed by SGEs. In this connection, we specifically ask that you disseminate this summary to other components within your own organization, such as regional offices, that you think may encounter questions pertaining to SGEs.

Attachment

CONFLICT OF INTEREST AND THE SPECIAL GOVERNMENT EMPLOYEE

A Summary of Ethical Requirements Applicable to SGEs

The Office of Government Ethics (OGE) frequently receives questions about the ethical requirements applicable to special Government employees (SGE). Many agencies use SGEs, either as advisory committee members or as individual experts or consultants, and OGE knows that these SGEs pose unique challenges for agency ethics officials. SGEs typically are recruited for temporary service to the Government because they provide outside expertise or perspectives that might be unavailable among an agency's regular employees. Frequently, however, these SGEs have substantial outside activities and financial interests that may raise difficult ethics questions. In order to help agencies resolve such questions, OGE is issuing this summary, which attempts to digest, in one place, the various conflict of interest laws and ethics regulations applicable to SGEs.

DEFINITION OF SGE

The SGE category was created by Congress as a way to apply an important, but limited, set of conflict of interest requirements to a group of individuals who provide important, but limited, services to the Government. SGEs were originally conceived as a "hybrid" class, in recognition of the fact that the "simple categories of 'employee' and 'non-employee' are no longer adequate to describe the multiplicity of ways in which modern government gets its work done." B. Manning, *Federal Conflict of Interest Law* 30 (1964). It is crucial to distinguish SGEs both from regular employees and from individuals who are not Federal employees at all. These distinctions are important because SGEs are subject to less restrictive conflict of interest requirements than regular employees, but are subject to more restrictive requirements than non-employees, who generally are not covered by the conflict of interest laws at all.

The first and perhaps most important point to emphasize is that SGEs are Government employees, for purposes of the conflict of interest laws. Specifically, an SGE is 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.

The terms "officer" and "employee" are not themselves defined in section 202(a). Nevertheless, the definitions of those terms in Title 5 of the United States Code have long been consulted for general guidance in determining whether a given individual should be considered an SGE or a non-employee. See 4B Op. O.L.C. 441, 442 (1980).¹ Three criteria for Government employment are identified in 5 U.S.C. §§ 2104 and 2105: (1) appointment in the civil service; (2) performance of a Federal function; and (3) supervision by a Federal official. With respect to the appointment element, however, it has been held that an appointment or other formal employment paperwork, "while perhaps the norm, is not a condition of special government employment as statutorily defined," *Association of American Physicians and Surgeons v. Clinton*, 187 F.3d 655, 662 (D.C. Cir. 1999); in order for an individual to be "retained, designated, appointed or employed" as an SGE, under section 202(a), it is sufficient that the circumstances indicate "a firm mutual understanding that a relatively formal relationship existed." 1 Op. O.L.C. 20, 21 (1977).² Moreover, with the respect to the supervision element, it should be remembered that SGEs, who often work as "specialists for short-term projects," sometimes need not be subject to the same level of "close supervision" as regular employees. *Aluminum Co. of America v. FTC*, 589 F. Supp. 169, 175-76 (S.D.N.Y. 1984).³ Nevertheless, supervision or operational control remains an important attribute of employee status, and an agency may consider numerous factors when determining whether an

¹ As the Office of Legal Counsel has observed, "'the Title 5 definition is frequently used as a starting point for any analysis of whether the conflict of interest laws apply to a particular individual . . . although the Title [5] definition is not necessarily conclusive for conflicts purposes.'" 17 Op. O.L.C. 150, 154 n.12 (1993) (quoting Memorandum of Assistant Attorney General, Office of Legal Counsel, to Deputy General Counsel, Department of Commerce, at 10 (Dec. 15, 1982)).

² See also OGE Informal Advisory Letter 95 x 8 (possibility of *de facto* SGEs); Manning at 29-30 (occasional informal advice vs. more formal services).

³ In a similar vein, it is recognized in various contexts that the "threshold level of control necessary to find employee status is generally lower when applied to professional services than when applied to nonprofessional services." *Weber v. Comm'r of IRS*, 60 F.3d 1104, 1111 (4th Cir. 1995).

individual is subject to the requisite degree of supervision to be deemed an SGE.⁴

Two of the more common types of non-employees from which SGEs must be distinguished are "representatives" and independent contractors. Representatives, as described more fully in OGE Informal Advisory Letter 82 x 22, typically serve on advisory bodies, and they represent specific interest groups, such as industry, consumers, labor, etc. Like SGEs, representatives can be appointed by the Government for a specified term on a Federal advisory committee, and they may make policy recommendations to the Government. See OGE Informal Advisory Letter 93 x 30. However, representatives can provide only advice. Moreover, unlike SGEs and other Federal employees, representatives are not expected to render disinterested advice to the Government. Rather, they are expected to "represent a particular bias." OGE Informal Advisory Letter 93 x 14. Therefore, representatives are not deemed employees of the Government for purposes of the conflict of interest laws.

Likewise, independent contractors are not deemed Government employees. True independent contractors are not employees because they are not subject to the supervision or operational control, described more fully above, that is necessary to create an "employer-employee relationship" with the Government. OGE Informal Advisory Letter 82 x 21. It should be noted, however, that persons who truly function like Federal employees will not avoid the application of the conflict of interest laws merely because their agency fails to designate them as employees or designates them as contractors. See 4B Op. O.L.C. at 441-42; *Association of the Bar of New York City, Conflict of Interest and Federal Service* 239-40 (1960).

⁴ *E.g.*, OGE Informal Advisory Letter 82 x 22, at 334-35 (focusing on degree of agency scrutiny and guidance); 17 Op. O.L.C. at 155-56 (looking to limits on power of removal and other aspects of specific legislation creating particular Federal position); see generally GAO, *Civilian Personnel Manual*, Title I, Chapter 10, at 14-15 (1990) (discussing six factors indicating supervision for certain Federal personnel purposes); *Juliard v. Comm'r of IRS*, 61 T.C.M. (CCH) 2683 (1991) (various factors indicating sufficient agency control over professional employee for certain tax purposes); *Hospital Resource Personnel, Inc. v. United States*, 68 F.3d 421, 427-28 (11th Cir. 1995) (discussing non-exclusive list of twenty common law factors identified by IRS for purpose of determining supervision); *Restatement (Second) of Agency* § 220(2) (1958) (ten factors to determine control).

Even though SGEs clearly are employees, agencies must be careful to differentiate them from regular Government employees. For most purposes, SGEs are distinguished from regular Government employees on the basis of the number of days of expected service to the Government.⁵ Specifically, an SGE is expected to perform temporary duties for no more than 130 days during any period of 365 consecutive days. 18 U.S.C. § 202(a).

The determination of SGE status must be made prospectively, at the time the individual is appointed or retained. Employees should be designated as SGEs only where the agency makes an advance estimate of the number of days the employee is expected to serve during the ensuing 365-day period. This is done so that employees are on notice with respect to the rules that will apply to them. As the Office of Legal Counsel has stated, "as a general matter, employees are *presumed to be regular government employees* unless their appointing Department is comfortable with making an estimate that the employee will be needed to serve 130 days or less." 7 Op. O.L.C. 123, 126 (1983) (emphasis added). If an agency designates an employee as an SGE, based on a good faith estimate, but the employee unexpectedly serves more than 130 days during the ensuing 365-day period, the individual still will be deemed an SGE for the remainder of that period. However, upon the commencement of the next 365-day period, the agency should reevaluate whether the employee is correctly designated as an SGE, i.e., expected to serve no more than 130 days. Indeed, any time an SGE serves beyond one year, the agency should perform a new estimate of the expected number of days of service for the next 365-day period; this is true whether the employee is actually reappointed for a new one-year term, which is the ordinary procedure, or is merely completing an indefinite or multiyear term. See, e.g., OGE Informal Advisory Letter 81 x 24.

The executive branch has long observed certain criteria for counting the number of days of expected service, based on a Presidential interpretation of 18 U.S.C. § 202(a) published shortly after enactment. Presidential Memorandum, "Preventing Conflicts of Interest on the Part of Special Government Employees," 28 *Federal*

⁵ The full definition of SGE also includes employees and officers in certain miscellaneous positions who are deemed SGEs *per se*, without regard to the number of days of service. 18 U.S.C. § 202(a). See *United States v. Baird*, 29 F.3d 647, 650 (D.C. Cir. 1994). In addition, individuals occupying other positions are specifically designated as SGEs in certain organic legislation. See, e.g., 42 U.S.C. § 12651b(e) (members of Board of Directors, Corporation for National and Community Service).

Register 4539, 4541 (May 2, 1963); see also Federal Personnel Manual, Chapter 735, Appendix C (sunset); 3 Op. O.L.C. 78, 81-82 (1979); OGE Informal Advisory Letter 84 x 4.⁶ OGE continues to use the same criteria, as follows: A part of a day is counted as an entire day. Work to be performed on weekends or holidays is counted. Where an employee is expected to serve in more than one agency, the expected number of days for both agencies must be aggregated in order for the employee to be considered an SGE for either agency. Where the second position commences at a later date, the number of days already served in the first agency must be added to the number of days expected to be served in both agencies for the remainder of the first 365-day period, in order to determine whether the employee may be considered an SGE for either agency during that remaining period.

A word is in order concerning two fairly common questions pertaining to SGE status and the applicability of the conflict of interest requirements. First, SGEs (and others) sometimes ask whether the ethics restrictions apply to them if they receive no pay from the Government. It is important to remember that the definition of SGE expressly includes those who serve "without compensation." 18 U.S.C. § 202(a). SGEs generally are covered by the ethics laws and regulations without regard to their pay status.⁷

Second, SGEs occasionally may ask whether the restrictions on their outside activities apply on days when they perform no Government services. SGEs must be advised clearly that any restrictions concerning their private activities (representational

⁶ The Presidential Memorandum was drafted by the Office of Legal Counsel, Department of Justice, and "reflects a contemporaneous interpretation" of the 1962 conflict of interest legislation. 2 Op. O.L.C. 151, 155 n.3 (1978). The history of the Presidential Memorandum, including its rescission and replacement by other documents, is described in OGE Informal Advisory Letter 82 x 22, at 329-32. Much of the substance of the Presidential Memorandum was reproduced in Appendix C, Chapter 735 of the Federal Personnel Manual (FPM), itself now sunset. To the extent that much of the guidance contained in these documents reflects longstanding interpretations of 18 U.S.C. § 202(a) and other provisions of the conflict of interest laws, OGE continues to follow many of the same principles.

⁷ One obvious exception would be certain narrow post-employment restrictions applicable only to employees paid at relatively high levels, as discussed below.

services, expert witness activities, etc.) apply equally on days when they serve the Government and days when they do not.⁸ Where the Government has not used an individual's services for some time, but has not specified a termination date in the appointment or otherwise, the individual might question whether he or she even remains an SGE. In such cases, the individual must seek a formal resolution of the matter before engaging in conduct prohibited for an SGE. As one early commentator observed, "presumably the consultant will remain an employee until the expiration of the designated term," but a "special government employee whose appointment is for a long or indefinite period would be well advised to submit a written resignation as soon as he thinks there may be a substantial hiatus in his services." R. Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1126 (1963).

CRIMINAL CONFLICT OF INTEREST STATUTES AND RELATED RESTRICTIONS

Agency ethics officials regularly deal with five conflict of interest statutes found in Chapter 11, Title 18 of the United States Code: 18 U.S.C. §§ 203, 205, 207, 208, 209. Each of these criminal statutes makes at least some special provision for the treatment of SGEs. The application of these statutes is discussed below, in addition to certain related requirements found in other provisions of law.

A. Restrictions on Representation

Two statutes, 18 U.S.C. §§ 203 and 205, impose related restrictions on the outside activities of SGEs, particularly activities involving the representation of others before the Federal Government. Section 203 prohibits an employee from receiving, agreeing to receive, or soliciting compensation for representational services, rendered either personally or by another, before any court or Federal agency or other specified Federal entity, in connection with any particular matter in which the United States is a party or has a direct and substantial interest. It should be noted that section 203 applies not only to representational services provided by the employee personally, but also to services provided by another person with whom the employee is associated, provided that the employee shares in the

⁸ In this respect, the conflict of interest restrictions differ from the restrictions on employee political activity described in 5 C.F.R. part 734 (Hatch Act regulations). See 5 C.F.R. § 734.601 (SGE subject to restrictions on political activity only "when he or she is on duty").

compensation for such services, for example, through partnership income or profit-sharing arrangements. See 4B Op. O.L.C. 603 (1980).

Section 205 prohibits an employee from personally representing anyone before any court or Federal agency or other specified Federal entity, in connection with any particular matter in which the United States is a party or has a direct and substantial interest. See 18 U.S.C. § 205(a)(2). Unlike section 203, this prohibition in section 205(a)(2) applies whether or not the employee receives any compensation for his or her representational activity. Furthermore, section 205(a)(1) prohibits an employee from representing anyone in the prosecution of a claim against the United States, or from receiving any gratuity, or share or interest in a claim, as consideration for assistance in prosecuting the claim.

Both section 203 and section 205 are limited, however, in their application to SGEs. 18 U.S.C. § 203(c) and 18 U.S.C. § 205(c) contain identical provisions that substantially narrow the prohibitions with respect to SGEs. One of the most significant limitations is that SGEs are restricted by sections 203 and 205 only in connection with "particular matters involving specific parties." Such matters typically involve a specific proceeding affecting the legal rights of parties, or an isolatable transaction or related set of transactions between identified parties; examples would include contracts, grants, applications, requests for rulings, litigation, or investigations. Unlike regular employees, SGEs may represent others or receive compensation for representational services in connection with particular matters of general applicability--such as broadly applicable policies, rulemaking proceedings, and legislation--which do not involve specific parties. See 14 Op. O.L.C. 79 (1990); 5 C.F.R. § 2640.102(1)(m); 5 C.F.R. § 2637.201(c)(1).

Furthermore, the restrictions on SGEs are narrowly drawn to focus only on those matters in which the SGE actually participated for the Government, as well as, in some cases, those matters actually pending in the SGE's own agency. More specifically, all SGEs are subject to the prohibitions of sections 203 and 205 with respect to those matters in which the SGE "at any time participated personally and substantially as a Government employee or special Government employee." 18 U.S.C. §§ 203(c)(1), 205(c)(1). Guidance on what constitutes personal and substantial participation may be found in regulations construing the same phrase in related conflict of interest statutes. See 5 C.F.R. § 2640.103(a)(2); 5 C.F.R. § 2637.201(d). Likewise, guidance on what constitutes participation in the *same particular matter* as the matter with

respect to which an SGE seeks to provide representational services may be found in regulations construing the analogous requirement in 18 U.S.C. § 207(a). See 5 C.F.R. § 2637.201(c)(4).⁹

SGEs who have served the Government for more than 60 days during the immediately preceding period of 365 consecutive days are subject to an additional restriction. Such SGEs are subject to the prohibitions of sections 203 and 205 in connection with any covered matter that "is pending in the department or agency of the Government in which [the SGE] is serving." 18 U.S.C. §§ 203(c)(2), 205(c)(2). It should be noted that the 60-day standard for determining the application of this additional restriction is a standard of actual past service, as contrasted with the 130-day standard of estimated future service for determining SGE status discussed above.¹⁰ Thus, for example, an SGE may represent another person before the agency in which he or she serves until the point at which the SGE has actually served 60 days in any prior period of 365 days; once the 61st day of service is reached, the SGE must discontinue the representation.

Beyond these basic limitations on the application of sections 203 and 205, SGEs also may be eligible for a special waiver that permits certain representational activity in connection with work under Federal grants and contracts. Identical provisions, in 18 U.S.C. §§ 203(e) and 205(f) allow an agency head to authorize an SGE to represent another before the Government "in the performance of work under a grant by, or a contract with or for the benefit of, the United States." The legislative history indicates

⁹ The regulatory guidance found in 5 C.F.R. part 2637 was promulgated prior to amendments to section 207 enacted by the Ethics Reform Act of 1989 and thereafter; however, "[e]xcept where the underlying statutory provision has changed, part 2637 remains persuasive concerning the interpretation of the newer version of 18 U.S.C. § 207." OGE Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (Nov. 5, 1992).

¹⁰ Nevertheless, certain similar rules apply to counting the number of days: a partial day worked should be counted as a full day, and work performed on weekends and holidays should be counted. However, unlike the 130-day standard for determining SGE status, the 60-day standard under sections 203(c) and 205(c) does not require that service at more than one agency be aggregated; in other words, only service at the agency before which the SGE intends to represent someone should be counted in determining whether the 60-day standard has been exceeded with respect to that agency.

that the purpose of this exception is "to take care of any situations involving the national interest where an intermittent employee's special knowledge or skills may be required by his employer or other private person to effect the proper performance of a Government contract [or grant] but where his services may be unavailable in the absence of a waiver." S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. 3852, 3860. Such a waiver may be granted only by the agency head and must be based on a written certification, published in the *Federal Register*, that it is required by the national interest. Such a waiver covers representation only during the "performance of work under" a grant or contract and therefore would not apply to representational activity prior to the awarding and commencement of work on a grant or contract. See Presidential Memorandum, 28 *Federal Register* at 4542 (waiver provision covers "situation which may arise after a Government grant or contract has been negotiated").¹¹

Finally, even where the narrow restrictions of section 203 and section 205 are inapplicable, agencies should be aware that certain representational activities of SGEs may implicate 5 C.F.R. § 2635.702, which prohibits the use of public office for private gain. The need for administrative action to prevent SGEs from abusing their inside position for the benefit of private persons was addressed in the legislative history of sections 203 and 205, as well as in subsequent issuances and opinions of the executive branch.¹² In some circumstances, private representational activity

¹¹ SGEs, like regular employees, also may be eligible for other exceptions to sections 203 and 205. See 18 U.S.C. §§ 203(d), (f), 205(d), (e), (g), (i).

¹² Discussing proposed sections 203 and 205, the Senate Report stated that, beyond the limited criminal prohibitions, "agency watchfulness and regulation" may be necessary to "make certain that persons serving [an agency] part time who also appear on behalf of outside organizations do not abuse their access to the agency for the benefit of those organizations." S. Rep. No. 2213, 1962 U.S.C.C.A.N. 3859. Similar concerns were voiced in a Presidential Memorandum issued shortly after the legislative enactment: "It is desirable that a consultant or adviser or other individual who is a special Government employee, even when not compelled to do so by sections 203 and 205, should make every effort in his private work to avoid any personal contact with respect to negotiations for contracts or grants with the department or agency which he is serving if the subject matter is related to
(continued...)

by SGEs can raise at least the appearance that they are using their official position to gain special access or attention from Government decisionmakers, which would be unavailable to the general public. Cf. OGE Informal Advisory Letter 91 x 17 (appearance that SGE made certain contacts through Government connections for benefit of outside organization). Such concerns are more likely to arise when the subject matter of the private representation is related to the subject matter of the SGE's official duties and the representational contacts are made to the SGE's own agency, especially to the same agency personnel with whom the SGE works in an official capacity. These issues must be addressed on a case-by-case basis, with adequate consideration of the legitimate interests and demands of an SGE's outside professional life.

B. Post-Employment Restrictions

The criminal post-employment statute, 18 U.S.C. § 207, imposes a number of different restrictions on the activities of former Government employees. Several of these restrictions provide no special treatment for SGEs. The provisions of section 207 that apply in the same way to both SGEs and regular employees include:

(1) 18 U.S.C. § 207(a)(1), the lifetime prohibition on representing others in connection with the same particular matter involving specific parties in which the former employee participated personally and substantially;

(2) 18 U.S.C. § 207(a)(2), the two-year prohibition on representing others in connection with the same particular matter involving specific parties that was pending under the employee's official responsibility during the last year of Government employment; and

(3) 18 U.S.C. § 207(b), the one-year prohibition on representing, aiding, or advising others about certain

¹²(...continued)

the subject matter of his consultancy or other service." 28 *Federal Register* at 4542. The Presidential Memorandum recognized that it may not be practicable for SGEs to avoid all such representational activity, depending on the circumstances, but advised that SGEs at least alert a "responsible government official" when contemplating such activities. *Id.*; see also Federal Personnel Manual (sunset), Chapter 735, Appendix C, at 3; 10 Op. O.L.C. at 82-83; 7 Op. O.L.C. at 125 n.3.

ongoing trade or treaty negotiations on the basis of certain nonpublic information.¹³

Other parts of section 207 do contain special provisions for SGEs. The most significant provision is found in section 207(c), the so-called "one year cooling off period" for former "senior employees." Section 207(c) prohibits former senior employees from representing anyone before their former agency or department for one year after terminating their senior position, in connection with any matter. This restriction generally applies to: positions for which the rate of pay is fixed according to the Executive Schedule; positions for which the rate of basic pay is equal to or greater than the rate of basic pay for level 5 of the Senior Executive Service;¹⁴ positions with appointment by the President under 3 U.S.C. § 105(a)(2)(B) or by the Vice President under 3 U.S.C. § 106(a)(1)(B); and positions held by an active duty commissioned officer of the uniformed services serving at pay grade 0-7 or above. 18 U.S.C. § 207(c)(2). However, with respect to SGEs, the application of section 207(c) is limited, based on the number of days the individual served during the last year in a senior position. Specifically, the one year cooling off period applies only to former SGEs who served 60 days or more during the one-year period before terminating their services as a senior employee.¹⁵

¹³ Additionally, 18 U.S.C. § 207(d) imposes a one-year prohibition on "very senior employees" against representing others before their former agency or before any official appointed to an Executive Schedule position. On its face, section 207(d) makes no special provision for SGEs; however, it is unclear whether an SGE would occupy a position that falls within the "very senior" category, as described in the statute. See 18 U.S.C. § 207(d)(1). Agencies with specific questions concerning the applicability of section 207(d) to a particular SGE or class of SGEs are advised to consult with OGE or the Office of Legal Counsel, Department of Justice.

¹⁴ Because SGEs often are paid on an hourly or daily basis, it may be necessary to prorate the basic pay for level 5 of the SES, either on an hourly or a daily basis, in order to determine whether the SGE's hourly or daily rate is equivalent.

¹⁵ The Director of OGE also has authority to waive the prohibition of section 207(c) with respect to certain senior positions, under limited circumstances. See 18 U.S.C. § 207(c)(2)(C); 5 C.F.R. § 2641.201(d).

Section 207(f), which restricts certain post-employment activities with foreign entities, is similarly limited with respect to SGEs. Section 207(f) generally imposes a one-year prohibition on representing, aiding, or advising certain covered foreign entities in connection with any official decision of an officer or employee of the United States. However, section 207(f) applies only to "senior employees" who are subject to section 207(c) and "very senior employees" who are subject to section 207(d). Therefore, SGEs who are not subject to section 207(c) or section 207(d)--for example, "senior employees" who served fewer than 60 days during the last year before they terminated from their senior position--are likewise exempt from section 207(f).¹⁶

Apart from 18 U.S.C. § 207, Executive Order 12834 (January 20, 1993) imposes a number of related post-employment restrictions on "senior appointees" and certain trade negotiators. These restrictions include, among other things, certain five-year cooling off requirements that are similar in scope to the one-year restrictions of 18 U.S.C. §§ 207(c) and 207(b), as well as a lifetime ban on certain activities as a foreign agent. The requirements of Executive Order 12834 apply only to "full-time, non-career appointees." Although it is possible for an SGE to provide temporary services on a "full-time" basis, pursuant to 18 U.S.C. § 202(a), and certain SGEs could be considered "non-career" for certain purposes,¹⁷ SGEs are not covered by the requirements of Executive Order 12834. The Executive order was not intended to cover employees who perform only temporary duties. It was not contemplated that the significant contractual obligations imposed by the Executive order would apply to persons who serve in the relatively limited capacity of an SGE.

Finally, former SGEs are subject to the provisions of the Procurement Integrity Act, 41 U.S.C. § 423, to the same extent as all former Federal employees. See 48 C.F.R. § 3.104-3 (definition of "official" includes SGEs). The act prohibits a former SGE from accepting compensation as an employee, officer, director, or consultant of a contractor within the one-year period after the SGE

¹⁶ Additionally, SGEs, like all employees, may be eligible for a number of exceptions to the various restrictions of 18 U.S.C. § 207. See 18 U.S.C. § 207(h), (j), (k).

¹⁷ See OGE Informal Advisory Letter 90 x 22 (Presidentially appointed member of board of directors of agency is noncareer officer or employee and may be SGE depending on estimate of number of days of service); see generally OGE Informal Advisory Letter 89 x 16 (indicia of non-career status).

participated in certain procurement matters pertaining to that contractor. See 41 U.S.C. § 423(d). This statute also imposes certain sanctions, including criminal penalties, on former SGEs who disclose certain information pertaining to Federal procurements. See 41 U.S.C. § 423(a), (e).

C. Financial Conflicts of Interest

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 interests or the financial interests of others with whom they have certain relationships. In addition to an employee's own personal financial interests, the financial interests of the following persons or organizations are also disqualifying: spouse; minor child; general partner; organization which the individual serves as officer, director, trustee, general partner or employee; person or organization with which the employee is negotiating or has any arrangement concerning prospective employment.¹⁸ Because SGEs typically have substantial outside employment and other interests, which are often related to the subject areas for which the Government desires their services, issues under section 208 frequently arise.

In certain circumstances, however, SGEs are eligible for special treatment under section 208. SGEs who serve on advisory committees, within the meaning of the Federal Advisory Committee Act (FACA), 5 U.S.C. app., are uniquely eligible for a particular waiver of the prohibitions of section 208(a). Under 18 U.S.C. § 208(b)(3), an SGE serving on a FACA committee may be granted a waiver where the official responsible for his or her appointment certifies in writing that the need for the SGE's services outweighs the potential for a conflict of interest posed by the financial

¹⁸ Related provisions in the Standards of Ethical Conduct for Executive Branch Employees also disqualify an employee, including an SGE, from participating in matters affecting the financial interests of a person or organization with which the employee is "seeking" employment, even if there have been no actual negotiations or arrangements for prospective employment, within the meaning of section 208. See 5 C.F.R. part 2635, Subpart F. Furthermore, a provision in the Procurement Integrity Act, which applies equally to SGEs and regular employees, imposes disqualification and reporting requirements on employees who participate in certain agency procurement matters and who receive employment contacts from bidders or offerors in those procurements. See 41 U.S.C. § 423(c).

interest involved. 18 U.S.C. § 208(b)(3). The standard for granting such waivers is more liberal than the standard for other employees, under 18 U.S.C. § 208(b)(1), which requires a determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services. Compare 5 C.F.R. § 2640.301 (requirements for waivers under section 208(b)(1)); 5 C.F.R. § 2640.302 (requirements for waivers under section 208(b)(3)). Agencies should remember that Congress reserved this special waiver authority only for those SGEs who serve on advisory committees; SGEs who do not serve in connection with a FACA committee may be granted a waiver only in accordance with section 208(b)(1). See Report of The President's Commission on Federal Ethics Law Reform 30 (1989) (advisory committees warrant different approach under section 208 because FACA provides important safeguards and members only make nonbinding recommendations).

SGEs serving on FACA committees also are covered by certain exemptions from section 208 that have been promulgated by OGE, pursuant to 18 U.S.C. § 208(b)(2). The most significant of these is 5 C.F.R. § 2640.203(g), which pertains to certain financial interests arising from the SGE's outside employment. Specifically, this exemption permits SGEs serving on FACA committees to participate in particular matters of general applicability--such as the development of general regulations, policies, or standards--where the disqualifying interest arises from the SGE's non-Federal employment or prospective employment. Agencies should note, however, that this exemption is subject to several important limitations: (1) the matter cannot have a "special or distinct effect" on either the SGE or the SGE's non-Federal employer, other than as part of a class;¹⁹ (2) the exemption does not cover

¹⁹ When we promulgated this exemption, we explained the "special or distinct effect" limitation as follows: "[I]t is not OGE's intent that the exemption apply only where the effect of the matter on members within a class is identical. Normally, the matter would have a 'special or distinct effect' when its impact would be unique to the employee or his employer, or where the effect would be clearly out of proportion in comparison to the effect on other members of the class." 61 *Federal Register* 66829, 66839 (December 18, 1996). Although the examples following section 2640.203(g) do not specifically address the "special or distinct effect" limitation, guidance as to the meaning of that phrase may be found in an example following another exemption that uses the same language. See 5 C.F.R. § 2640.203(b) (Example 2) (even though grant announcement open to all universities, employee's university

(continued...)

interests arising from the ownership of stock in the employer; (3) and the non-Federal employment must involve an actual employee/employer relationship, as opposed to an independent contractor relationship (such as certain consulting positions). See 61 *Federal Register* at 66838. Furthermore, it should be emphasized that section 2640.203(g) does not apply to all SGEs, but only to those serving on advisory committees within the meaning of FACA.

Two other exemptions also specifically cover SGEs serving on FACA committees, although these are much more narrow in scope. One covers certain SGEs participating in matters pertaining to medical products, 5 C.F.R. § 2640.203(i), and the other covers a very limited class of SGEs serving on certain advisory committees of the Food and Drug Administration, 5 C.F.R. § 2640.203(j). Additionally, OGE expects to promulgate other exemptions in the near future, some of which may apply to specific situations involving SGEs serving on certain advisory committees.

Another exemption, 5 C.F.R. § 2640.203(c), is not specifically limited to SGEs but can be helpful in resolving certain issues particularly common among SGEs. Section 2640.203(c) permits any employee to participate in a particular matter affecting one campus of a multi-campus institution of higher education, where the disqualifying interest arises from the individual's employment with a separate campus of the same institution, provided that the individual has no multicampus responsibilities at the institution. SGEs frequently are drawn from universities, including large universities with multiple campuses. These SGEs may be called upon to participate in official matters--such as grants, contracts, applications, and other particular matters--that affect the financial interests of another campus in the same university system where they are employed. Hence, section 2640.203(c) may have particular utility for many SGEs.²⁰

Finally, because divestiture of a disqualifying interest is one of the remedies for a potential violation of section 208, it is important to note that SGEs are *not* eligible for a Certificate of

¹⁹(...continued)

one of just two or three likely to receive grant because very few universities known to have necessary facilities and equipment).

²⁰ Of course, SGEs also may take advantage of the other generally applicable exemptions promulgated by OGE, including the exemptions for certain interests in publicly traded securities. See 5 C.F.R. part 2640, Subpart B.

Divestiture (CD). A CD is a tax benefit that allows the deferral or nonrecognition of capital gain where an employee divests a financial interest in order to comply with conflict of interest requirements. However, Congress specifically excluded SGEs from the definition of "eligible person," and consequently SGEs may not take advantage of this benefit. 26 U.S.C. § 1043(b)(1)(A).

D. Supplementation of Federal Salary

18 U.S.C. § 209 prohibits Federal employees from receiving "any salary, or any contribution to or supplementation of salary" from an outside source as compensation for their Government services. SGEs, however, are completely exempt from this prohibition. 18 U.S.C. § 209(c). This means, for example, that SGEs may continue to collect their regular salary from an outside employer for days on which they are providing services to the Government (whether their Government service is paid or unpaid).

SGEs should be advised, nevertheless, that there may be other restrictions on the receipt of compensation in connection with the performance of their official duties. For example, 5 C.F.R. § 2635.807 prohibits all Federal employees, including SGEs, from receiving outside compensation for teaching, speaking, or writing when "the activity is undertaken as part of the employee's official duties." 5 C.F.R. § 2635.807(a)(2)(i)(A). SGEs also are subject to the criminal bribery and illegal gratuity statute, which prohibits, under certain circumstances, the receipt of anything of value in connection with official acts. 18 U.S.C. § 201(b), (c).

OTHER ETHICS STATUTES

Apart from the five major criminal conflict of interest statutes in Chapter 11 of Title 18, there are other ethics statutes, some of which apply to SGEs and some of which do not.

As discussed above, SGEs are subject to the bribery and illegal gratuity statute, 18 U.S.C. § 201. SGEs also are covered by 5 U.S.C. § 7353, which prohibits the acceptance of gifts from certain sources. Likewise, SGEs are subject to 5 U.S.C. § 7351, which prohibits certain gifts to official superiors and gifts from employees receiving less pay. Both section 7353 and section 7351 are specifically implemented by the Standards of Ethical Conduct for Employees of the Executive Branch, discussed more fully below. See 5 C.F.R. part 2635, subparts B and C. Similarly, SGEs are covered by the financial disclosure provisions of the Ethics in Government Act of 1978, 5 U.S.C. app. §§ 101-111, as implemented by

5 C.F.R. part 2634, discussed below. The restrictions of the Procurement Integrity Act, 41 U.S.C. § 423, also apply to SGEs, as discussed above.²¹

Agencies also should note that SGEs are subject to 18 U.S.C. § 219, a criminal statute that prohibits employees from acting as an agent of a foreign principal under certain circumstances. Unlike regular employees, however, SGEs may be eligible for a special exemption from the prohibitions of section 219, where the agency head certifies that employment of the SGE "is required in the national interest." 18 U.S.C. § 219(b). The Department of Justice also has held that SGEs may be subject to the Emoluments Clause of the United States Constitution, U.S. Const., art. I, § 9, cl. 8, which prohibits persons who "hold offices of profit or trust" in the Federal Government from having any position in or receiving any payment from a foreign government. See 15 Op. O.L.C. 65 (1991); 17 Op. O.L.C. 114 (1993). OGE does not render opinions concerning section 219 or the Emoluments Clause, and agencies are advised to consult with the Department of Justice if they have any questions about the application of these provisions to SGEs.

SGEs are not, however, subject to 5 U.S.C. app. § 501, which imposes limits on the outside earned income of certain noncareer employees. See 5 U.S.C. app. § 505(2)(B).²² Nor are SGEs covered by 5 U.S.C. app. § 502, which imposes a number of restrictions on the outside activities of certain noncareer employees. See *id.* Moreover, as discussed above, SGEs are not covered by the statutory

²¹ Also in the procurement area, we note that SGEs are covered by a provision in the Federal Acquisition Regulation that generally prohibits the award of Federal contracts "to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more government employees." 48 C.F.R. § 3.601(a). However, unlike regular employees, SGEs are covered by this prohibition only if: (1) the contract arises directly out of the SGE's official activities; (2) the SGE is in a position to influence the award of the contract in his or her official capacity; or (3) some other conflict of interest is determined to exist. 48 C.F.R. § 3.601(b).

²² Similarly, SGEs are not subject to the related prohibition on outside earned income applicable to certain Presidential appointees, under Executive Order 12674, § 102 (1989), as modified by Executive Order 12731 (1990). This provision, which covers certain "full-time non-career" appointees, is inapplicable to SGEs for reasons similar to those discussed above with respect to the applicability of Executive Order 12834.

provision authorizing certificates of divestiture for the nonrecognition of capital gain in cases where employees sell property to comply with ethics requirements. See 26 U.S.C. § 1043(b)(A). SGEs also are not subject to 26 U.S.C. § 4941, which imposes tax sanctions on certain Government employees who engage in specified acts of "self-dealing" in connection with a private foundation. See 26 U.S.C. § 4946(c).

**STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES
OF THE EXECUTIVE BRANCH**

Generally, SGEs are treated the same as regular employees under the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635. See 5 C.F.R. § 2635.102(h) ("employee" includes SGEs, and employee status not affected by fact that SGE does not perform official duties on given day). There are, however, a few notable exceptions. Only those exceptions, as well as a few other items of particular relevance to SGEs, will be discussed below.²³

A. Gifts from Outside Sources

SGEs, like all employees, are subject to 5 C.F.R. § 2635.202(a), which prohibits the acceptance of gifts from a "prohibited source" and gifts given because of an employee's official position. The definition of "prohibited source" includes any person seeking official action from the employee's agency, doing or seeking to do business with the employee's agency, conducting activities regulated by the employee's agency, or having interests that may be substantially affected by the employee's official duties; the definition also includes organizations the majority of whose members fall within any of the aforementioned categories. 5 C.F.R. § 2635.203(d). From this definition, it should be immediately apparent that SGEs pose unique issues, because many SGEs are employed by, or have substantial professional and business relationships with, such prohibited sources. For this reason, OGE originally proposed an exception, 5 C.F.R. § 2635.204(e)(2), specifically to permit SGEs to accept various benefits resulting from outside business or employment activities, where it is clear that such benefits are not offered or enhanced because of the employee's official position. See 56 *Federal Register* 33777, 33782 (July 23, 1991). Although the final version of section 2635.204(e)(2) was broadened to cover all employees, not

²³ See also the discussion above of 5 C.F.R. § 2635.702, in connection with the representational activities of SGEs.

just SGEs, this exception continues to be of particular importance to SGEs.

B. Presidential Appointees and Covered Noncareer Employees

5 C.F.R. § 2635.804 references certain outside earned income restrictions on specified Presidential appointees and other covered noncareer employees. These restrictions are inapplicable to SGEs.²⁴

C. Outside Expert Witness Activities

Employees generally may not participate as an expert witness, other than on behalf of the United States, in any proceeding before a Federal court or agency in which the United States is a party or has a direct and substantial interest. 5 C.F.R. § 2635.805(a). This prohibition applies whether or not the employee receives compensation for the activity. The Designated Agency Ethics Official may authorize an employee to serve as an expert witness where such service is determined to be in the interest of the Government or where the subject matter of the testimony is determined to be unrelated to the employee's official duties. 5 C.F.R. § 2635.805(c).

For SGEs, the restrictions of section 2635.805 are substantially narrowed. With respect to most SGEs, section 2635.805 applies only where the SGE actually participated officially in the same proceeding or in the particular matter that is the subject of the proceeding. 5 C.F.R. § 2635.805(a). A somewhat more restrictive standard applies to a smaller class of SGEs who are deemed to have particularly significant Federal positions, i.e., those either appointed by the President, serving on a commission established by statute, or serving (or expected to serve) for more than 60 days in a period of 365 days. 5 C.F.R. § 2635.805(b). For this class of SGEs, the restriction on expert service also applies to any proceeding in which the SGE's own agency is a party or has a direct and substantial interest.

D. Outside Teaching, Speaking and Writing

5 C.F.R. § 2635.807(a) generally prohibits an employee from receiving outside compensation for speaking, teaching or writing activities that relate to the employee's official duties. Such activities may relate to an employee's official duties in several different ways: if the activity is performed as part of the employee's official duties (discussed above in connection with

²⁴ See footnote 22 and accompanying text.

supplementation of Federal salary); if the invitation to engage in the activity was extended primarily because of the employee's official position rather than expertise in the subject matter; if the invitation or offer of compensation was extended by someone with interests that may be affected substantially by the employee's duties; or if the information conveyed through the activity draws substantially on nonpublic information obtained through the employee's Government service. 5 C.F.R. § 2635.807(a)(2)(i)(A)-(D). SGEs, like all employees, are prohibited from receiving compensation for activities that are related to their official duties in any of these ways.

Additionally, pursuant to paragraph (E) of the definition of relatedness, there are several other ways in which teaching, speaking and writing may relate to an employee's official duties, and SGEs receive special treatment in this connection. See 5 C.F.R. § 2635.807(a)(2)(i)(E). Under paragraph (E)(1), an activity is related if it deals, in significant part, with any matter to which the employee is currently assigned or has been assigned during the previous year. Under paragraph (E)(2), an activity is related to an employee's official duties if it deals, in significant part, with any ongoing or announced policy, program or operation of the employee's agency. Moreover, under paragraph (E)(3), with respect to certain noncareer employees, an activity is related to the employee's duties if it deals, in significant part, with "the general subject matter area, industry, or economic sector primarily affected by the programs and operations" of the employee's agency.

The scope of paragraph (E) is substantially narrowed, however, with respect to SGEs. First, SGEs are completely exempt from paragraphs (E)(2) and (E)(3). See 5 C.F.R. § 2635.807(a)(2)(i)(E)(4). Thus, for example, nothing in section 2635.807(a)(2)(i)(E) prohibits an SGE from accepting compensation for speaking, teaching, or writing simply because the activity relates to the programs or the general subject area of the SGE's agency. Second, even with respect to paragraph (E)(1), which covers matters in which the employee has been personally involved during the past year, the restriction is limited. For all SGEs, paragraph (E)(1) is limited only to the matters to which the SGE is currently assigned or had been assigned during his or her *current* appointment. Moreover, for SGEs who have not served (or are not expected to serve) more than 60 days during the first year of appointment or any subsequent one-year period of appointment, the restriction is even narrower: paragraph (E)(1) applies only to "particular matters involving specific parties" in which the SGE "has participated or is participating personally and substantially." Thus, for example, nothing in section

2635.807(a)(2)(i)(E) prohibits an SGE from accepting compensation simply because the activity pertains to a policy matter that does not involve specific parties, even though the SGE may be assigned to such matter.²⁵

Another provision in section 2635.807 has special significance for SGEs, even though it applies equally to regular employees. There is a specific exception to the ban on compensation for activities that are related to an employee's duties under either section 2635.807(a)(2)(i)(B) (invitation primarily because of official position) or section 2635.807(a)(2)(i)(E) (activity deals with personal assignments, etc.). This exception permits employees to accept compensation, otherwise prohibited by these two provisions, for teaching a course requiring multiple presentations offered as part of: (a) the regularly established curriculum of various specified types of educational institutions; or (b) educational or training programs sponsored and funded by Federal, State, or local government. 5 C.F.R. § 2635.807(a)(3). Because SGEs so often are employed by universities and other institutions of higher learning, on a full-time or adjunct basis, this exception may have particular relevance.

E. Fundraising

All employees, including SGEs, are equally subject to certain restrictions on personal fundraising for nonprofit organizations. These include restrictions on the use of official title, position and authority, and the solicitation of subordinates. 5 C.F.R. § 2635.808(c). Additionally, employees may not personally solicit funds or other support from a person known by the employee to be a "prohibited source." (The definition of prohibited source is discussed in more detail above, under "Gifts from Outside Sources.") With respect to SGEs, however, this restriction is limited to a narrower subset of the definition of prohibited source. SGEs are prohibited only from personally soliciting persons whose interests may be affected substantially by the performance or nonperformance of the SGE's official duties. 5 C.F.R. § 2635.808(c)(1)(ii).

²⁵ As discussed above (under "Supplementation of Federal Salary"), however, section 2635.807 still prohibits an SGE from receiving compensation for teaching, speaking or writing activities that are undertaken as part of the employee's official duties.

FINANCIAL DISCLOSURE

As a general rule, all SGEs must file either a public financial disclosure statement or a confidential financial disclosure statement.

A. Public Reporting

SGEs are required to file a public financial disclosure report if they meet two criteria. First, they must perform the duties of their office, or be expected to perform those duties, for more than 60 days in the calendar year. See 5 C.F.R. § 2634.204. Second, they must meet the pay conditions for public filing, i.e., they must be paid at least the equivalent of 120% of the minimum rate of basic pay for GS-15 of the General Schedule (or, if they are members of the uniformed service, they must be at or above pay grade 0-7). See 5 C.F.R. § 2634.202(c). SGEs meeting both of these criteria file the same new entrant, incumbent, and termination reports as regular employees. Additionally, any prospective SGE who is nominated by the President to a position requiring Senate confirmation--regardless of pay level or expected number of service days--may be required by the confirming committee to file an initial "nominee" report. See 5 U.S.C. app. § 101(b)(1).

Unlike regular employees, certain SGEs may be eligible for a special waiver of the public availability of their financial disclosure reports. In "unusual circumstances," the Director of OGE may grant a waiver of the public availability requirement for a financial disclosure report submitted by an SGE who has neither performed, nor is expected to perform, official duties for more than 130 days in a calendar year. 5 C.F.R. § 2634.205(a). Such a waiver may be granted only if the Director determines that the individual is able to provide services specially needed by the Government, it is unlikely that the SGE's outside employment or financial interests will create a conflict of interest, and public financial disclosure is not otherwise necessary. *Id.* Requests for such waivers are subject to a number of very specific procedural requirements, including deadlines for submissions, so SGEs and their agencies should consult 5 C.F.R. § 2634.205(b) carefully. Moreover, it should be understood that such waivers are rarely granted.

B. Confidential Reporting

Generally, any SGE not required to file a public financial disclosure report must file a confidential financial disclosure

report. 5 C.F.R. § 2634.904(b). The SGE must submit the standardized OGE Form 450 and any OGE-approved supplement, unless the SGE's agency has received approval to use an alternative reporting system. 5 C.F.R. § 2634.907 (standard form prescribed by OGE); § 2634.905(c) (OGE-approved alternative). However, SGEs may not use the standardized OGE Optional Form 450-A (Confidential Certificate of No New Interests). 5 C.F.R. § 2634.905(d)(1).

SGEs must file a new entrant report no later than 30 days after assuming the position or office. 5 C.F.R. § 2634.903(b)(1). However, an SGE serving on an advisory committee may be required to file even earlier, *i.e.*, before any advice is rendered by the individual and prior to the first meeting of the committee. 5 C.F.R. § 2634.903(b)(3).

SGEs do not file incumbent confidential reports. Instead, they are required to file an additional new entrant report each year, upon their "reappointment or redesignation" as an SGE for a new 365-day period. 5 C.F.R. § 2634.903(b)(1). In cases where an SGE is appointed for a term in excess of one year, the agency still must at least "redesignate" the individual as an SGE annually by estimating the number of days the employee is expected to serve in the next 365-day period (as discussed in more detail under "Definition of SGE" above). Ordinarily, this would mean that each SGE with a multiyear term would file an additional new entrant report each year within 30 days of the anniversary of that employee's appointment date. However, OGE recognizes that agencies with many SGEs might have to keep track of multiple filing dates for these "follow-on" reports, corresponding to the multiple appointment anniversaries of different SGEs. Therefore, in order to reduce administrative burden, OGE permits agencies to specify one date each year on which to collect follow-on new entrant reports from all SGEs (or discrete groups of SGEs, such as all members of a given advisory committee) who serve for terms in excess of one year. OGE DAEOgram DO-95-019 (April 11, 1995).

Finally, an SGE may be excluded from any confidential reporting requirement, under appropriate circumstances. An agency may exclude an SGE from such reporting requirements where it determines, based on the duties of the SGE's position, that: (1) the possibility of a real or apparent conflict of interest is remote, or (2) the SGE's level of responsibility is sufficiently low to make reporting unnecessary. 5 C.F.R. § 2634.905(a), (b).