

ETHICS COUNSELOR FUNDAMENTALS

I. REFERENCES.

- A. Ethics in Government Act of 1978 (5 U.S.C. App. § 101 et. seq.).
- B. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," April 12, 1989, as amended.
- C. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635 (Office of Government Ethics Rules).
- D. DOD 5500.07-R, JOINT ETHICS REGULATION (JER), 30 Aug 93. Change 7, effective 17 November 2011.

II. BASIC OBLIGATIONS OF PUBLIC SERVICE UNDER EXECUTIVE ORDER 12674.

1. **Public Service is a public trust**, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty**.

3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.

4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees **shall put forth honest effort in the performance of their duties**.

6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.

7. Employees **shall not use public office for private gain**.

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.

9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.

10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.

11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.

12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

III. JOINT ETHICS REGULATION (JER).

- A. Created by DOD Dir. 5500.07, Standards of Conduct, (August 30, 1993).
 - 1. Currently at Change 7. Good source for updates:
http://www.dod.mil/dodgc/defense_ethics/ethics_regulation/.
 - 2. Rescinds old DODD 5500.7 (Source of AR 600-50; AFR 30-30; SECNAVINST 5370.2).
 - 3. Applies to all DOD Components.
 - 4. Authorizes publication of DOD 5500.07-R - The Joint Ethics Regulation (JER).
 - 5. Makes parts of the JER punitive. Rules printed in *bold italics* in JER are general orders--they apply to all military members without further implementation and violations may be punishable as violations of a lawful general order, Article 92, UCMJ.
- B. Foreword to the JER. Directs that all DOD and service directives and regulations that are inconsistent with the JER be canceled.
- C. Overview. A single, comprehensive regulation covering more than traditional standards of conduct.
- D. Applies OGE rules (CFR provisions) to DOD.
 - 1. Republishes and specifically applies many of the OGE rules to enlisted members and National Guard.

2. Rules apply to all "DOD employees" except the following do **not** apply to enlisted personnel: 18 U.S.C. §§ 203, 205, 207, 208, and 209; but provisions *similar* to 18 U.S.C. §§ 208 and 209 do apply. (*See* JER 1-300b).

E. Key definitions under the JER.

1. DOD Employee (JER § 1-209). The JER applies the Executive Branch Standards of Conduct rules to "DOD Employees." The definition essentially includes everyone in DOD:
 - a. Any DOD civilian officer or employee (including special Government employees) of any DOD Component (including any nonappropriated fund activity).
 - b. Any active duty Regular or Reserve military officer, including warrant officers.
 - c. Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.
 - d. Any Reserve or National Guard member on active duty under orders issued pursuant to Title 10, United States Code.
 - e. Any Reserve or National Guard member while performing official duties or functions under the authority of either Title 10 or 32, United States Code, or while engaged in any activity related to the performance of such duties or functions, including any time the member uses his Reserve or National Guard of the United States title or position, or any authority derived therefrom. [Changed from a status to an action analysis.]
 - f. Foreign national employees if consistent with labor agreements and international treaties and agreement, and host country laws, *e.g.*, local national employees in Germany and Japan are not subject to JER; but Korean national employees are.

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- (4) participation in or dealings with private and professional associations, such as AUSA;
 - (5) review of public (OGE Form 278) and confidential (OGE 450) financial disclosure reports, and resolving conflicts of interests;
 - (6) post-Government employment restrictions; and
 - (7) use of Government resources and time.
- c. The Ethics Counselor as “Ethics Magistrate:”
- (1) 5 C.F.R. § 2635.107 gives the EC authority to make factual determinations and render decisions on matters falling under the OGE Rules.
 - (2) Advice may be oral, but written is preferred often and sometimes required (see below under specific duties).
 - (3) EC's advice *generally* precludes disciplinary action against an employee who follows EC's advice. *De facto* but not *de jure* immunity under 5 C.F.R. § 2635.107(b).
- d. Independent Agency Authority. 5 C.F.R. § 2635.105(c)(3) allows agencies to rely upon independent authority, i.e., Title 10 authority or inherent command authority. Example: Gift acceptance statutes, Government Vehicle use.

4. Agency Designee (JER § 1-202): The first supervisor who is a commissioned military officer or a civilian above GS/GM-11 in the chain of command or supervision of the DOD employee concerned. Except in remote locations, the Agency Designee may act only after consultation with his local Ethics Counselor. For any military officer in grade 0-7 or above who is in command and any civilian Presidential appointee confirmed by the Senate, the Agency Designee is his Ethics Counselor.

5. Special Government Employee (JER § 1-227). Person, including an enlisted member, who performs temporary duties NTE 130 days during any period of 365 consecutive days. Includes RC officer “serving on active duty involuntarily or for training for any length of time, and one who is serving voluntarily on active duty for training for 130 days or less.” Caveat: See also 18 U.S.C. 202, which provides a slightly different definition regarding when RC officers are SGEs. Consult the online websites listed at the end of this outline for future updates and clarification on this matter.

IV. AUTHORITY AND APPOINTMENT OF ETHICS COUNSELORS.

A. Army:

1. Secretary of the Army appointed GC as DAEO.

2. GC appointed The Judge Advocate General of the Army as Alternate DAEO.

3. DAEO appointed Deputy DAEOs and delegated authority: Principal Deputy General Counsel; Deputy General Counsel (Ethics and Fiscal); TJAG; TAJAG, Chief Counsel, USACE; Command Counsel, USAMC; Chief, SOCO.

4. Deputy DAEOs appointed senior ECs and delegated authority.

5. Senior ECs appoint ECs and delegate authority.

B. Air Force:

1. Secretary of the Air Force appointed the Air Force General Counsel Office (SAD/GC) as the DAEO.
2. GC appointed Principal Deputy as Alternate DAEO.
3. GC appointed Deputy GCA as Deputy DAEO.
4. GC appointed other Associate GCs as Ethics Officials
5. GC appointed MAJCOM and Field Operating Agency (FOA) Staff Judge Advocates as Ethics Counselors (with authority to re-delegate to installation staff judge advocates).

C. Navy:

1. Secretary of the Navy appointed GC as DAEO and TJAG as the Alternate DAEO.
2. DAEO appointed Deputy DAEOs: Principal Deputy General Counsel; Deputy General Counsel; Deputy Judge Advocate General; Director, Judge Advocate Division, HQ Marine Corps; Counsel, Commandant of the Marine Corps; Assistant General Counsel (Ethics).
3. DAEO also appointed EC's: Associate General Counsels; Assistant General Counsels; SJAs to Flag Officers; Counsel in Charge of OGC Field and Branch Offices. (*See* General Counsel memorandum, dated 25 January 1996, for entire list.)

V. EC RESPONSIBILITIES.

- A. Implements, administers, and oversees all aspects of the organization's ethics program and all matters relating to ethics covered by the JER (*See* JER 1-401a and 5 C.F.R. § 2638.201 in Chapter 11 of the JER).

- B. Specific responsibilities set out in the Ethics rules;
 - 1. Chapter 2, JER:
 - a. 5 C.F.R. § 2635.107(b) - Advise and counsel.

 - b. 5 C.F.R. § 2635.204(d)(2) - Written determination required before certain awards or honorary degrees may be accepted.

 - c. 5 C.F.R. § 2635.205(c) - Advise on proper disposition of improper gifts.

 - d. 5 C.F.R. § 2635.502(a)(1) - Consult with EC when appearance of a conflict may exist over personal or business relations.

 - e. 5 C.F.R. § 2635.602(a)(2) - Post-Government Employment advice.

 - f. 5 C.F.R. § 2635.805(c) - Authorize appearance of Government Employee as an expert witness in a case in which the U.S. Government is a party. (Delegated by DAEO to Chief, Litigation Division for Army. Current and former Air Force employees rules are found in Air Force Instruction 51-301 (20 June 2002), Chapter 9.)

 - g. JER § 2-202b - Determination regarding gifts of scholarship and grants.

2. Chapter 3, JER. (5 C.F.R. § 2636.103) – Advisory opinions (honoraria, etc.).
3. Chapter 10, JER - EC responsibility to consult on and report violations of the ethics laws.
4. Chapter 11, JER. (5 C.F.R. Part 2638.701 et seq.) - Training responsibilities.

C. “Agency Designees” consult with ECs when dealing with:

1. Acceptance of Gifts from Outside Sources - Widely Attended Gathering (Chapter 2, JER).
 - a. 5 C.F.R. § 2635.204(g)(3) - Determination of agency interest.
 - b. 5 C.F.R. § 2635.204(g)(3)(i) - Written determination of agency interest--that employee's participation outweighs favoritism appearances.
 - c. 5 C.F.R. § 2635.204(g)(3)(ii) - Blanket determination of agency interest.
 - d. 5 C.F.R. § 2635.204(g)(6) - Authorize accompanying spouse or other guest.
2. Waiver of Conflicting Financial Interest (Chapter 2, JER).
 - a. 5 C.F.R. § 2635.402(d)(2)(i) - Official responsible for appointment waives 18 U.S.C. § 208 conflict of interest.

- b. 5 C.F.R. § 2635.402(d)(3)(ii) - Official responsible for appointment of SGE to a Federal Advisory Committee waives 18 U.S.C. § 208 conflict.
 - 3. Conflict of Interests - Impartiality (Chapter 2, JER).
 - a. 5 C.F.R. § 2635.502(a) - Consult when appearance of a conflict.
 - b. 5 C.F.R. § 2635.502(c) - Determines if appearance of a conflict.
 - c. 5 C.F.R. § 2635.502(d) - Authorize participation notwithstanding appearance of a conflict of interest.
 - 4. Seeking Employment (Chapter 3, JER) - 5 C.F.R. § 2635.605(b) - Authorize participation in a particular matter notwithstanding appearance of a conflict of interest while seeking employment.
 - 5. Events sponsored by State and Local Government (JER § 2-202) - Determination of community relations interest.
 - 6. Outside Employment (JER § 2-206) - Authorize employment.
- D. Act as the Agency Designee for General/Flag Officer in Command (JER § 1-202).
- E. 31 U.S.C. § 1353 (Gifts of Travel and Travel-Related Expenses to the Agency). Travel approval authority may not authorize acceptance without advice and concurrence of EC: 5 C.F.R. Parts 301-1 & 304-1; JER §§ 4-100 & 4-101 HQDA Letter 55-98-1; SECNAVINST 4001.2H (14 MAR 06) (No Specific instruction in Air Force).
- F. Public (OGE Form 278) and Confidential (OGE 450) Financial Disclosure Reports (5 C.F.R. Part 2634).

1. JER §§ 7-205 & 7-305 - Submit financial disclosure report through ECs.
 2. JER §§ 7-206 & 7-306 - EC review of financial disclosure reports.
- G. Provide Written Ethics Opinions to Individuals.
1. Chapter 2, JER, 5 C.F.R. § 2635.107 (In general).
 2. Chapter 2, JER, 5 C.F.R. § 2635.602 (Post-Government Restrictions).
 3. 5 U.S.C. App. 504(b); Chapter 3, JER, 5 C.F.R. § 2636.103 (Compensation for Teaching).
 4. 41 U.S.C. § 2101-2107 (Procurement Integrity).
- H. Additional EC Responsibilities (JER 1-411).
1. Request assistance through EC channels if issue cannot be resolved locally.
 2. Maintain a current copy of JER for review of employees.
 3. Maintain thorough understanding of DOD Ethics Policies.
 4. Provide copies of precedential ethics opinions to DAEO.

VI. COMMAND RESPONSIBILITIES (CHAPTER 1, SECTION 4, JER).

- A. DOD Component Heads (JER § 1-400).
1. Exercise personal leadership.

2. Take personal responsibility.
 3. Provide sufficient resources to implement the program.
- B. Heads of DOD Component Commands or Organizations (JER § 1-404).
1. Personally accountable for command's ethics program.
 2. Exercise personal leadership in maintaining the command's program.
- C. Inspector General (JER § 1-412).
1. Investigate ethics matters.
 2. Report to DAEO or Designee matters referred to Department of Justice.
- D. Personnel and Administrative Officers (JER §§ 1-413 & 414).
1. Identify employees required to receive ethics training.
 2. Inform new employees of requirement to receive ethics training.

VII. REQUIRED REPORTS.

- A. **OGE Form 450 - Confidential Financial Disclosure Reports** (or the DOD version of OGE Optional Form 450-A, Confidential Certificate of No New Interests) **(Due 15 February)**.
- B. **OGE Form 278 - Public Financial Disclosure Reports (Due 15 May)**.
- C. **Gifts of Travel - (31 U.S.C. 1353). (Due within 30 days of travel) (Agency submits semi-annual reports to OGE NLT 31 May & 30 Nov)**.

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- D. Annual Ethics Training Plan. (5 C.F.R. § 2638.702) (Chapter 11, JER § 11-302). Due December each year.** (Note: In the Air Force, only the Air Force General Counsel's Office is required to have a written training plan. For all other Air Force legal offices, it is recommended that they have a written training plan, but it is not required. *See* HQ USAF/JAG Ethics Update pamphlet, December 2000, page 13.) (Note: In the Navy, the AGC(E) prepares the written Annual Agency Ethics Training Plan.).
- E. Annual Ethics Program Survey. (5 C.F.R. § 2638.602(a)). (Due Feb each year).**
- F. Enforcement of the Joint Ethics Regulation - (Chapter 10, JER). (As needed for serious criminal misconduct. Matters referred to DOJ or U.S. Attorney are reported on OGE Form 202, "Notification of Conflict of Interest Referral," July 1998. *See* Appendix C, JER).**

VIII. RESOURCES (IN ADDITION TO LAW AND REGULATION)

- A. GAO Principle of Federal Appropriations Law (Redbook) for Fiscal Law Related Issues, <http://www.gao.gov/>.
- B. OGE Material see: <http://www.usoge.gov/>.
- C. DOD SOCO website: http://www.dod.mil/dodgc/defense_ethics/index.html
- D. Your MACOM/MAJCOM/higher command EC.
- E. Navy JAG (Code 13); Navy Assistant General Counsel (Ethics); AF/JAG General Law Division; Army SOCO.
- F. Army Ethics website: <http://www.jagcnet.army.mil/>. Ethics Forum and SOC Database. Also check <http://ogc.hqda.pentagon.mil/Ethics.aspx>
- G. Navy Ethics website: <http://www.ethics.navy.mil>.

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H. AFMC website: <http://www.afmc-pub.wpafb.af.mil/HQ-AFMC/JA/lo/lojaf..>

IX. CONCLUSION.

SPECIFIC DUTIES UNDER THE STANDARDS OF CONDUCT

(all short references are to 5 CFR 2635)

Agency Designee The first commanding officer or supervisor above the grade of GS-11 in the chain of command or supervision of the employee concerned.

.102(b) Definition: Any employee who, by agency regulation, has been delegated authority to make determinations or give approval under the Standards of Conduct. (X-ref .105(c)(2)(i))

.204(g)(3)(i) Shall make written finding of agency interest in the personal acceptance of free attendance at a widely attended gathering.

.204(g)(3)(ii) Has the power to make blanket determination that agency interest allows a category of employees to accept free attendance at a widely attended gathering.

.204(g)(6) May authorize spouse acceptance of free attendance at a widely attended gathering.

.205(a)(2) May decide how to dispose of improper perishable gift (note: all supervisors have this power).

.402(C)(2) May require written disqualification in resolving conflicting financial interest under 18 USC 208 (note: all supervisors have this power).

.402(d)(2) May waive 18 USC 208 conflict which is not likely to affect the integrity of the Government (note: hiring or appointing authority exercises this power).

.402(d)(3) May waive 18 USC 208 conflict for Special Government Employees serving on an advisory committee (note: all appointing authorities exercise this power).

.403(b) May determine that an individual employee may not acquire or hold a specific class of financial interests.

.502(a);(c);(d) May authorize, upon independent finding, participation in matters which, although not violating 18 USC 208, would otherwise raise questions about the employee's impartiality.

.502(a)(1) May provide advice to employees on whether an outside interest or relationship creates an appearance of impropriety.

.502(e)(2) May require written disqualification in resolving appearance of impropriety (note: all supervisors have this power).

.604(c) May require written disqualification while "seeking employment" (note: all supervisors have this power).

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.605(b) May authorize participation in matters where "seeking employment" would otherwise create appearance of impropriety.

.606(b) May extend period of disqualification after "seeking employment" has ended.

Agency Ethics Official An individual appointed in writing by the DAE0, or by the head of a command or organization, who has been delegated the authority to assist in managing the ethics program and provide ethics advice (aka "Ethics Counselor").

.102(c) Definition: Has been delegated authority to carry out agency ethics program.

.107(b) May give authoritative advice on the Standards of Conduct.

.204(d)(1) Must make written determination that awards in excess of \$200 in value are bona fide part of a program of established recognition.

.204(d)(2) Must make written determination that acceptance of an honorary degree would create an appearance of impropriety.

.205(a)(2) May decide how to dispose of improper perishable gift (note: all supervisors have this power).

.205(c) May provide qualified immunity from adverse actions to employees who seek advice on disposition of improper gifts.

.402(c)(2) May require written disqualification in resolving conflicting financial interest under 18 USC 208 (note: all supervisors have this power).

.502(a)(1) May provide advice to employees on whether an outside interest or relationship creates an appearance of impropriety

.502(e)(2) May require written disqualification in resolving appearance of impropriety (note: all supervisors have this power).

.602(a)(2) May provide advice to employees on post-employment restrictions (including 18 USC 207, 5 CFR 2637; 2641, 41 USC 423).

.604(c) May require written disqualification while "seeking employment" (note: all supervisors have this power).

2636.103(b) May provide advisory opinion on whether honorarium prohibition applies to a specific activity.

FAR 3.104-6 (a) Shall, within 30 days of written request, provide written opinion on whether this statute precludes engaging in a specific activity.

Designated Agency Ethics Official (or designee) An employee appointed in writing to administer agency ethics program.

- .102(c) DAEO and various designees are also agency ethics officials.
- .107(a) Responsible for managing agency ethics program.
- .805(c) May authorize, in coordination with DoJ, service as an expert witness which might otherwise violate 18 USC 205 or 18 USC 207.
- 2634.201(f) Reviewing official (DAEO or alternate) may grant 45 extension for filing SF 278.
- 2634.204(a) May determine that filer will serve less than 60 days in a given year and not have to file SF 278.
- 2634.602 SF 278s are filed with DAEO.
- 2634.604(a) SF 278s must be reviewed within 60 days after filing.
- 2634.604(b) SF 278s are to be reviewed for facial completeness and apparent conflicts.
- 2634.604(b) When SF 278s are incomplete:
 - (1) Reviewer must request info by date certain (usually no more than 90 days)
 - (2) Must give filer notice & opportunity to respond
 - (3) Must pursue remedies to resolve conflicts
 - (4) Must notify head of agency if in noncompliance
- 2634.605(b) DAEO must maintain list of 278 filers in non-compliance.
- 2634.803(d)** DAEO may enter into ethics agreements to resolve conflicts of interest (should this power be expressly delegated to Ethics Counselors?)
- 2638.203(b) DAEO duties in managing agency ethics program are:
 - (1) Liaison with OGE
 - (2) Maintain financial disclosure system
 - (3) Personally review Presidential appointee disclosures
 - (4) Report ethics violations
 - (5) Maintain agency ethics education program
 - (6) Maintain counseling program

- (7) Keep records of advice rendered
- (8) Enforce ethics rules
- (9) Periodically evaluate/audit agency ethics
- (10) Liaison with IG

2638.204 May delegate powers to deputy ethics officials (as used by OGE "deputy ethics officials" includes alternate DAEOs, agency ethics officials, and Ethics Counselors).

- 2638.702 In managing the agency ethics training program, DAEO must:
- (1) ensure it is legally correct
 - (2) ensure qualified trainers are available
 - (3) submit an annual training plan to OGE.

2641.201(d) DAEO can request exemption of positions, or revocation of exemption, from 18 USC 207(c) coverage.

Head of Agency

.102(b) Determinations relating to the conduct of the agency head, or actions which must be taken by agency head, must be done in consultation with the DAEO

.102(i) Definition: "Head of Agency" means head of agency

.503(c) Waiver of conflict created by extraordinary payments from former employers shall be in writing and given only by the head of agency. However, this waiver authority may be delegated.

2634.605(b) Must maintain list of SF 278 filers in noncompliance

2638.202(a);(b) Is personally responsible for agency ethics program, and shall make sufficient resources available for the program, and select the DAEO. NOTE! The headnote summaries of these sections have been condensed and simplified. However, the greatest extent possible, the operative verbs and objects in the regulations have been retained.

SPECIAL GOVERNMENT EMPLOYEES UNDER OGE RULES

.102(h) Definition of "employee" includes special government employees (SGE)

.102(1) Definition of "SGE" incorp from 18 USC 202(a), i.e., on temp duty not to exceed 130 days per year

.202(c)(4) "Public official" under 18 USC 801 (bribery) includes SGEs

.204(e)(2) Example 1 For gifts based on outside relationships, SGEs may accept gifts (even from DOD contractors) so long as it is not given for work done as an SGE

.402(d)(3) SGEs who are members of advisory committees may get 18 USC 208 waivers

.603(b)(3) Example 5 SGE used as an example of how sending a resume is not negotiating for employment (implying that SGEs are subject to 18 USC 208 conflicts on this issue)

.604(c) SGE used as an example of when duties would conflict Example 4 with negotiating for employment

801(d) Summarizes four statutes in which SGEs mentioned

.805(a) Restriction on service as an expert witness only applies to SGEs on the same particular matter in which they served as a federal official

.805(b) SGE must get agency permission to act as expert witness in a matter involving agency where SGE was employed if the SGE is a Presidential appointee, serves on a statutory commission, or has served more than 60 days in a given year

.807(a) SGE prohibited from receiving compensation for speaking, teaching or writing about official duties

.807(a)(2)(i)(E)(4) Teaching, speaking, and writing do not relate to SGE official duties when the SGE comments on matters of official agency policy, agency operations, agency programs, general subject matter concerning an industry or economic sector, or matters to which to employee was assigned during the previous year (unless the employee has served more than 60 days during the previous year and 60 days during the 3 subsequent year). In other words, the restriction on SGE's compensation for teaching, speaking or writing is limited to the same particular matter in which they were involved personally and substantially. See examples 7, 8, 9.

.808(c) SGE may engage in fund-raising in a personal capacity and may solicit a prohibited source, if the prohibited source is not directly affected by the SGE's duties