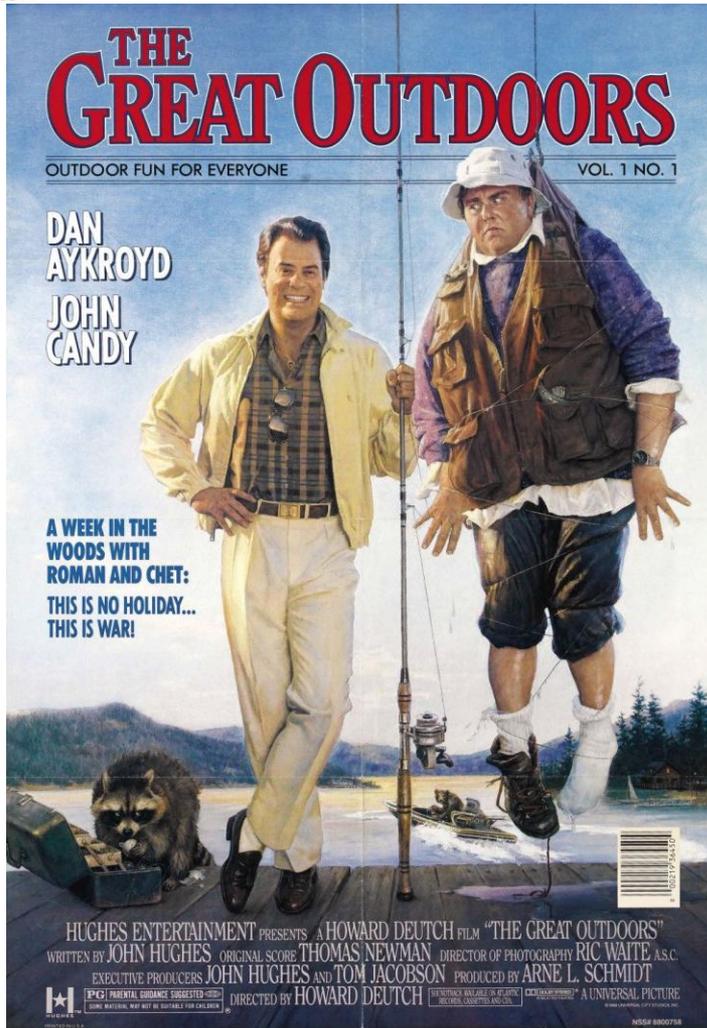




# 2010 Outside Activities



*Office of Counsel for the Commandant  
Headquarters, United States Marine Corps*



# Overview

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- **Revised from last year's slide deck**
- **Background Rules**
- **Uncompensated Activity**
- **Compensated Activity**
- **Misc. Outside Activity Rules**
- **Examples**



# Background: Conflicts of Interest

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- **Employees may not act as agent for anyone before the Government on a matter where the U.S. has a direct and substantial interest – 18 U.S.C. 205**
- **5 C.F.R. 2635.802**
  - **Employees shall not engage in outside activities that conflict with official duties**
  - **Activity conflicts exist when:**
    - **prohibited by statute or regulation**
    - **or would require disqualification from matters so central to official duties that ability to perform duties of position is materially impaired (not subjective...)**



# Background: Government Property

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- **Employees may use government property for other than official purposes if agency designee determines that:**
  - **The use would not adversely affect performance of duties,**
  - **The use is of reasonable duration and frequency,**
  - **The use serves a legitimate public interest,**
  - **The use does not reflect adversely on the Government,**
  - **And the use creates no significant additional cost.**



# Background: Inside Information

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- **Employees may not use or allow the use of “nonpublic information” to further private interests**





# Definitions

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- **Non Federal Entity: Entities that are Non-Federal. Thank-you. (See JER 1-221)**
  - This includes favorite or ‘been around forever’ organizations.
- **Outside Activities: Activities that are outside your office and/or outside your normal duties.**



# Key to Resolving these issues:

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- **Threshold Question: Is this OFFICIAL CAPACITY or PERSONAL CAPACITY?**
- **Identifying and Working Through Cross-Disciplinary Issue:**
  - Gifts; Use of Govt. Resources;

**And default answers ...**



# For Outside Activities in one's Personal Capacity

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... SAY YES! (unless..)



# For Outside Activities in One's Official Capacity

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**BE CAREFUL!!**



# Notes on Official vs. Personal Capacity

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- **Sliding Scale based on rank, position, and perception (See DoD GC memo 18 Aug 97)**
- **Watch for special rules, especially for General / Flag Officers and especially especially for PES or PES like officials.**
  - **SECDEF memo of 23 Jul 96 (O-7 to O-10)**
  - **SOCO memo 26 Jan 04 (O-9 and O-10) (unpublished – because they can)**



# Professional Capacity

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Official -----Personal



Notes:

- Not Gift analysis; normally based on your current duties
- Sliding scale – what may be OK to go to in personal capacity may not be OK to manage or fundraise for.



# Attending NFE Events



## Official Capacity

- If supervisor (or agency designee finds there is a legitimate Federal Government Interest.
- Special Fundraiser Rules (see below)

## Personal Capacity

- Yes. Just don't imply DoD endorsement.
- Go on your own dime, but possibly excused absence.
- Watch for:
  - Political Activities
  - “Creeping” official capacity
  - Conflicts of interest.
  - WAGs



# Membership of an NFE

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## Official Capacity

- Only if authorized by statute or regulation. JER and other secondary sources suggest Agency can become a member of certain organizations. Comp Gen Opinion Supports.

## Personal Capacity

- Yes. Watch out for:
  - Use of Title
  - Gift issues
  - Ethics filings declarations
  - Implied official capacity



# Management of an NFE

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## Official Capacity

- **No, unless**
  - **Relief Society**
  - **DoD GC approved**
- **If yes, watch for conflicts**
- **Otherwise, DoD Liaison**

## Personal Capacity

- **Yes, if completely outside scope of official position AND not offered because of official position**
- **Watch for JER 3-305 prohibition on support staff**



# Fundraising for an NFE



## Official capacity

- **No.**
- **Exception:**
  - Relief Societies (including 2467 AF relief societies)
  - BOFO
  - Other rules still apply
- **Participation in fundraiser IAW JER 3-211**

## Personal Capacity

- **Yes, if:**
  - Outside workplace unless approved
  - Outside scope of official position
  - Other rules still apply



# Speaking / Teaching / Writing at an NFE for no compensation

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**May be useful to break into four categories:**

- 1. Official Capacity**
- 2. Personal Capacity but about official stuff**
- 3. Personal Capacity but related to official expertise**
- 4. Personal Capacity and unrelated to official duties or expertise**
  - Note: Read 5 CFR 2635.807**
  - Note: Remember all this for compensation discussion later**



# **Speaking / Teaching / Writing at an NFE for no compensation**

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## **Official Capacity**

- **OK if sent by command in order to express DoD policies as speakers, panel members, or other participants.**
- **Watch interaction with fundraising and gifts to person / agency.**



# **Speaking / Teaching / Writing at an NFE for no compensation**

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## **Personal Capacity**

### **1. Personal Capacity but about official stuff**

- **5 CFR 2635 807(b) and JER imply this is OK.**
- **Must use disclaimer found at JER 3-307 if activity deals with ongoing or announced policy, program or operations UNLESS authorized to discuss.**
- **May use title as part of biographical data**
- **Security, Privacy / non-public info rules still apply**



# **Speaking / Teaching / Writing at an NFE for no compensation**

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## **Personal Capacity**

### **2. Personal Capacity but related to Official Expertise**

- **Rules from before apply, except no disclaimer needed**
- **Note: Professional and learned societies rule is an unusual hybrid. PTAD and some admin assistance OK if:**
  - **Related to official position or DoD functions, management or mission**
  - **Agency can derive some benefit**
  - **No interference with official duties**



# **Speaking / Teaching / Writing at an NFE for no compensation**

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## **Personal Capacity**

- 3. Purely personal – Same rules as before apply. Watch use of title, implied endorsement, etc.**



# Paid Work



Likely an improper use of the uniform for financial gain



# Criminal Conflicts of Interest

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- **Employees may not receive compensation for representational services against the United States provided by another – 18 U.S.C. 203**
- **Only the Federal Government can pay you for doing your Federal Job – 18 U.S.C. 209**



# General Rule

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- **So long as you are not being paid to do what the Federal Government Already pays you to do, the answer is (Surprisingly) normally Yes.**
- **Watch for:**
  - **Conflicts**
  - **Special situations**



# **Moonlighting in 2<sup>nd</sup> Government Position (JER 5-405)**

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## **Military Personnel**

**may not accept pay for a second federal government position.**

- **Exception: terminal leave**

## **Civilian Personnel**

**can accept pay for a second federal government positions**

**Federal Retirement and similar payments not considered payment for a second government position for these purposes.**



# Moonlighting in the Private Sector

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## Official Capacity

- **No. See 18 USC. Only Federal Govt. can pay you for doing your job.**
  - Gifts are an exception
  - Use teaching / speaking / writing analysis below as applicable.

## Personal Capacity

- **Yes, unless:**
  - Violation of 18 USC
  - Conflict of interest
  - Subject to rules described on next slide ...



# Moonlighting in the Private Sector Rules

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- **Commands may require prior reporting of outside employment**
  - May prohibit if detracts from readiness or poses a security risk
- **“Agency Designee” must approve employment of SF-278/OGE 450 filer by prohibited source**
  - Advance written approval
  - Applies on terminal leave



# Teaching / Speaking / Writing for Compensation

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## Official capacity

- If it meets the definition on the next slide, then no, unless:
  - Part of a established curriculum IAW 807(a)(3)\*; or
  - Outside of 807(a)(2)(iii) def of Compensation:
    - gifts that could be accepted from prohibited sources
    - free attendance at the event in which the speaking or teaching takes place
    - publications that provide a record of the activity
    - Transportation / lodging / meals



# Teaching, Speaking, and Writing Cont.

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- 1. The activity is undertaken as part of the employee's official duties; or**
- 2. The invitation was extended because of the employee's official position rather than his expertise\*; or**
- 3. The invitation is from a person whose interest may be affected by the employee's official duties; or**
- 4. The presentation is based on nonpublic information; or**
- 5. The topic deals with the employee's current duties or those during the previous year, or the topic deals with a policy, program, or operation of the employee's agency\*.**

**\* Indicates areas where exception to curriculum rule applies.**



# Teaching, Speaking, and Writing for Compensation

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- **Official Duty = No Compensation**
- **Personal Participation but about Official Stuff = Maybe, if part of a certain established curriculum**
- **Personal Participation but about Official Expertise = Very likely yes, so long as follow non-public, privacy, security rules**
- **Personal Capacity and unrelated to official duties or expertise = Have at it.**



# Honoraria

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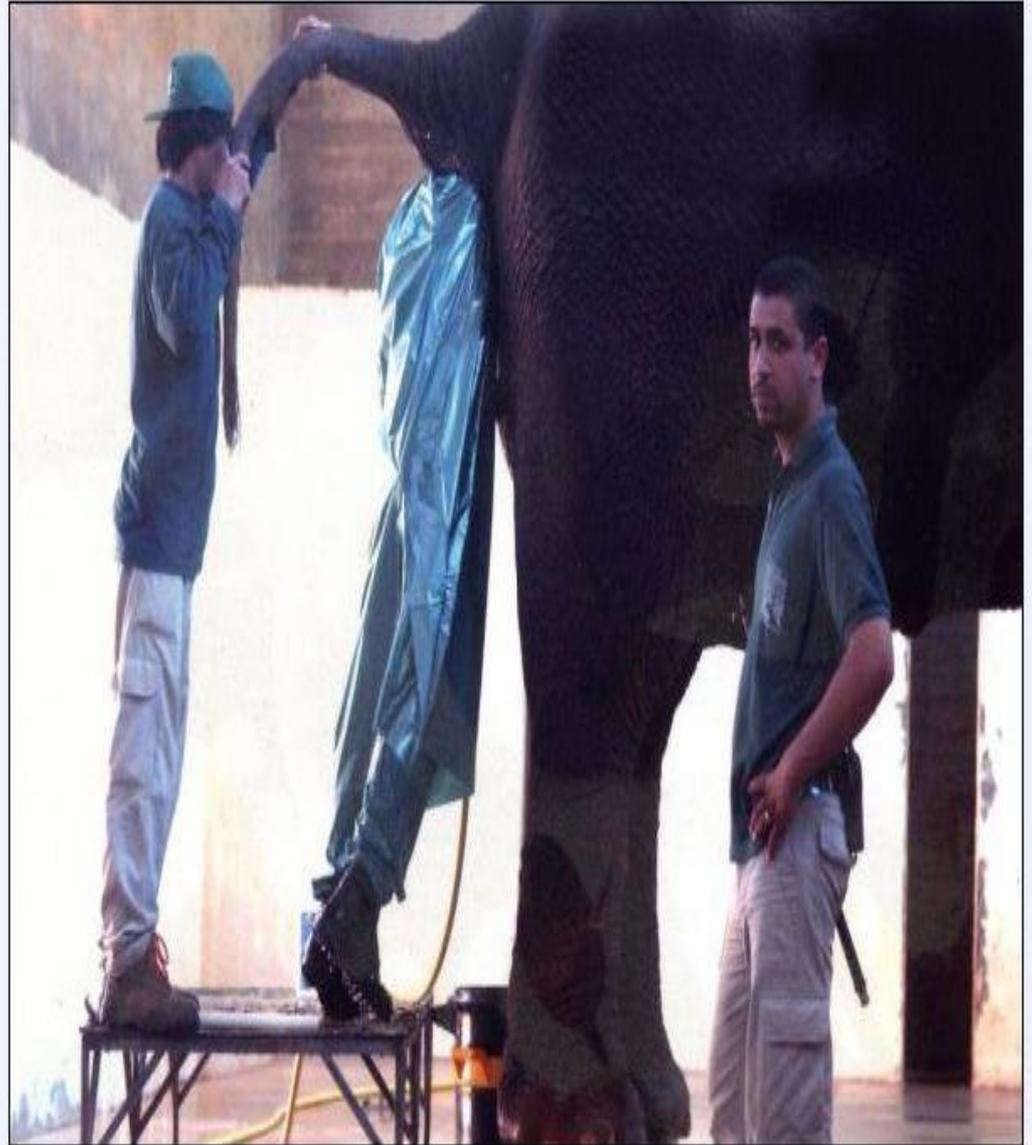


- **Honoraria**. An honorarium is payment to an individual in recognition of a special service for which custom or propriety forbids any fixed price to be set. Honoraria services may include, but are not limited to, speeches, panel participation, reviewing manuscripts, and leading group discussions.
  - Honoraria are permitted for certain federal employees (GS-15 and below) IAW regular compensation and gift rules.
  - Please place this in the trash-bin of history.



## Other rules to keep in mind...

because you don't want to put your  
clients in a bad position.





# Income Limitations on “Covered Noncareer Employees”

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- **Applies to non-career employees with basic pay equal to lowest SES**
  - **Does not apply to career SES or to military personnel**
- **Limits outside income to less than 15% of Executive Level II (\$25,830 in 2008)**
- **No pay for activities involving fiduciary relationships**
- **No compensation for serving as officer or member of a board of directors of any entity**
- **DAEO must approve compensation for teaching**



# Job Hunting Expenses

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- **Employee may accept compensation to defray expense of job hunting if customarily provided by prospective employer**
  - **If not offered or enhanced because of official position**
  - **Employee may have to disqualify himself from taking official action wrt that employer**



# Expert Witness



- **Employees may not appear as expert witnesses, other than on behalf of the U.S., in a proceeding before a Federal court or agency in which the U.S. is a party or has a direct and substantial interest- 5 C.F.R. 2635.805**
- **DAEO may authorize exceptions if not for compensation**
- **Does not apply to fact witnesses appropriately subpoenaed**





# Jury Duty

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- **Civilian Federal Employees:** “Court leave” with pay. Must accept jury duty fees, when paid (except from Federal court) and must turn fees into employer (Reimbursement for expenses OK).
- **Military Members:** Exempt when it would interfere unreasonably with performance of duties or adversely affect command readiness. Not charged leave, must turn in any fees (Reimbursement for expenses OK).



# Solicited Sales

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- **General rule - *JER 2-205, 5-409***
  - DoD employees may not make solicited sales to junior personnel or their families
  - Solicitation by spouses
- **Exceptions**
  - Does not prohibit sale or lease of non-commercial property
  - Does not prohibit off-duty commercial sales solicited and made in a retail establishment
  - Absent coercion or intimidation, does not prohibit sales made because the junior approaches the senior



# Contracts to Federal Employees

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- **The Government may not award appropriated fund contracts to Federal employees or businesses substantially owned or controlled by them, unless the needs of the Federal Government cannot reasonably be otherwise met.**



# Example 1: Pimp My Engaged and Underaged Military Apprentice:

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- **Lieutenant Rishel's dream has finally been realized as he has been invited to be a participant on the subject show.**
- **The show, using lovely Jacksonville, NC, as a background, will highlight Lieutenant Rishel's Marine-ness as he negotiates physical and emotional hurdles in pursuit of whatever it is one gets for winning on this show. Hilarity and emotional catharsis will ensue.**
- **Lieutenant Rishel will be paid for his work on the show. He will also receive a souped up 1972 Pinto with self-extinguishing gas tank.**



## **Example 2: Not nearly as funny as example 1:**

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**SES Dornberg has been asked to speak at the Bernie Madoff Symposium on Government Ethics. She has an extensive background in this subject, but for the past several years has served as a General Counsel to NASA employment law advice.**

**What if she will be paid \$1,000,000 for this speech?**

**What if her speech was such a hit Mr. Madoff asked her to consult for his legal team?**



## **Example 3: Sort of a throw away:**

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**Admiral LaCroix has been asked to serve on the board of RRUC (Really Really Underhanded Contractor) as their Director of inside information.**

**What if he were CAPT LaCroix?**

**What if it was just a job selling auto insurance?**

**What if it were RRGC (Really Really Great Contractor) and his boss wanted to send him in as a DoD official to serve on the board?**



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# Questions?

