First

Basics For Ethics Counselors Workshop

The Judge Advocate General's School
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Standards of Conduct Deskbook

This Deskbook is provided to students attending the 1st Basics for Ethics Counselors Workshop (12-16 April 1999) and the 1st Advanced Ethics Counselors Workshop (14-16 April 1999). This Deskbook is a joint publication of The Judge Advocate General's School, U.S. Army (TJAGSA), and the Army Standards of Conduct Office, Office of The Judge Advocate General, U.S. Army. Additionally, the following offices significantly contributed to its contents:

- **Department of Defense: OGC, Standards of Conduct Office**
- **Department of the Army: OTJAG (AdLaw); OGC; and Office of Command Counsel, AMC**
- **Department of the Navy: OGC; OJAG; and SJA to the Commandant of the Marine Corps**

These resources are arranged for quick access in researching and resolving ethics issues. This resource and the significant electronic resources available on-line should greatly assist ethics counselors in quickly resolving ethics issues.

MAJ Herb Ford
TJAGSA, Course Manager

STANDARDS OF CONDUCT DESKBOOK

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2. @@ ampersands indicate that the document is available at the DoD SOCO website, http://www.defenselink.mil/dodgc/defense_ethics/

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COL Michael E. Schneider,
Chief, Army SOCO

Role of the Ethics Counselor

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. 2635 (Office of Government Ethics Rules).

D. DOD 5500.7-R, JOINT ETHICS REGULATION (JER), 30 Aug 93. Change 4, effective 6 August 1998.

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. EC RESPONSIBILITIES (JER 1-412).

A. Provide written and oral advice, counseling, and assistance on all ethics matters.

B. Request assistance, through appropriate channels, from the DOD Component DAEO or designee on any matter that cannot be resolved locally.

C. Maintain a current copy of the JER, and all changes, for review by any DOD employee.

D. Maintain a thorough understanding of current DOD ethics policy through contact with the DOD Component DAEO, attendance at periodic ethics training courses, and other appropriate methods.

E. Promptly provide a copy to the DOD Component DAEO of precedental written decisions to assist uniformly throughout the DOD Components.

F. Perform other duties as assigned by written delegation from the DOD Component DAEO.

G. Review financial disclosure reports in accordance with Chapter 7 of the JER.

H. Conduct Ethics Training.

IV. HOW DO YOU GET INVOLVED?

A. Advise, counsel, and render opinions concerning ethics law and regulations:

1. Determine facts. - Inquire, question and examine.

2. Determine applicable laws and regulations.

3. Apply law and regulation to facts. - Give analysis.

4. Render ethics opinions. Sometimes strictly legal opinion. Oft-times requires lots of judgment. Oft-times requires ethics *counsel*.

B. Oral advice and Counsel.

1. Identify caller/visitor.

2. If situation calls for it, advise no attorney-client relationship.

3. Inquire, question, examine.

4. Don't just give answer...give analysis.

5. Written Record.

C. Written Opinions.

1. Insist on written requests for written opinion - in some cases, the law demands it.

41 U.S.C §423 (Procurement Integrity).

2. If written opinion is to an individual:

a. Should be a letter: Dear Requester, Sincerely Yours, signed EC.

b. Should not be signed FOR THE STAFF JUDGE ADVOCATE:, FOR THE COMMANDER:.

c. Should not sign as SJA or Chief Counsel or Chief of Administrative Law and Civil Law.

V. SHOULD I GIVE ADVICE?

A. Every request for assistance is not a matter of ethics/standards of conduct.

B. Some matters may have to be answered by others, if at all.

1. Fiscal law issues. (Contract/Administrative Law).

2. Interpretation of JTR/JFTR. (Travel Office/AdLaw).

3. Computation of dual compensations offset. (Finance/Personnel).

4. Political Activities. (AdLaw/Labor Law/Office of Special Counsel).

5. Supervisor lied on civilian evaluation. (Grievance Process).

6. Commander treats unfairly. (Article 138/EO Process).

VI. 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 30 November)**

Timeline

JER PARA	DATE	ACTION
7-301a2	3 Oct	Directors of personnel offices will provide list of names, positions, and organizations of DoD employees required by supervisor to file an annual OGE 450. (Do so immediately for new employees upon entry.)
7-301b1	31 Oct	Administrative offices shall coordinate with supervisors within organization to update the list of annual reporting individuals and report any additions or deletions to the Ethics Counselor (EC).
7-301b2		Directors of personnel offices shall coordinate with EC and supervisors to ensure that position descriptions of reporting individuals contain a statement that an OGE 450 must be filed.
7-302		DAEOs or designees shall provide appropriate notices and instructions to ensure timely preparation of the reports and submission to their supervisors/EC for review and filing.
7-303b	30 Nov	Employee submits annual report (OGE 450) through supervisor to EC. Covers 12 month period through 30 Sep.
7-309	15 Dec	EC prepares consolidated status report concerning the annual filing of the OGE 450.
7-307		NOTE: OGE 450s are retained for six years, then destroyed unless needed in an ongoing investigation.
7-303a		Note: New entrant reports are due not later than 30 days after employee assumes duty. Submit through supervisor to EC.
7-300b3		Note: OGE OF 450-A authorized when no job change or no new interests. Must use DoD version and attach last year's OGE 450. Beginning in 2000, and in years subsequent divisible by 4, must file updated OGE 450.

B. OGE Form 450 - Status Report (JER 7-309) (Due 15 December - until Completed)

C. SF 278 - Public Financial Disclosure Reports (Due 15 May)

D. Gifts of Travel - (31 U.S.C. 1353). (Due within 30 days of travel) (Agency submits semi-annual reports on SF 326 to OGE NLT 31 May & 30 Nov)

E. Annual Ethics Training Plan. (5 C.F.R. §2638.702) (Chapter 11, JER §11-301). (Due Dec each year).

F. Annual Ethics Program Survey. (5 C.F.R. §2638.602(a)). (Due Feb each year).

G. 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," January 1992. See Appendix C, JER).

VII. AUTHORITY AND APPOINTMENT OF ETHICS COUNSELORS.

A. Army:

1. Secretary of the Army appointed GC as DAEO.

2. GC appointed Deputy GC (Ethics & Fiscal) as Alternate DAEO.

3. DAEO appointed Deputy DAEOs and delegated authority: TJAG; Command Counsel, USAMC; Chief, SOCO; Senior Assistant to the GC

4. Deputy DAEOs appointed senior ECs and delegated authority.

5. Senior ECs appointed ECs and delegated authority.

B. Air Force:

1. Secretary of the Air Force appointed:

a. GC as DAEO.

b. Deputy GC as Deputy DAEO.

c. TJAG and Deputy TJAG as Deputy Ethics Officials.

2. USAF TJAG appointed MAJCOM and Base Legal Office SJA as Ethics Counselors.

C. Navy:

1. Secretary of the Navy appointed GC as DAEO and TJAG as the Alternate DAEO (ALNAV 139/93, SECNAV 16213Z Nov 93).

2. DAEO appointed Deputy DAEOs: Principle 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. Secretary of the Navy also appointed EC's: Associate General Counsels; Assistant General Counsels; SJAs to Flag Officers; Counsel in Charge of Office of GC Field and Branch Offices. (See ALNAV 139/93 for entire list.)

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

A. DOD Component Heads (JER1-400).

1. Exercise personal leadership.

2. Take personal responsibility.

3. Provide sufficient resources to implement the program.

B. DOD Component Commanders (JER 1-404).

1. Personally accountable for command's ethics program.

2. Exercise personal leadership in maintaining the command's program.

C. Inspector General (JER1-413).

1. Investigate ethics matters.

2. Report to DAEO or Designee matters referred to Department of Justice.

D. Personnel and Administrative Officers (JER 1-414 & 415).

1. Identify employees required to receive ethics training.

2. Inform new employees of requirement to receive ethics training.

IX. RESOURCES (IN ADDITION TO LAW AND REGULATION)

A. GAO Redbook for Fiscal Law Related Issues.

B. OGE Material (see www.usoge.gov).

C. Your MACOM/MAJCOM/higher command EC.

D. Navy JAG (Code 13); Navy Assistance General Counsel; AF/JAG General Law Division; Army SOCO

E. LAAWS BBS.

X. 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)

.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)(l) 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 conflictinq 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, 10 USC 2397b)

.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

10 USC 2397a(e) May issue written opinion on whether a covered defense official must file a report (DD Form 1787), or is disqualified from participation $n certain procurement functions

10 USC 2397b(e)(4) May issue a written opinion that this statute does not prohibit compensation from a specific defense contractor

41 USC 423(k) Shall, within 30 days of written request, provide written opinion on whether this statute precludes engaging in a specific activity

<u>Designated Agency Ethics Official</u> (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

<u>Head of Agency</u>

.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

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 lt 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 (implyinq 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

8Ol(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 fromreceiving 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 3ubsequent year). In other words, the restriction on SGEs compensation for teaching, speaking or writinq 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

SECRETARY OF THE ARMY
WASHINGTON

October 21, 1994

MEMORANDUM FOR MR. WILLIAM T. COLEMAN III, ARMY GENERAL COUNSEL

SUBJECT: Designation of Agency Ethics Officials

In accordance with General Orders No. 24, paragraph 9.k, dated November 23, 1993, I hereby appoint you as the Army's Designated Agency Ethics Official (DAEO) and delegate to you the authority to coordinate and manage the Army's ethics program, as set forth in 5 C.F.R. § 2638.203. Mr. Matt Reres, Deputy General Counsel (Ethics and Fiscal), is appointed as the Alternate DAEO and may exercise the same authority in your absence.

You may delegate such other functions as you consider appropriate to other officials or agencies of the Department o5'9e Army, to be performed under your general supervision.

s/s

Togo D. West, Jr.

CF:
Mr. Reres

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON DC 20310-2200

DAJA-SC (600-50) 1 October 1993

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT Appointment of Ethics Counselors and Delegation of Authority UP Joint Ethics Regulation (JER)

1 Pursuant to appointment as a Deputy Designated Agency Ethics Official (DAEO) and the delegation of authority by the Army Designated Agency Ethics Official, dated 27 September 1993 (enclosed), I hereby appoint the listed addressees as Ethics Counselors for their respective commands and redelegate the following authority to them

a. To appoint subordinate Ethics Counselors, with the discretion to redelegate this authority (JER 1-214, l-4Olb); Ethics Counselors will have the responsibilities set out in JER 1-413, elsewhere in the JER, in this delegation and in any authorized redelegation; copies of all appointments will be forwarded to the DA Standards of Conduct Office

b. To issue written opinions to current and former WD employees of their respective organizations concerning the applicability of 10 U S C §§ 2397a and 2391b, 41 U S C § 423, and other post-Government employment restrictions, with the discretion to redelegate to subordinate Ethics Counselors with sufficient knowledge in this area (S C F R 2635 6o2(a)(2)~ JER 1-401d, JER 9-500 et seq.).

c. To issue other written ethics opinions to current and former DOD employees of their respective organizations concerning limitations on outside employment, prohibitions against accepting honoraria (5 C F R § 2636.103), or other standards of ethical conduct issues (5 C F R § 2635.107), with the discretion to redelegate to subordinate Ethics Counselors with sufficient knowledge to deal with these issues

d. To act as reviewing officials for Confidential Financial Disclosure Reports (SF 450), for filing within their respective organizations, with the discretion to redelegate to subordinate Ethics Counselors (5 C F R § 2634 60S and JER 7-306)

e. To grant extensions to employees within their respective organizations for the annual filing of the Confidential Financial Disclosure Report (SF 450), not to exceed 30 days beyond 30 November of each year, without the power to redelegate

f. To require and receive information needed to carry out the purposes of the JER from, and to coordinate and work with, Inspectors General, personnel offices and administrative offices to assist in accomplishing the functions set out in JER 1-414, 1-415 and 1-416, with the discretion to redelegate to subordinate Ethics Counselors.

g. To provide necessary coordination and concurrence, if appropriate, when the approval of the acceptance of payment from a non-Federal source for travel expenses under 31 U.S.C. § 1353 requires conf11ct of interest analysis (41 C.F.R. § 304-1.5), with the discretion to redelegate to subordinate Ethics Counselors (JER 4-300b and 4-301c).

h. TO provide necessary notices and instructions to filers of Public Financial Disclosure Reports (JER 7-202) and Confidential Financial Disclosure Reports (JER 7-302)~ with the discretion to redelegate to subordinate Ethics Counselors.

i. To authorize training material in accordance with JER 11-200 to accomplish the JER training requirements, with the discretion to redelegate to subordinate Ethics Counselors.

2. Request that copies of your redelegations be provided to the DA Standards of Conduct Office.

s/s

Enclosure

MICHAEL J. NARDOTTI, JR.
Major General, USA
The Judge Advocate General

DISTRIBUTION:
COMMANDER, US ARMY LEGAL SERVICES AGENCY
JUDGE ADVOCATE, USA EUROPE AND SEVENTH ARMY
STAFF JUDGE ADVOCATE
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US ARMY TRAINING AND DOCTRINE COMMAND
FORCES COMMAND
US MILITARY TRAFFIC MANAGEMENT COMMAND
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US ARMY PACIFIC
US ARMY INFORMATION SYSTEMS COMMAND
US ARMY HEALTH SERVICES COMMAND
US ARMY SPACE AND STRATEGIC DEFENSE COMMAND
US ARMY SPECIAL OPERATIONS COMMAND
US ARMY INTELLIGENCE AND SECURITY COMMAND
US ARMY SOUTH
BUREAU JUDGE ADVOCATE, NATIONAL GUARD BUREAU
COMMAND LEGAL COUNSEL, US ARMY RECRUITING COMMAND
COMMANDANT, THE JUDGE ADVOCATE GENERAL'S SCHOOL

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON DC 20310-2200

DAJA-SC (600-50) 25 October 1994

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Determination that a Qualified Individual need not be present for Annual Ethics Training (AET) under certain circumstances

l. On 27 September 1993, in my capacity as Chief, Army Standards of Conduct Office, I was delegated the authority to make determinations under 5 C.F.R. § 2638.704(d)(2)(i).

2. Pursuant to 5 C.F.R. § 2638.704(d)(2)(i) and the DOD Joint Ethics Regulation (JER), DOD 5500.7-R, paragraph 11-302b, I have determined that it is impracticable for a Qualified Individual to be present for AET when the personnel to be trained must travel more than 50 miles from their principal place of duty in order to attend training. Under these circumstances, an individual may be trained with materials prepared by a Qualified Individual, provided those materials include the name and phone number of the Ethics Counselor assigned to that individual's organization.

3. Under this determination, the principal place of duty for a member of the U.S. Army Reserve and the Army National Guard is the location where that individual's inactive duty training (IADT or “drill”) is performed.

s/s
MARSHALL M. KAPLAN
Colonel, JA
Chief, Standards of Conduct Office
Deputy Designated Agency Ethics
Official

DISTRIBUTION:
CHIEF COUNSEL
USA CORPS OF ENGINEERS
COMMAND COUNSEL
USA MATERIEL COMMAND
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COMMANDANT
THE JUDGE ADVOCATE GENERAL'S SCHOOL
JUDGE ADVOCATE
USA EUROPE AND 7TH ARMY
NATIONAL GUARD BUREAU
STAFF JUDGE ADVOCATE
EIGHTH US ARMY
US FORCES COMMAND
US MILITARY ACADEMY
US MILITARY TRAFFIC MANAGEMENT COMMAND
USA CRIMINAL INVESTIGATION COMMAND
USA INFORMATION SYSTEMS COMMAND

USA INTELLIGENCE AND SECURITY COMMAND
USA MEDICAL COMMAND
USA MILITARY DISTRICT OF WASHINGTON
USA PACIFIC
USA RECRUITING COMMAND
USA RESERVE COMMAND
USA SOUTH
USA SPACE AND STRATEGIC DEFENSE COMMAND
USA SPECIAL OPERATIONS COMMAND
USA TRAINING AND DOCTRINE COMMAND
CHIEF LEGAL ADVISOR
US MILITARY ENTRANCE PROCESSING COMMAND
CF:
DEPUTY GENERAL COUNSEL (ETHICS AND FISCAL)

INFORMATION PAPER

DAJA-SC
29 January 1997

SUBJECT: The Role of the HQDA Ethics Counselor

1. **Purpose:** To provide information concerning the role of HQDA Ethics Counselor.

2. **Facts:**

a. The Army General Counsel is the Designated Agency Ethics Official (DAEO); the Deputy General Counsel (Ethics and Fiscal) is the Alternate DAEO. The Chief, Army Standards of Conduct Office (DA SOCO), Office of The Judge Advocate General) has been appointed as Deputy DAEO. He has been delegated extensive authority to run the ethics program within HQDA.

b. DA SOCO oversees the Army's ethics program and its Ethics Counselors in general, and provides ethics support to Headquarters, Department of the Army in particular. In DoD, Ethics Counselors are attorneys unless there are exceptional circumstances.

c. Every Army command, installation, and organization is expected to have an assigned Ethics Counselor. The role of the Ethics Counselor is delineated throughout the ethics regulations in title 5, Code of Federal Regulation and the DOD *Joint Ethics Regulation* (JER), DOD 5500.7-R. Ethics Counselors are responsible to ensure that their organizations have an effective ethics program in place, that all training and reporting requirements are met, and that all missions and functions are accomplished within an ethical environment.

d. The following are examples of issues on which Ethics Counselors advise and assist:

(1) gifts from non-Federal sources;

(2) gifts in the workplace;

(2) initial ethics orientation for new employees, and annual ethics training;

(3) official relationships with, official support to, and personal participation in, non-Federal professional, scientific, technical and other associations (*e.g.* AUSA, ABA, FBA, AAAA, SAME, ASME, *etc.*);

(4) public (SF 278) and confidential (OGE 450) financial disclosure reports;

(5) conflicts of interests issues;

(6) job-hunting and post-Government employment restrictions; and

(7) use of Government resources and time;

(8) handling of inside information;

(9) use official position and improper endorsement of non-Federal activities;

(10) outside employment and speaking, teaching, or writing.

e. When Ethics Counselors advise and counsel individual employees and soldiers, they act as the organization's lawyers. Their role is to provide information to members of the command, and to implement practical solutions for common standards of conduct problems. However, Ethics Counselors are not legal assistance attorneys. No attorney-client relationship or privilege of confidentiality exists with individual members of the command.

Mr. Novotne DSN 227-0921

1ST BASICS FOR ETHICS COUNSELORS WORKSHOP

A WALK THROUGH THE JER

Al Novotne
Army Standards of Conduct Office

I. INTRODUCTION - Get Out Your Highlighters, Page Tabs and Paperclips.

II. THE DIRECTIVE - 5500.7 AND THE FOREWORD

A. The Directive was required jurisdictionally for promulgation of the Regulation.

1. Don't throw it away. It contains critical material.

2. Application to enlisted personnel - Para. B.1.a. and b., p. 2.

   a. Makes OGE rules applicable to enlisted personnel.

   b. Makes federal conflict of interest statutes applicable to enlisted personnel. 18 U.S.C. §§ 208; 209. **NOTE:** As a result these are now only enforceable as violations of Article 92 and may not be assimilated under Article 134(3).

3. The Directive makes 5500.7-R punitive under the UCMJ - Para. B.2.a., p. 2.

   "The prohibitions and requirements printed in bold italics . . . are general orders and apply to all military members without further implementation. Violations may result in prosecution under the UCMJ . . . as well as adverse administrative action and other adverse action authorized by United States Code or Federal regulations."

B. The Foreword contains additional jurisdictional material. As of August 30, 1993 all service regulations that overlap with JER subjects must be read in light of this statement:

"All DoD component regulations implementing these cancelled DoD Directives, and all provisions of other DoD Component regulations, directives, instructions, or other policy documents that are not consistent with this Regulation will be cancelled."

III. CHAPTER 1 - GENERAL INFORMATION

A. Purpose - Para. 1-100. Consistent with the Foreword, confirms that 5500.7-R is the single source of guidance for standards of conduct, financial disclosure, post employment and ethics training guidance.

B. Definitions

1. 1-202 - Agency Designee. This is a critical term. It is the first-line supervisor, an individual who has responsibility for many JER decisions.

2. 1-211 - DoD Employee. Generally, anyone performing a federal function. If you have responsibility for USAR or NG personnel, note 1-211d. and e. Although this is just a definition, it is also an important jurisdictional limitation.

3. 1-214 - Ethics Counselor. Note that you need a written delegation from your SJA or head of office to perform these functions.

4. 1-219 - Head of DoD Component Command or Organization. This title applies to anyone who holds independent operational command. At a minimum, someone who has BCD Special UCMJ authority fits this definition.

5. 1-232 - Special Government Employee. Become familiar with this term. Do not use this paragraph as original authority. Refer to 18 U.S.C. § 202.

C. Responsibilities

1. 1-404 - Command responsibility for the ethics program. Ethics programs are often managed by lawyers, but in the end this is a command program.

2. 1-408 - Supervisor duties. Among other things, supervisors should be making a conscious decision as to who must file financial disclosure reports and attend annual ethics training.

3. 1-412 - Minimal list of Ethics Counselor duties. There's really more to it.

4. 1-413 - Inspector General duties. Does your command have this level of liaison with its IG? Do you train IGs on the JER?

5. 1-415 - Administrative and personnel offices are required to identify and annotate financial disclosure filers as part of their records process. Good Luck.

IV. CHAPTER 2 - STANDARDS OF CONDUCT (THE "OGE" RULES)

A. General observations.

1. The reprint of the OGE Rules has errors. (I know, because I'm the one who typed it originally.)

2. The changes to the OGE Rules have not been uniformly tracked in the JER changes.

B. General Provisions - Subpart A.

1. 2635.101(b) - General Principles. In fact, this is the Executive Order upon which the OGE Rules are based, E.O. 12674. It is stand alone authority and may be cited as such.

2. 2635.105 - Supplemental Regulations. You and your command may not supplement the OGE Rules. *But see,* .105(c)(1) & (2). These sections give you considerable latitude to issue implementing instructions (which, if crafted carefully, may be enforceable lawful orders).

3. 2635.105(c)(3) - Independent Agency Authority. Use this section aggressively. *See also*, JA 221, Law of Military Installations (the old DA Pam 27-21, *Administrative and Civil Law Handbook)*, para. 1-7 for an excellent discussion of the basis of inherent command authority. *(attached as an appendix to this outline)*

4. 2635.107 - Ethics Advice. This is the "Ethics Magistrate" section. Ethics Counselors have the discretion to find facts and dispose of questions arising under the OGE rules.

C. Gifts From Outside Sources - Subpart B

1. 2635.202 - General Standards. This section is often ignored. Don't fall into that habit. Your answer may be here (note .202(c)(5)).

2. 2635.203 - Definitions. Check the definitions section of OGE Rules first. They frontload substantive law in the definitions.

a. .203(b)(2) - The cheap and worthless rule. You'll use it often.
b. .203(b)(4) - Highlight last phrase. Note overlap with .204(c)
c. .203(b)(5) - Lots of fact-specific questions arise under this section.
d. .203(b)(7) - Resolves local travel issues. Have your contracting personnel cover this in contract requirements and avoid many issues.
e. .203(b)(8) - Use agency gift acceptance authority aggressively.
f. .203(f)(1) - Often overlooked. Helpful in gifts to commander's spouse.

3. 2635.204 - Gift Exceptions. People often call these "the rules on gifts." WRONG! Practice client control; insist in calling them exceptions to the rule.

a. .204(b), example 2 - Highlight "As evidenced . . ." This important example operates as a rule.
b. .204(c), example 2 - OGE used San Antonio golf courses for this example. Don't attempt to work around this fact pattern.
c. .204(g)(4) & (6) - Note these sections. I often get calls that are answered directly by them.

4. 2635.205(c) - Disposal of Improper Gifts - This is the second part of your "Ethics Magistrate" authority. Use it. This section enables you to convert a gift which was intended to be personal into a gift to the agency. *See .203(b)(8)*

D. Gifts Between Employees - Subpart C

1. 2635.303(b) - Highlight this section.

2. 2635.303(f) - Highlight the last two lines. This is mandatory in a gift solicitation. It's not an option.

E. Conflicting Financial Interests - Subpart D

1. Be aware the 1989 Ethics Reform Act gave the Office of Government Ethics the power to define legislative terms. This subpart is their definition of terms under 18 U.S.C. § 208. These definitions are perhaps more important than the statute itself. Further, using your power under .107 to interpret OGE rules, you are, *de facto,* making binding decisions on a statutory application.

2. 2635.402(b)(1) - Direct and Predictable. This is the conceptual basis for conflicts of interest. Study the material on pages 20-17 and 20-18 carefully.

3. 2635.402(d) - Waivers. Make a marginal note to cross-reference to 5 C.F.R. § 2640 and to JER para. 5-302.

F. Impartiality in Performing Official Duties - (better titled, "Appearance of Impropriety")

1. 2635.501 - Highlight "if he determines . . . "

2. 2635.502 - This is a rule of general application and may used effectively in conjunction with 2635.702. OGE has done it (but they didn't tell you). Use .502 as the measuring stick to assess whether specific conduct is objectionable under any other section of the OGE rules.

3. 2635.502(d) - Note that resolution of .502 problems can be managed locally. This is where the power of the agency designee may be greatest.

G. Misuse of Position - Subpart G

1. 2635.702 - One of the most heavily used rules.

a. .702(a) Note that it includes solicitation of subordinates.
b. .702(b) Highlight the last sentence.
c. .702(c), example 3. This also operates as a rule.
d. .702(e) Allows use of military rank in personal activity. This allows "Captain, U.S. Navy," but not "Commander, U.S.S. Enterprise."

2. 2635.705(b) - Highlight. This rule needs constant emphasis in most commands.

H. Outside Activities - Subpart H

1. 2635.801(d) - Only use this section as a guide. Go directly to the statutes for actual use and implementation.

2. 2635.802 - Make a marginal cross-reference note to 2635.101(b)(5). In conjunction with this portion of the Executive Order, this is the best authority available for the proposition that employees must conscientiously perform their duties.

3. 2635.806 - OGE has announced that it will never issue regulations on this subject. Thus, JER Chapter 3 is the exclusive authority on this topic.

4. 2635.807(a) - Concentrate on using this paragraph as opposed to the remainder which is not in bold and italics.

a. .807(a)(2)(i)(E)(2) - This section has been rendered void by *NTEU* and *Sanjour v. EPA*
b. The note in the middle of page 20-37 should be highlighted.
c. Tab or highlight example 2 on p. 20-37.
d. .807(a)(3), p. 20-39 - Highlight.

5. 2635.808 - Fundraising

a. .808(a)(2) - Note that sitting at head table in official capacity is prohibited.
b. .808(a)(3) - Note that official speeches may be made at fundraisers.
c. .808(c)(1)(ii) - Note that employees may not personally solicit a prohibited source.

I. DoD Supplementation to the OGE Rules

1. JER 2-202a. - Often overlooked. Cross-reference to AR 360-61, or to your

service's community relations regulations.

2. JER 2-205 - Cross-reference to JER 5-409.

3. JER 2-206 - Note that, since we may not supplement OGE Rules, this is the only situation where prior approval for outside employment may be required.

4. JER 2-300 - Gifts at ship launches and roll-outs. Often overlooked.

5. JER 2-303 - Outside Employment. Cross-reference to 2635.105(c)(3). I intended this section to affirm inherent command authority.

V. Chapter 3 - Activities With Non-Federal Entities

A. JER 3-201a. - Liaison Activities, the preferred method for official interface with private organizations.

B. JER 3-202 - Official Management of Private Organizations. Has your command forwarded requests for your docs to participate in management of standards-setting organizations? Why not?

C. JER 3-206 - Co-sponsorship. Consider hiring the outside organization to manage your event under a no-cost contract. Your organization will be a lot safer and happier.

D. JER 3-208 - Distributing Information. Be sure to read this together with 3-209. Any such distribution cannot be a generic endorsement of the private organization.

E. JER 3-210a.(6) - Highlight this section and read each night before going to sleep.

F. JER 3-305b. - Read and heed. This section is often abused. Note that it is a lawful general order under Article 92.

G. JER 3-307 - Cross reference to 2-207, but use this section instead. It is more current than 2-207, although the two sections are supposed to be identical.

VI. Chapter 4 - Travel Benefits

A. Do not use this chapter as an original source of authority. You will notice that it engages in restatement of other authorities, such as the JTR and JFTR. Use those original sources instead.

B. JER 4-102a. is in error. Military members may not use this Title 5 authority.

C. JER 4-201a. is far from complete. Be sure that you have all of the latest guidance when analyzing frequent flyer point issues.

D. JER 4-202b. is misleading, although technically correct. It is important to know that this paragraph does not apply to frequent flyer points, bonus coupons for free tickets, or any fungible cash-equivalent benefit.

E. JER 4-202c. expands on 2635.203(b)(5). Note that this is primarily a fiscal issue. Be sure to analyze questions arising under this paragraph using fiscal guidance. *See GAO Redbook*.

VII. Chapter 5 - Conflicts of Interest

A. Obtain and insert 5 C.F.R. § 2640 at the head of this chapter.

B. Note that JER 5-302a. has been superceded by 2640.

C. Note that JER 5-302b. & c. are redundant. Use both as a general guide, subject to the directions and preferences of your service's standards of conduct office. Both sections are consistent, and serve the same purpose; *i.e.*, when processing a request for an individual waiver, you are expected to full analyze the request and prepare a record of the relevant facts.

D. JER 5-400 should not be used as original authority for civilians. Unlike other conflict of interest sections, such as 18 U.S.C. § 208, enlisted personnel are not excluded from the coverage of 18 U.S.C. § 201. For UCMJ purposes, incorporation of § 201 clouds use of this paragraph under Article 92.

E. JER 5-409 - Commercial Dealings Involving DoD Employees. Compare this cross-referenced 2-205. These sections were supposed to be identical. Use this section because it is more current.

VIII. Chapter 6 - Political Activities

A. Do not rely on the Hatch Act regulations, 5 C.F.R. §734, unless you have posted the regulations based on the new Hatch Act.

B. Section 2 of this chapter is derivative of other authority. Use only original authority in the area of political activities. For civilians, this is the Hatch Act and GSA implementing regulations. For military personnel, it is DoD Directive 1344.10.

C. Be sure that you have inserted the most current version of 1344.10 in Chapter 6.

IX. Chapter 7 - Financial Disclosure Reports

A. 2634.201(a) - 60 day service requirement

B. 2634.202(c) - 120% of GS-15 step 1 pay definition.

C. 2634.301(a) - last sentence states requirement that underlying assets of brokerage accounts be reported.

D. 2634.309(a)(2) & (3) - Study these sections and correlate with your knowledge of separate and community property.

E. 2634.310(a)(2) - Compare "nonvested beneficial interest" in the first sentence to the third sentence of the section which declares that a defeasible interest is reportable. Are these two sentences inconsistent?

F. 2634.311(a)(1) - Use of broker's statement in lieu of reporting assets on the form directly. A very useful section--a real timer saver. But be sure that SSNs, account numbers, home addresses and home phone numbers are redacted.

G. 2634.602(a) - Highlight middle of first sentence. Report is considered filed when delivered to first agency official in the handling chain.

H. 2634.605(b)(2) - Report contents may be accepted at "face value." Use this section as an after-the-fact saver, but do not use it in your initial review. This statement has only been honored in the breach, and certainly does not apply to Senate nomination reports.

I. 2634.904 (a)(1) - Study this paragraph carefully and craft guidance for your command that minimizes the number of OGE Form 450 filers.

X. Chapter 9 - Post Employment Restrictions - Office of Government Ethics letter dated November 5, 1992, at p. 116-1 is the principle authority for interpretation of 18 U.S.C. § 207. When you have a question under this statute, you should consult this letter first. It has the force and authority of a regulation.

XI. Chapter 10 - Enforcement - Paragraph 10-201c. requires that an Ethics Counselor report to an appropriate investigative organization, "if the facts tend to support a violation." This phrase is intended to allow the Staff Judge Advocate of the organization to exercise the same degree of prosecutorial discretion as in any other UCMJ-covered matter. This discretion extends not only to whether a JER violation exists, but also to whether the alleged violation is so serious that further investigation is warranted. As with UCMJ violations, infractions and offenses should be resolved at the lowest appropriate level, and may be resolved by administrative actions.

XII. Appendices

A. Do not rely on Appendix A for guidance on applicable statutes. Consult these statutes directly to determine whether they apply to the facts under consideration.

B. Note that Appendix C has the OGE Form 202, a reproducible form. 90% of conflict of interest referrals to the Department of Justice are not reported as required.

Appendix

Department of the Army Pamphlet 27-21, *Administrative and Civil Law Handbook* (15 Mar 92)

1-7 Command Authority

Congress has authorized the Secretary of the Army to assign, detail, and prescribe the duties of the members of the Army.[19] Command is exercised by virtue of the office and special assignment of members of the Army holding military rank who are eligible by law to exercise command.[20] Therefore, a civilian may not exercise command, and officers who are not eligible by statute may not exercise command.[21] The Secretary of the Army has also established other restrictions or grounds of ineligibility to exercise command, such as being under arrest, being located at an installation where not permanently assigned, or being assigned to the general staff or Department of the Army (DA) staff agencies.[22]

Command is normally connected with seniority in rank. Thus the senior officer of a unit or at an installation who eligible for command is the commander. Rank is the relative position or degree of precedence bestowed on military persons that confers eligibility to exercise command or authority in the military service.[23] The chain of command is the fundamental organizational technique for the exercise of command and is simply the succession of commanders, superior to subordinate. At the head of the chain of command is the President, acting as the Commander in Chief. Staff and administrative officers are not in the chain of command. It is Army policy that all individuals in the chain of command are delegated sufficient authority to accomplish their assigned tasks and responsibilities.[24]

The actual scope of command has several sources. Some authority is given commanders by statute,[25] while most command authority is contained in various ARs.[26] It is also generally accepted that commanders has the inherent power to issue orders necessary for the accomplishment of their mission or for the welfare of their troops, so long as such orders are lawful.[27] the scope of command authority is also limited to the personnel and the physical facilities that make up a particular command. Thus battalion commanders may appoint boards to investigate battalion morale, but they cannot appoint boards to investigate division morale.

[19] 10 U.S.C. § 3013(g)(3)
[20] AR 600-20, Army Command Policy and Procedures. para. 1-4
[21] A chaplain has rank without command. 10 U.S.C. § 3581. An officer in the Medical Department is not generally entitled to exercise command except within the Medical Department. 10 U.S.C. § 750 (1982). Retired officers may not exercise command except when on active duty. 10 U.S.C. § 750.
[22] *See* AR 600-20, paras. 3-11, 3-12
[23] AR 600-20, para. 1-6
[24] AR 600-20, para. 2-1
[25] *E.g.*, commanders are authorized by statute to administer nonjudicial punishment to members of their commands. 10 U.S.C. § 815.
[26] *E.g.*, commands are authorized by regulations to take specific actions relating to the elimination of enlisted members. AR 635-200, Enlisted Personnel.
[27] *See* Greer v. Spock, 424 U.S. 828 (1976); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, at 892-3 (1961).

GIFTS

I. REFERENCES.

A. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. 2635 (Office of Government Ethics Rules).

B. DOD 5500.7-R, JOINT ETHICS REGULATION (JER), Chapter 2 (30 Aug 93).

C. 5 USC § 7342; JER 2-300; DoD Dir. 1005.13

II. GIFTS FROM OUTSIDE SOURCES (JER, CHAPTER 2).

A. Basic Punitive Prohibition on Gifts From Outside Sources. An employee shall not solicit or accept, directly or indirectly, a gift:

1. from a prohibited source (e.g., someone who has an interest in the performance of official DoD missions); or

2. given because of the employee's official position.

3. "Prohibited Source" means any person or entity:

   a. seeking official action by the employee's agency;

   b. doing or seeking to do business with the employee's agency;

   c. regulated by the employee's agency:

   d. substantially affected by the employee's official duties, or;

   e. a majority of whose members fit into one or more of these categories.

4. The test for "official position" is whether the gift would have been solicited, offered, or given had the employee not held the status, authority or duties associated with his Federal position (63 Fed.Reg. 69992, Dec. 18, 1998).

B. Practical Approach. Three questions:

1. Is the item actually a gift? The term "gift" includes almost anything of monetary value, but not these (*exemptions*):

   a. Coffee, donuts, and similar modest items of food and refreshments when offered other than as part of a meal;

   b. Greeting cards and items with little intrinsic value, such as most plaques, certificates, and trophies which are intended solely for presentation;

   c. Rewards and prizes in contests open to the public;

   d. Commercial discounts available to the general public or to all Government or military personnel;

   e. Commercial loans, and pensions and similar benefits;

   f. Anything paid for by the Government, secured by the Government under Government contract, or accepted by the Government in accordance with a statute; and

   g. Anything for which the employee pays market value.

2. If the item is a gift, does an exception apply? Common ***exceptions*** when an employee may accept:

   a. unsolicited gifts with a market value of $20 or less <u>per source</u>, per occasion, so long as the total value of all gifts received from a single source during a year does not exceed $50 (63 Fed.Reg. 69992, Dec. 18, 1998);

   b. gifts based on an outside relationship, such as a family relationship or personal friendship rather than the position of the employee;

   c. discounts and similar benefits offered to groups in which membership is not related to Government employment (or "Government discounts" where the same offer is broadly available to the public through similar groups), and certain benefits offered by professional associations or by persons who are not prohibited sources;

d. legitimate awards that are part of a regular and established program of recognition for meritorious public service; honorary degrees from institutions of higher learning.

e. gifts resulting from the outside business activities of employees and their spouses which have not been offered or enhanced because of the employee's official position;

f. * free attendance (not travel or lodging) paid by the sponsor of a widely-attended gathering, speaking engagement, or other event if the agency determines an interest in the event (attend in personal capacity) [Rule amended: 61 Fed. Reg. 42965 (20 Aug 96) allows payment by other than the sponsor if >100 people attend and the cost is $250 or less; also allows spouse or other guest to attend];

g. food, refreshments, and entertainment at certain social events extended by persons who are not prohibited sources, where no one is charged a fee to attend the event;

h. meals, refreshments and entertainment in foreign areas;

i. Gifts accepted under specific statutory authority;

j. unsolicited gifts of free attendance for DOD employees (and spouses) at events sponsored by state or local governments or non-profit, tax exempt civic organizations, where the agency has determined its community relations interests in the event (JER 2-202a); and

k. certain educational scholarships or grants for DOD employees and dependents (JER 2-202b)

l. certain gifts at ship launch and similar ceremonies. (JER 2-300c.)

3. Would using the exception undermine Government integrity? If an item meets an exemption or exception, the general prohibitions on gifts are overcome, including appearance concerns (63 Fed.Reg. 69992, Dec. 18, 1998)., However, even if a gift is covered by one of the exceptions, do not accept it if it will undermine Government integrity.

a. Cannot use official position to solicit a gift or force someone to give a gift.

b. Any gift is illegal if it is in exchange for an official action (bribe).

c. Some gifts may be prohibited by other statutes (such as procurement integrity contract laws).

d. Finally, gifts may not be accepted so frequently that anyone would question whether influence is being bought. For example, a Federal building manager cannot accept a free sandwich every week from a lunch counter operating in the building.

C. Handling Improper Gifts (5 C.F.R. § 2635.205). When an employee cannot accept a gift:

1. First and foremost, if possible, refuse the offer of an improper gift. Diplomatically explain that Federal employees may not accept certain gifts.

2. The employee should pay the donor its market value; or

3. If the gift is a tangible item, the employee may instead return the gift.

4. Subject to approval, perishable items may be donated to a charity, shared within the office, or destroyed.

III. FOREIGN GIFTS. (U.S. CONST. ART. I, §9, CL. 8; 5 U.S.C.A. §7342, AND JER §2-300.)

A. Gifts from foreign governments.

1. Can accept a "gift of minimal value" (i.e., one having a retail value in the United States not in excess of $260 at the time of acceptance. "Minimal value," based on the Consumer Price Index.)

2. Gifts valued above "minimal value" can only be accepted on behalf of the U.S. Report to and deposit these with Commander, PERSCOM, ATTN: TAPC-PDO-IP, Alexandria, VA, 22332-0474 for disposal, official use, or forwarding to the General Services Administration. Air Force (AFI 51-901) POC: AFPC/DPPPRS, 550 C. Street West, Suite 12 (Attn: Ms. Garsford), Randolph AFB 78150-4714, tel: DSN 487-4327; COM (210) 652-4327. Navy (SECNAVINST 1650.1F, Chapter 7) for disposal, official use, or forwarding to the General Services Administration.

3. * Aggregate the value of gifts from different officials during the same presentation. (If gifts are from different governmental levels (city, state, national), aggregate the levels separately.

4. * Gifts from spouses of foreign officials are deemed gifts from the foreign official.

5. * Gifts to employees' spouses are deemed gifts to the employee.

6. * Gifts received at separate presentations are separate gifts - their values are not aggregated (even if from the same official and on the same day).

7. * When more than one gift is given at a single presentation, the employee may retain only those with an aggregate of less than "minimum value." The remainder (valued over "minimal value") may not be kept by the employee.

B. Gifts to deployed personnel. Apply general gift analysis, unless gift is from a foreign government, then apply those rules.

IV. GIFTS BETWEEN EMPLOYEES (JER CHAPTER 2)

A. General Punitive Rules. An employee shall not, directly or indirectly:

1. give a gift or solicit a contribution for a gift for an official superior (i.e., supervisor or those in supervisory chain); or

2. accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship.

B. Exceptions.

1. Unsolicited gifts may be given on an occasional basis, including traditional gift-giving occasions, such as birthdays and holidays.

   a. This includes minor contributions of food which will be consumed at the office, meals at someone's home (of a type and value customarily provided to personal friends), and customary gifts, such as a bottle of wine brought when invited to another's home.

   b. This also includes infrequent gifts having a value of less than $10 on appropriate occasions, such as Christmas or birthdays. Such gifts may not become "routine."

2. A subordinate may give or donate toward a gift to a superior on special infrequent occasions, such as, marriage PCS, or retirement.

   a. Gifts on special infrequent occasions that do not terminate the superior subordinate relationship are limited to $300 in value per gift per donating group (JER 2-203).

      (1) Donating group is comprised of all contributors to that group gift.

      (2) If one contributor contributes to two donating groups, then value of gifts from groups with a common contributor is aggregated as if from a single donating group--$300 limit applies to total value (JER 2-203a(2)).

   b. * Special infrequent occasion gifts that terminate the superior, subordinate relationship (retirement, resignation, transfer) may exceed $300 per donating group if they are appropriate to the occasion and are uniquely linked to the departing employee's position or tour of duty and commemorate the same. (Changed on 2 January 1997.)

   c. An employee cannot solicit more than $10 from another employee for a group gift to the contributing employee's superior (JER 2-203b).

   d. Solicitations for gifts to a superior must be completely voluntary. Solicited individual may decline to contribute.

e. To avoid improper pressure, the collection should be handled by someone junior in the organization.

GIFTS SUMMARIZED

Methodology	Gifts from Outside Sources	Gifts Between Employees
Prohibited **(*Punitive*)**	Yes if from prohibited source, or given because of off. psn § 2635.202	Yes if from subordinate or solicited for superior § 2635.302
A gift?	Nongifts - exemptions (§ 2635.203): 1. nonmeal food/refreshments 2. cards, plaques 3. bank loans 4. paid for by Government 5. paid market value	
Exceptions?	§ 2635.204 Examples: 1. $20/50 rule 2. personal relationship 3. discounts/benefits 4. awards/degrees 5. outside bus. relations 6. widely attended event 7. social invitations 8. local Govt/civil events 9. scholarships/grants	§ 2635.304 Two categories: 1. occasional basis ($10 or less; food refreshments; hospitality; leave transfers) 2. special infrequent occasions (gift appropriate to occasion - max $300 (unless event terminates superior/subordinate relationship) from single donating group; $10 max on solicitation per person)
Limitations	§ 2635.202(c) 1. no bribes 2. no gift solicitations 3. reasonable person test 4. no statutory violations	§ 2635.302(c) 1. no coercion 2. common member in donating groups

Citations to 5 CFR § 2635 reprinted in the Joint Ethics Regulation, chapter 2. Provisions on accepting or soliciting gifts are punitive. Violations may result in UCMJ actions.

INFORMATION PAPER

DAJA-SC
15 April 1998

SUBJECT: Gifts Between Employees

1. **PURPOSE:** To summarize the Standards of Ethical Conduct and Joint Ethics Regulation rules concerning gifts between employees.

2. **FACTS:**

a. General Rule. (5 C.F.R. § 2635.300 *et seq*) Employees may not:

(1) give, or solicit contributions for, gifts to someone in their subordinate-official superior chain;

(2) accept gifts from employees who receive less pay, unless there is no subordinate-official superior relationship <u>and</u> there is a personal relationship justifying a gift.

b. Exceptions:

(1) On an occasional basis gifts may be given when:

(a) $10 or less per occasion (e.g. a birthday gift or a souvenir gift upon return from a vacation) (no cash).

(b) Refreshments shared in the office.

(c) Personal hospitality at an employee's home.

(d) Customary gifts given in connection with the receipt of hospitality.

(2) On special, infrequent occasions, subordinates may give a gift to a superior "appropriate to the occasion."

(a) Infrequently occurring occasions of personal significance such as marriage, illness, or birth of a child (does not include a promotion unless the employee is also being transferred out of the chain of command).

(b) Occasions that terminate subordinate-official superior relationship, such as retirement, resignation or transfer.

(c) Value of gift normally should not exceed $300 from a "donating group" whose definition depends on the circumstances. If the gift exceeds $300 in value, the gift must still be "appropriate to the occasion," and "uniquely linked to the departing employee's position or tour of duty."

(d) An employee may not contribute as part of more than one donating group. If he or she does, the different groups become one donating group.

c. Voluntary contributions of a nominal amount may be solicited only for the following:

(1) The occasional sharing of food and refreshments in the office;

(2) The gift for a special, infrequent occasion.

(3) DoD rule: the nominal amount is defined as $10; however, while more than $10 may not be solicited, an individual may offer to contribute more.

d. Gifts from an employee's spouse to another employee's spouse will be considered a gift between employees subject to the above rules, unless there is an independent basis for the gift to the spouse.

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INFORMATION PAPER

DAJA-SC
15 April 1998

SUBJECT: Receipt of Gifts from Outside Sources

1. **PURPOSE:** To summarize the rules on gifts from outside sources.

2. **FACTS:**

a. Generally, DoD employees may not accept gifts from a prohibited source or a gift that is offered because of the recipient's official position. There are four steps to determining whether a gift may be accepted. (5 C.F.R. § 2635.204)

(1) First, is it a "gift?" Items with little intrinsic value intended solely for presentation, benefits available to all military personnel in a particular geographic area, and coffee and donuts offered during a meeting are examples of "non-gifts."

(2) Second, if it is a "gift," is it a prohibited source gift?

(a) A prohibited source is someone who does business with the employee's agency, seeks to do business with the agency, conducts activities regulated by the agency; or is an organization, a majority of whose members are prohibited sources.

(b) A gift given because of the recipient's official position is treated as a prohibited source gift.

(3) Third, if it is a "prohibited source gift," does an exception apply? The exceptions are:

(a) A gift with a market value of $20 or less, not to exceed $50, in a calendar year from any one source.

(b) A gift to a group of Federal employees or class of individuals, but not based on official position or rank.

(c) Awards for meritorious public service or achievement if pursuant to an established program of recognition (might require an Ethics Counselor written determination).

(d) Social invitations from other than prohibited sources, but based on the employee's official position, if no fee is charged to anyone attending.

(e) Gifts based on a personal relationship (must be clearly motivated by family or personal relationship).

(f) Gifts based on outside business or employment relationships (for example, gifts that arise from the spouse's business activities).

(g) Free attendance at widely attended gatherings, typically conferences or seminars, when the supervisor determines it to be in the agency interest for the employee to attend.

(h) Gifts permitted by other statute, such as gifts from foreign governments under the authority of 5 U.S.C. § 7342 (currently, retail value in United States may not exceed $245).

(4) Fourth, if an exception applies, should it be used?

(a) Exceptions do not authorize bribes. If a gift buys influence, it is a bribe.

(b) A gift may never be solicited or coerced.

(c) If the frequency of gifts would lead a reasonable person to believe that the employee is using public office for private gain, they may not be accepted.

b. Disposal of improper gifts. An Ethics Counselor may authorize the following dispositions. (5 C.F.R. § 2635.205).

(1) The gift may be converted to a gift to the agency, or to an appropriate morale, welfare and recreation activity.

(2) If perishable, the gift may be consumed in the office where received.

(3) The recipient may keep the gift, and pay the donor its cost.

(4) The gift may be returned to the donor.

b. If the value of gifts from a single source is $250 or more during a calendar year, they must be reported on public (SF 278) or confidential (SF 450) financial disclosure report.

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INFORMATION PAPER

DAJA-SC
13 August 1998

SUBJECT: Free Attendance at Seminars, Conferences, and Similar Functions

1. PURPOSE: To summarize when employees may accept free attendance at a seminar, conference, or similar function.

2. FACTS:

a. General. In 1993, the Office of Government Ethics published standards of conduct for the executive branch. Among those rules is authorization to accept free attendance at official speaking engagements (5 C.F.R. § 2635.204(g)(1)), and "widely-attended gatherings" (5 C.F.R. § 2635.204(g)(2)).

b. Participation in an Official Capacity:

(1) Speaking and Similar Engagements: An employee may accept free attendance at a conference or other event where the employee will participate in an official capacity, as a speaker or panel participant, to present information on behalf of his agency, provided the offer is from the event's sponsor. This is limited to free attendance on the day of the official presentation, and permits the employee to accept conference fees, food, refreshments, entertainment, instruction and materials furnished to all attendees as an integral part of the event. It does not permit acceptance of travel expenses.

(2) Other Official Participation: Under certain circumstances, employees in an official travel status may accept travel and related expenses to attend conferences and similar functions, in addition to free attendance at the event. This authority, 31 U.S.C. § 1353, is covered in a separate information paper.

c. Participation in a Personal Capacity: An employee attending an event in his personal capacity may accept a gift of free attendance if the event is "widely attended." The principle elements of a "widely attended gathering" are size and diversity. Free attendance is further justified by a finding of agency interest.

(1) For the "size" element, there must be at least 20 or more individuals in attendance.

(2) For the "diversity" element, the event must be open to members from throughout a given industry or profession, or to all parties who may have an interest in the subject of the event.

(3) The employee's supervisor must determine (verbally or in writing) that attendance is in the agency's interest because it will further agency programs and operations. The agency's interests may include promoting community relations or providing the opportunity to exchange views or technical information with members of a specific profession. If the person who invited the employee has interests that may be affected by execution of the employee's official duties, the supervisor must make a further written determination that the agency's interest outweighs the appearance of improper influence. Supervisors should make this determination in consultation with their Ethics Counselor.

(4) Cost of Attendance. Under this exception, there is no limit on the cost of free attendance. However, acceptance of free attendance only applies to activities which are integral to the event. Generally, social and sports activities, such as golf outings, will not be integral to a widely attended gathering, and may not be accepted. They are also some restrictions on how the costs are paid:

(a) The event's sponsor must bear the cost of free attendance or, if someone other than the sponsor bears the cost, the sponsor must decide who to invite and where to seat them.

(b) If someone other than the sponsor pays for attendance, the offer of free attendance may not be accepted unless more than 100 persons are expected to attend, and the value of free attendance (including the value of free attendance for an invited spouse or guest) does not exceed $250.

(c) Attendance of Spouses. An employee may accept free attendance for his spouse if a spouse will generally accompany others in attendance, and the offer to the spouse is from the same source as the offer to the employee.

(5) Blanket Determinations of Agency Interest: A supervisor may issue a blanket determination that attendance by all or a specific category of subordinate employees is in the agency's interest. This determination does not, however, eliminate the need for the written finding for individuals whose duties may present a conflict.

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INFORMATION PAPER

DAJA-SC
4 March 1999

SUBJECT: Foreign Gifts

1. **PURPOSE**: To summarize restrictions on acceptance of gifts from foreign governments.

2. **REFERENCES**:

a. U.S. Constitution, article I, § 9,cl.8.

b. 5 U.S.C.A. § 7342;

c. Title 41, Code of Federal Regulations, Parts 101-49 and 101-45;

d. DoD 5500.7-R, Joint Ethics Regulation § 2-300b;

e. DoD 1005.13, Gifts from Foreign Governments (20 Jul 96).

3. **FACTS:**

a. DoD employees (including members of the uniformed services) **MAY NOT** request or encourage the giving of gifts from foreign governments.

b. DoD employees **MAY** accept:

(1) Gifts of ”minimal value (currently not in excess of $260 retail value in the United States at time of acceptance).

(a) Value of the gift is the value it would have in the United States--not value at point of donation.

(b) If more than one gift is given at one presentation from the same donor to an employee they constitute on gift; values must be aggregated.

(c) Gifts from different officials of the same foreign government at the same presentation must be aggregated. If gifts are from different governmental levels (e.g., national, state, local, and municipal), aggregate the levels separately.

(d) Gifts received at separate presentations, even on the same day and/or from the same foreign official, are separate gifts; their values are not aggregated.

(e) Gifts to a DoD employee's spouse are deemed gifts to the DoD employee, and gifts from a foreign official's spouse are deemed gifts from the foreign official.

(2) Gifts of travel (or expenses for travel) occurring entirely outside the United States, even if in excess of "minimal value."

c. Gifts of more than "minimal value' may be accepted **on behalf of the United States** if refusing the gift would offend or embarrass the donor or adversely affect foreign relations. Gift becomes government property.

(1) Within 60 days, gifts must be deposited with "employing DoD Component" for return to donor, use within the Component, or disposition by General Services Administration (GSA). (Army: Commander, PERSCOM, ATTN: TAPC-PDO-IP, Alexandria VA 22332-0474; Air Force: AFI 51-901, AFPC/DFFFRS, 550 C. Street West, Suite 12, Randolph AFB 78150-4714; Navy: SECNAVIST 1650.1F, Chapter 7.)

(a) Gifts retained by DoD Components must be used for benefit of all employees. GSA must be notified by SF 120, "Report of Excess of Personal Property," within 30 days following termination of official use.

(b) Gifts that DoD Components do not wish to retain must be reported to GSA within 30 days on SF 120 and held by the Component pending GSA disposition instructions.

(c) Gifts for which GSA determines there are no federal requirements may be sold to recipient for appraised value (plus cost of appraisal).

(d) Recipients may recommend foreign gifts for donation to public agencies or nonprofit tax-exempt organizations for public display, reference or use.

(e) Firearms received as foreign gifts may be transferred to federal agencies or if not required for federal use, sold at GSA's discretion to interested recipients.

(2) DoD components must maintain records of foreign gifts or more than minimal value (other than travel or travel expenses) received by their employees. Compilations are transmitted annually to Department of State by January 31.

d. DoD components may sell or destroy gifts of minimal value.

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March 19, 1996

MEMORANDUM FOR SENIOR ASSISTANT FOR POLICY AND OSD SPEAKERS BUREAU OPERATIONS

SUBJECT: DoD Employee Participation in Sporting Events

This is in response to your request for guidance regarding the free attendance of DoD employees in community relations events that include sporting activities. The example you provided involved the golf tournaments hosted by the Greater San Antonio Chamber of Commerce.

The specific rule in question is 5 CFR 2635.204(g), "widely attended gathering." It states

> When there has been a determination that his attendance is in the interest of the agency because it will further agency programs or operations, an employee may accept a sponsor's unsolicited gift of free attendance at all or appropriate parts of a widely attended gathering of mutual interest to a number of parties. A gathering is widely attended if, for example, it is open to members from throughout a given industry or profession or if those in attendance represent a range of persons interested in a given matter. For employees subject to a leave system, attendance at the event shall be on the employee's own time or, if authorized by the employee's agency, on excused absence pursuant to applicable guidelines for granting such absence, or otherwise without charge to the employee's leave account.

Under this gift acceptance exception, individual written determinations of agency interest must be made by the agency designee when the sponsor (or a majority of the sponsors members) has an interest that could be substantially affected by the performance or nonperformance of the employee's official duties.

As you indicated in your attachments, there may be occasions when the gift acceptance exception for widely attended gatherings is applicable to free attendance by DoD employees at gatherings that include sporting activities. However, use of this exception is never appropriate for free attendance at sporting events when there is no opportunity to gather with all the participants representing a wide range of persons interested in a given matter. For example, a DoD employee could not use this exception to accept free attendance at a golf tournament hosted by a defense contractor when the employee would only have the opportunity to converse with the other three

members of the foursome. Similarly, a DoD employee may not use this exception to accept free attendance to sit in the stands with the donor at a Super Bowl game or tennis match.

The widely attended gathering exception may be used when there is a gathering, usually of twenty people or more, comprised of a range of persons interested in a given matter, when the proper determinations have been made. For example, a DoD employee with official interest in the installations surrounding a community may use this exception to accept free attendance to a dinner party hosted by a local civic association if the other invitees have similar interests. Specifically, representatives of the Office of Government Ethics have agreed that if the Governor of Maryland invited the Secretary of Defense to the Preakness (horse races) along with other officials who are interested in the well being of Maryland military installations, the Secretary may accept free attendance at the event when the invitees meet in the confines of the Governor's tent where they are afforded the opportunity to gather and converse immediately before, during, or immediately after the sporting event. The critical factor is whether there is an opportunity to exchange ideas in a gathering that is associated with the sporting activity.

Many times, free attendance at events may be accepted under other gift acceptance exceptions even when the widely attended gathering exception is not appropriate. For example, there are specific exceptions for when an invitation comes from a personal friend or relative or when attendance costs up to $20. With regard to the Greater San Antonio Chamber of Commerce Golf Tournament, the information you provided indicates that the event would meet the criteria of either one of the following gift acceptance exceptions:

(a) 5 CFR 2635.204(h) Social invitations from persons other than prohibited sources. An employee may accept food, refreshments and entertainment, not including travel or lodgings, at a social event attended by several persons where:

(1) The invitation is from a person who is not a prohibited source; and

(2) No fee is charged to any person in attendance.

(b) Joint Ethics Regulation, 5500.7-R, section2-202.a. Events Sponsored by States, Local Governments or Civic Organizations. A DoD employee may accept a sponsor's unsolicited gift of free attendance for himself and an accompanying spouse at an event sponsored by a State or local government or by a civic organization exempt from taxation under 26 USC 501 (c)(4) . . ., when:

(1) The Agency Designee has determined that the community relations interest of the Agency will be served by the DoD employee's attendance;

(2) The cost of the DoD employee's and the spouse's attendance is provided by the sponsor in accordance with 5 CFR 2635.204(9)(5) . . .; and

(3) The gift of free attendance meets the definition in 5 CFR 2635.204(9)(4) ....

I recommend that you rely upon one of the two exceptions described above for the events taking place in San Antonio. Similar events should be analyzed against the guidance set out in this memorandum.
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I hope this information is helpful to you. If you have other this matter, you may contact me at (703) 697-5305.

s/s
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April 15, 1996

MEMORANDUM FOR DESIGNATED AGENCY ETHICS OFFICIALS
DEPUTY DESIGNATED AGENCY ETHICS OFFICIALS

SUBJECT: Incentives for Performance of Official Duty

Interesting facts have recently come to light in a Component of the Department of Defense (DoD). A DoD employee in charge of the Component's Saving Bond Campaign, an official program of the Federal Government, decided to encourage attendance by canvassers at the orientation meeting by giving out door prizes at the meeting. The prizes came from the local Credit Union, Civilian Welfare Fund, etc. One prize was the temporary use of an executive parking space.

Issues regarding solicitation of gifts from non-Federal entities, especially from prohibited sources, were addressed immediately and the DoD Component was strongly urged to return those prizes to the donors due to the prohibitions in 5 CFR 2635.202(a) and 702(a). The DoD Directive on Savings Bonds, DoDD 5035.6, was silent on the matter of incentive gifts to canvassers, although it specifically prohibits incentive gifts to purchasers of bonds. As for prizes paid for by appropriated funds, such as the executive parking space, a statute, 5 USC 5536, is applicable. That statute basically prohibits "extra pay for extra services." Savings Bond canvassers are employees on official duty, and are expected to attend the orientation meeting. As such, they are specifically prohibited from receiving any additional pay or allowances for this extra duty.

In addition, several Comptroller General opinions prohibit giving to employees or others gifts that are paid for by appropriated funds, unless there is specific statutory authority for the gifts (such as for official award programs). See 68 Comp. Gen. 226 (1989), 53 Comp. Gen. 770 (1974), 54 Comp. Sen 976 (1975), 57 Comp. Gen. 385 (1978), all discussed in GAO/OGC-91-5 Appropriations Law - Volume I, Chapter 4, section 8.

I hope this information is helpful to you.

s/s

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Standards of Conduct Office

GIFTS TO SUPERIORS UPON DEPARTING STATION

by

Mr. Michael J. Wentink
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(U)

Introduction.

It's that time of year again when senior officers change their duty station and many retire. When that happens, their subordinates often wish to honor their service to the organization and, if they are retiring, to the Army and the United States. In addition to the ceremonies and other celebrations, gifts of refreshments, food, entertainment, plaques and other remembrances are often involved. These gifts create issues under the *Standards of Ethical Conduct for Employees of the Executive Branch* and the Department of Defense (DOD) *Joint Ethics Regulation*. The following article will help you deal with these gift issues.

What is the General Rule?

The general rule is two-fold. First, employees may not directly or indirectly give gifts to an official superior, or solicit other employees to contribute to or give a gift to an official superior. Second, employees may not accept gifts from employees who are paid less than they are unless there is a personal basis justifying the gift **and** there is no subordinate-official superior relationship between them.

Are There Any Exceptions?

The normal social interaction of the workplace requires these basic rules against gifts to protect junior employees, avoid coercion, and to ensure that senior employees do not abuse their official Government positions for their own gain or that of someone else. However, this same normal social interaction of the workplace requires some exceptions to the rule. These exceptions fall into two basic categories: the general "occasional basis" and the "special, infrequent occasions" exceptions.

Occasional basis: These are the common sense situations, most of which hardly seem to need an "exception." But, with the blanket prohibition, the exceptions are needed so as not to interfere with normal office social interaction. The exceptions are as follows:

- Food and refreshments shared in the office.

- Personal hospitality at home of a type and nature customarily provided by the employee to friends.

- Customary gifts given in connection with receipt of personal hospitality.

- Items, other than cash, with an aggregate market value of $10 or less on any occasion on which gifts are traditionally given or exchanged.

This means that it is perfectly acceptable to bring a cake to the office, or to bring dishes of food for an office pot luck. Employees may invite their supervisors to dinner at their home (note, however, that under this exception an employee may ***not*** entertain his or her supervisor at the employee's favorite restaurant). When employees are invited to their supervisor's home for dinner, they may bring a bottle of wine or flowers. Members of an office may participate in a holiday exchange of gifts as long as no one feels "pressured" to participate.

While the last exception listed above permits employees to give gifts to their bosses for many different types of occasions such as holidays, birthdays and other occasions, we suggest that it be used sparingly. Just because an exception permits a gift does not mean that it is necessarily appropriate, especially in a military environment.

Solicitation of contributions are not permitted under this “occasional basis” exception except for the occasional food and refreshments to be shared in the office among several employees. Accordingly, even though a birthday gift for the boss might be technically permissible, contributions may not be solicited for the gift.

Special, infrequent occasions. This category permits a "gift appropriate to the occasion," and solicitation of contributions in a “nominal amount” from Army employees in “donating groups,” in the following two situations:

- Infrequently occurring occasions of personal significance such as marriage, birth of child, or illness (this does not include birthdays or other annual celebrations; it does not include official visits to commands or other organizations by a visiting Army or other DOD dignitary; and it does not include promotions).

- Occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

The latter exception often comes into play within the Department of the Army during the normal summer rotation cycle. Gifts from subordinates upon retirement and permanent change of station (PCS) are permitted. However, note that a PCS gift is not permitted if the officer is merely moving up in the chain of command; such a "transfer" does not "terminate [the] subordinate-official superior relationship."

DOD has supplemented this rule in the Joint Ethics Regulation (JER) to require that any gift or gifts "appropriate to the occasion" should not generally exceed $300 in value from any donating group. This general $300 limit does not include the cost of food, refreshments and entertainment provided to the honoree and his personal guests to mark the occasion for which the gift is given. The JER also defines the "nominal amount" that may be solicited in the way of voluntary contribution as not exceeding $10.

"Donating group" is not defined. This permits employees to do what make sense under the circumstances. However, they should work with their Ethics Counselor, because if their scheme stretches the limits of credulity, they will not only embarrass themselves, but also the person whom they are trying to honor. For example, it might be appropriate for each brigade to give a gift to a departing division commander (assuming that he is PCS'ing out of the chain of command); but it would be inappropriate for each battalion to give a gift. Similarly, while it might be appropriate for the general's staff group to give her a $300 gift upon her retirement, it might be inappropriate for each staff section to do so. This does not, however, restrict various staff sections and other groups from presenting framed certificates of honorary membership, simple plaques reflecting the honoree's service, and similar presentation items of little intrinsic value.

There is a "technical" aspect to the DOD rule. If an employee contributes as part of more than one "donating group," the total value of all gifts given by both donating groups normally should not exceed $300. For example, if the commander's Executive Officer (XO) contributes to both the gift from the staff group and the gift from his former battalion, the total value of the gifts from the staff and that battalion normally should not exceed $300. This also means that, if the XO's wife also contributes to the Officers' Spouses Club gift to the departing commander's spouse, the total value of the gifts from the staff and the spouses club may not exceed $300 **unless** there is in fact a separate and distinct basis for the spouses club gift. For example, perhaps the commander's spouse was the president of the club, and cherished and loved by all the members for his or her good works; in such a case, the gift from the

spouses club would be because of the spouse's personal stature within the military community, not just to honor the general's PCS or retirement, *i.e.*, an indirect gift to the departing officer.

Finally, "donating groups" may not band together to buy the departing commander one **large** gift that is intended to circumvent the normal maximum of $300. For example, a print that costs $250 paid for by the officers of the command, which is then framed for $150 by the non-commissioned officers, could be an improper gift. A $1,500 set of golf club, with bag, balls and other paraphernalia, would be improper even though a number of individual "donating groups" purchased individual parts of the set, none of them exceeding $300.

Recently, the Department of Defense changed the *Joint Ethics Regulation* to permit the $300 limit to be exceeded in certain cases for those special occasions where the superior-subordinate relationship is being terminated. However, we do not believe that this is an exception that should be exercised in the normal course of events.. The gift must still be "appropriate to the occasion." We advise and counsel that $300 is a good test of what is "appropriate."

What to Do if You Receive an Improper Gift?

The obvious answer is to prevent improper gifts in the first place. The departing official should make it known that there are rules concerning gifts and he expects them to be followed. The members

of the command should already have received training and other reminders concerning the rules. The official's Ethics Counselor should be alert to potential problems and provide necessary guidance.

But, what about the gift? There are three options: refuse or return it; pay for it (in full); or accept it on behalf of the Army or the morale welfare fund, as appropriate. Accordingly, if someone received one of the following gifts that were "inappropriate to the occasion," he or she might direct that a $500 sword be displayed in the post museum; a $400 clock might adorn the wall of the enlisted club; a $1,500 set of golf clubs be returned to the donating group (or the officer might reimburse the donating group); and the $200 coffee service from the local chamber of commerce might remain with the official's office and be used by his or her successors when they entertain official visitors.

Yes, even the $200 coffee service mentioned above is improper. The JER $300 figure is not applicable here because this is not a gift from other employees; rather, it is a gift from an outside source and given because of the employee's official position. Different rules apply to this gift; it exceeds $20 in value and no other exception would permit the departing official to accept it.

IV. Conclusion.

One would instinctively think that the rules surrounding gifts in the office should be relatively simple. For the most part, they are. However, it's the facts that complicate things. For many different reasons, not all of them necessarily laudable, employees want to give their supervisors or other senior

employees gifts. And, although the general rule is no gifts, they work really hard to force their situation into one of the exceptions. You are encouraged to seek the advice of your Ethics Counselor if you have the slightest concern about any gift that is offered to you. Finally, we have often found that departing or retiring general officers or senior employees are not interested in groups collecting money and buying them farewell gifts. In such cases, we encourage them to issue such guidance to their personnel. Otherwise, before you PCS or retire, we recommend that you seek the advice and counsel of your Ethics Counselor and direct your Ethics Counselor to ensure that your subordinates are aware of the rules.

See also, **TJAGSA Practice Notes**

Faculty, The Judge Advocate General's School

Major Stephen E. Castlen & Captain Holly O. Cook

Administrative and Civil Law Notes

An Overview and Practitioner's Guide to Gifts

Published in the Army Lawyer

NOTE: This article does not reflect the 2 January 1997 change to the gift rules (JER 2-203(a)(2)) which allows the value of gifts on special infrequent occasions to exceed $300 if the gift is: appropriate to the occasion; is given on an occasion that severs the superior/subordinate relationship, and; is uniquely linked to the departing employee's position of tour of duty and commemorates the same.

(Cite as: 63 FR 69992)

Standards of Ethical Conduct for Employees of the Executive Branch
Friday, December 18, 1998

ACTION: Final rule; amendments.
EFFECTIVE DATE: January 19, 1999.
PART 2635--[AMENDED]
1. The authority citation for part 2635 continues to read as follows:

Authority: 5 U.S.C. 7301, 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

2. Section 2635.203 is amended by revising paragraph (e) and adding a new Example 2 after that paragraph to read as follows:

s2635.203 Definitions.

* * * * *
(e) A gift is solicited or accepted because of the employee's official position if it is from a person other than an employee and would not have been solicited, offered, or given had the employee not held the status, authority or duties associated with his Federal position.
* * * * *
Example 2: Employees at a regional office of the Department of Justice (DOJ) work in Government-leased space at a private office building, along with various private business tenants. A major fire in the building during normal office hours causes a traumatic experience for all occupants of the building in making their escape, and it is the subject of widespread news coverage. A corporate hotel chain, which does not meet the definition of a prohibited source for DOJ, seizes the moment and announces that it will give a free night's lodging to all building occupants and their families, as a public goodwill gesture. Employees of DOJ may accept, as this gift is not being given because of their Government positions. The donor's motivation for offering this gift is unrelated to the DOJ employees' status, authority or duties associated with their Federal position, but instead is based on their mere presence in the building as occupants at the time of the fire.
* * * * *
3. The undesignated introductory text of s2635.204 is amended by revising the first sentence to read as follows:

s2635.204 Exceptions.

The prohibitions set forth in s2635.202(a) do not apply to a gift accepted under the circumstances described in paragraphs (a) through (l) of this section, and an employee's acceptance of a gift in accordance with one of those paragraphs will be deemed not to violate the principles set forth in s 2635.101(b), including appearances. * * *
* * * * *
4. Paragraph (a) of s2635.204 is amended by adding the words "per source" before the words "per occasion"
***69994** in the first sentence, and by adding a new Example 5 after paragraph (a) to read as follows:

s2635.204 Exceptions.

(a) * * *
Example 5: During off-duty time, an employee of the Department of Defense (DOD) attends a trade show involving companies that are DOD contractors. He is offered a $15 computer program disk at X Company's booth, a $12 appointments calendar at Y Company's booth, and a deli lunch worth $8 from Z Company. The employee may accept all three of these items because they do not exceed $20 per source, even though they total more than $20 at this single occasion.

TRAVEL-RELATED GIFTS

Outline of Instruction

I. REFERENCES.

A. 5 U.S.C. э 7342. (Foreign Gifts Act)

B. 31 U.S.C. э 1353. (Acceptance of Travel)

C. DoD 5500.7-R, The Joint Ethics Regulation (JER), Chapter 4.

D. Joint Federal Travel Regulation (JFTR), && U3125, U2010, and U7900-7908.

E. Joint Travel Regulation (JTR), Vol II, && C2204, C1058, and C4900-4908.

F. Presidential Memorandum on Restriction of Government Aircraft, February 10, 1993.

G. OMB Bulletin 93-11, Fiscal Responsibility and Reducing Perquisites.

H. DoD Dir. 4500.56, subject: DoD Policy on the Use of Government Aircraft and Travel (2 Mar 97). (supersedes DEPSECDEF Policy Memos of 9 Oct 95, 9 May 95, and 10 Jun 94).

I. SECARMY memorandum, subject: Policy for Travel by Department of the Army Officials (8 Dec 95).

J. HQDA Letter 55-96-1, Subject: Acceptance of Payments from a Non-Federal Sources for Official Expenses (30 Oct 96) (New letter pending publication.).

K. Marine Corps Order P5800.16, “Marine Corps Manual for Legal Administration” (LEGADMINMAN) dtd 1 Apr 98; Ch. 15

L. Secretary of the Navy Instruction (SECNAVINST) 4001.2G, “Acceptance of Gifts” dtd 16 Sept 96, w/ch. 1 dtd 16 Apr 97; para 5.o.

II. INTRODUCTION. Fiscal principles/how can we accept these gifts/why?

III. ACCEPTANCE OF TRAVEL EXPENSES FOR OFFICIAL TRAVEL FROM NON-FEDERAL SOURCES (31 U.S.C. э 1353; 41 CFR 304; JER 4-101; JFTR , Chapter 7, Part W, && U7900-7908; JTR, Chapter 4, Part Q, && C4900-4908; HQDA Letter, Subject: Acceptance of Payments from a Non-Federal Source for Official Travel Expenses (30 Oct 96) - Expect New Letter Soon.

A. Travel for attendance at meetings or similar functions under 31 U.S.C. э 1353. Unsolicited gifts to the Government may be accepted.

1. Travel Approval Authority must conduct a conflict of interest analysis to determine whether acceptance would cause a reasonable person with knowledge of relevant facts to question the integrity of agency programs or operations. Must submit written determination to Ethics Counselor for concurrence. To resolve the conflict issue, TAA must consider all relevant factors, including the six factors from 31 CFR 304:

. a. Identity of the Source;

b. Nature & Purpose of the meeting or similar function;

c. Identity of the other expected participants;

d. Nature and sensitivity of matters pending in the agency affecting the interests of the source;

e. Significance of the traveler's role in such matters; and

f. Monetary value and character of the travel benefits.

2. Payment may be accepted for travel, subsistence and related expenses, either in-kind or check payable to the agency (no cash), for a "meeting or similar function" not required to carry out the agency's statutory or regulatory authority (attendance at promotional vendor training or other events primarily intended for marketing products is inappropriate).

3. Travel approving authority is the 31 U.S.C. э 1353 approval authority. No superior travel approving authority required.

4. If over $250 accepted, traveler initiates report (after travel) through the approval authority, through the local Ethics Counselor to: Army, DA-SOCO; Navy, through chain of command and are consolidated at Assistant General Counsel (Ethics); Air Force, through local SJA or servicing legal office to HQ USAF/JAG for forwarding to SAF/GC; Marine Corps, all reports are consolidated by CMC, (Code JAR), and sent to Assistant General Counsel (Ethics). Reports are consolidated and submitted to OGE semi-annually. Use new GSA Form, SF 326.

5. Payments from a non-federal source may not be used for first-class travel (Unless SECARMY approves), only coach or premium-class (less than first-class, e.g., business class) (JFTR, & U3125 (7/1/94), JTR, Vol II, & C2204, see V.D.7. below).

B. SPOUSE TRAVEL UNDER 31 U.S.C. ' 1353 (JFTR & U7902; DOD, OGC Memorandum, Subject: Spousal Travel Under 31 U.S.C. э 1353 (Sept 8, 1995), 42 C.F.R. 304, "Federal Travel Regulation: Acceptance of Payment from a Non-Federal Source for Travel Expenses.")

1. When a non-Federal source pays for spouse travel, the rules for acceptance are more lenient.

2. Agency may accept (approval authority for Army is SECARMY) when the spouse's presence at the event is "in the interest of the agency" *i.e.*, spouse will:

   a. support agency's mission or substantially assist employee in their official duties, or

   b. attend a ceremony where the employee will receive an award or honorary degree, or

   c. participate in substantive programs related to the agency's programs or operations.

C. Travel expenses from foreign governments.

1. The Foreign Gifts Act, 5 U.S.C. э 7342(c)(1)(B)(ii), governs if travel begins and ends outside the United States. See also JER 4-103, DoD Directive 1005.13, and AR 672-5-1, para 7-14.

2. Acceptance must be "appropriate" and "consistent with the interests of the United States."

a. Prior approval is required unless "impracticable." Approval must come from someone in the recipient's chain of command or supervision in the grade of O-7, GS-16 or higher.

b. If prior approval is not obtained, then a report to the approval authority is required.

IV. INCIDENTAL TRAVEL BENEFITS (JER, chapter 4, section 2; JFTR && U3125 and U2010; and JTR & C2204)**.**

A. Federal Government Property. Anything that a DoD employee receives as a result of official travel belongs to the Federal Government unless it falls under a gift exception (5 C.F.R. part 2635, Subpart B, and JER chapter 2).

1. Frequent Traveler Benefits. (JER 4-201a.)

a. Frequent flyer mileage credits earned on official travel belong to the Federal Government and may only be used on subsequent official travel. First consider using them for free tickets, although they may also be used for upgrades (airline, rental car, or hotel).

(1) They may not be used to upgrade to first-class airline seats, only to premium-class.

(2) If there is no premium-class, then they may not be used for airline seat upgrades at all.

b. If official and personal miles are mixed in the same account so that they are impossible to segregate, all miles belong to the Federal Government. Those miles may only be used for

official travel. Therefore, keep separate accounts, or keep detailed records of the one account.

2. Awards and prizes (merchandise) from travel services on official travel belong to the Federal Government.

B. Personal Property. Benefits that can't be used for official purposes may be accepted if a gift exception (5 C.F.R. Part 2635, Subpart B, and JER chapter 2) applies.

1. On-the-spot upgrades may be accepted if they meet the gift exceptions. May accept if generally available to the public, all Federal employees, or all military members. Do not accept if offered because of traveler's rank of official position.

a. Should not accept while traveling in uniform.

b. Travelers should not try to manipulate the system to maximize upgrades. JTR and JFTR impose an obligation of prudence on official travelers to minimize expenses.

2. Cash or credit rebates from personal credit cards used on official travel are not the property of the Federal Government and may be accepted (Comp. Gen. Decision B-236219, Matter: Use of Discover Charge Cards, May 4, 1990; Comp. Gen. Decision B-270423, Matter: Bonus Points for Use of Personal Credit Cards for Certain Official Travel Expenses).

3. "Gold Card" Memberships based upon accumulated miles, even if official miles, may keep the benefits (usually free upgrades). (JER 4-202b.)

4. Getting "bumped" on official travel. JER 4-202d..

a. Benefits, such as free tickets, as a result of being *involuntarily* bumped from an overbooked flight on official travel belong to the Federal Government. The traveler remains on Government time.

b. Benefits as a result of voluntarily relinquishing a seat on an overbooked flight belong to the traveler and can be used on personal travel. The traveler is on his own time and may not

give up the seat if it would interfere with mission accomplishment.

V. USE OF FIRST-CLASS AIRLINE ACCOMMODATIONS ON OFFICIAL TRAVEL

(JFTR & U3125 (7/1/94), and JTR, Vol II, & C2204).

A. Policy: all official travel by air will be coach-class, with limited exceptions (see references G and H).

B. Exceptions. First-class accommodations may only be authorized (Army approval authority is SECARMY) under the following circumstances:

1. No other accommodations are reasonably available (within 24 hours of required arrival/departure time);

2. Travel is by a disabled employee whose condition necessitates first-class travel; or

3. Exceptional security circumstances exist.

C. Report all purchased first-class travel to GSA within 60 days of the end of each fiscal year.

D. Premium-class (other than first-class) may be used under the following circumstances:

1. Regularly scheduled flights along the required route only provide premium-class seats;

2. No space is available in coach, and travel is urgent and cannot be postponed;

3. Travel by an employee with a disability substantiated in writing by competent medical authority;

4. Exceptional security circumstances exist;

5. Travel on a foreign flag carrier has been approved and the sanitation or health standards in coach are inadequate;

6. Overall savings to the Government would result, such as avoidance of additional subsistence costs, overtime, or lost productive time incurred while waiting for available coach seats;

7. Travel costs are paid by a non-federal source. NOTE: Payments from a non-federal source may not be used for first-class travel, only coach or premium-class;

8. Travel is in excess of 14 hours, and begins or ends in a foreign country is now only authorized premium upgrade in very limited circumstances.

E. Upgrades: a person traveling on TDY may use his or her own personal travel benefits or money to upgrade to first-class, but not while traveling in uniform.

VI. CONCLUSION.

SECRETARY OF THE ARMY
Washington

March 5, 1999

MEMORANDUM FOR DESIGNATED AGENCY ETHICS OFFICIAL

SUBJECT: Determination of Agency Interest in Professional Development Events

In accordance with 5 C.F.R. § 2635.204(g)(3)(ii), I determine that it is in the Army's interest for Army personnel (and accompanying spouses, if invited, and if others in attendance will generally be accompanied by spouses) to accept free attendance at the meetings listed below, provided that the Agency Designee (as defined in *Joint Ethics Regulation*, DOD 5500.7-R, para. 1-202) has specifically determined that acceptance by the individual invited will further the programs, operations and policies of the organization to which that individual is assigned, and that acceptance will not undermine the integrity of the Army's operations or programs.

This determination does not apply to acceptance of travel and travel-related expenses from non-federal sources. Acceptance of such offers is governed by 31 U.S.C. § 1353; 41 C.F.R. § 304-1; and HQDA Letter 55-96-1.

This determination does not apply to Army personnel who have a financial interest, as defined in 5 C.F.R. § 2635.403(c), in the organizations hosting the events, or who have "covered relationships" as defined in 5 C.F.R. § 2635.502(b).

This determination does not apply to sporting events or golf tournaments held in conjunction with the listed events. Army personnel who wish to participate in collateral recreational activities must do so while off-duty and at their own personal expense.

This determination is not approval for expenditure of appropriated funds for official travel to attend these events. As with any other official travel, the travel approving authority must consider all of the facts and circumstances and determine that it would be proper to expend appropriated funds.

This determination is not an endorsement of the events, or of the sponsoring organizations.

- Institute of Land Warfare (ILW) Breakfast Meeting Jan. 7, 1999

- Association of the U.S. Army (AUSA) Army Aviation Symposium — Jan. 11-13, 1999
- ILW Breakfast Meeting — Feb. 11, 1999
- AUSA Winter Symposium — Feb. 16-18, 1999
- AUSA Special Operations Symposium — Mar. 1-3, 1999
- ILW Breakfast Meeting — Mar. 4, 1999
- ILW Breakfast Meeting — Apr. 1, 1999
- ILW Breakfast Meeting — May 6, 1999
- Army Aviation Association of America Convention — May 9-12, 1999
- ILW Breakfast Meeting — Jun. 3, 1999
- ILW Breakfast Meeting — Jul. 8, 1999
- ILW Breakfast Meeting — Aug. 5, 1999
- ILW Breakfast Meeting — Sep. 2, 1999
- Army Acquisition Reform Symposium — Mid-Sep., 1999
- AUSA Yearly Membership Meeting — Oct. 11-13, 1999
- Space and Missile Defense Symposium — Nov. 30-Dec. 2, 1999
- ILW Breakfast Meeting — Dec. 9, 1999

// signed //

Louis Caldera

August 29, 1997

FACT SHEET

Acceptance of Payment from a Non-Federal Source for Travel Expenses While In Official Capacity

Section 1353 of title 5, *United States Code,* permits non-Federal sources, such as organizations, associations, or businesses, to pay the Government for the expenses of transportation, accommodations, and meals for Government officials and employees in their official capacities to attend meetings and similar functions such as conferences and symposia.

The law has been implemented by the General Services Administration (Federal Travel Regulation, 41 CFR Part 304-1), and DoD (DoD 5500.7-R (Joint Ethics Regulation, Chapter 4); The Joint Travel Regulation (JTR) for civilians and the Joint Federal Travel Regulation (JFTR) for members of the uniformed services). The requirements are summarized below:

Before payments for travel may be accepted from a non-Federal source, the travel approving authority must make the following determinations:

! Payment is for attendance at a **meeting or similar function**. This excludes events required to carry out an agency's statutory and regulatory functions. It also excludes promotional vendor training. The event need not be "widely attended."

! Payment is for travel related to the employee's official duties.

! Payment is from a non-Federal source that is not disqualified on conflict of interest grounds. A "conflicting source" of payments is a non-Federal organization that "has interests that may be substantially affected by the performance or nonperformance of the employee's duties." In this case, the official must determine that "the agency's interest in the employee's . . . attendance at or participation in the event outweighs concern that acceptance of the payment may or may reasonably appear to influence improperly the employee in the performance of his/her official duties."

! The travel is primarily for the benefit of the Government, not the organization paying for it.

These determinations must be made in writing. An example is attached. The acceptance of travel benefits must be approved by the employee's travel approving authority in advance.

Benefits in kind (e.g., plane tickets, prepaid hotel reservations) are preferred. **Cash may not be accepted by DoD employees**. If benefits are provided by reimbursement of expenses, checks must be made out by the non-Federal source to the U.S. Treasury or the DoD Component, not to the employee.

Reports:

Prior to acceptance of the benefits, the travel approving authority must approve the acceptance of the travel benefits. A model memorandum is included as Attachment 1. Please note that ethics counselor concurrence is required when the employee's official duties could effect the interests of the non-Federal source.

After the travel has been completed, if the value of the travel benefits exceed $250, a report (Attachment 2) must be forwarded to the ethics counselor for inclusion in the semi-annual report to the Office of Government Ethics. The travel approving authority's findings, Attachment 1, must be included.

Since these travel benefits are provided to the Government, they should not be listed as gifts on financial disclosure documents (SF 278 or OGE Form 450) of the affected Government employee.

Please call me or the attorneys in the Standards of Conduct Office at (703) 695-3272, if you have any questions.

David W. Ream
Director

travel.ho

Attachments

date

MEMORANDUM FOR RECORD

SUBJECT: Acceptance of Travel Benefits Under 31 USC 1353

Travel benefits have been offered by __non-Federal source's name__ to accommodate the participation of _DoD employee's name_ in _name of meeting or similar event_ on _date of meeting_ in _place of meeting_. The DoD employee will be participating in an official capacity and travel benefits will be provided in kind or by check or similar instrument made payable to the "U.S. Treasury or _DoD Component name_". I make the following determination regarding acceptance of these travel benefits by this DoD Component:

> Acceptance of these travel benefits would not cause a reasonable person with knowledge of all the relevant facts to question the integrity of the DoD Component's program or operations. I have considered any impact the performance or nonperformance of the DoD employee's official duties might have on the non-Federal source.

The acceptance of these travel benefits is approved. This memorandum has been coordinated with the Standards of Conduct Office.

Travel Approving Authority

Coordination: DoD SOCO

Concur _____
Nonconcur _____

Attachment 1 {{Note: Attachment now obsolete--see SF 326]]]

MEMORANDUM FOR: STANDARDS OF CONDUCT OFFICE, OFFICE OF GENERAL COUNSEL, DEPARTMENT OF DEFENSE

SUBJECT: Report of Payments for Travel Expenses from Non-Federal Source Pursuant to 31 U.S.C. э 1353

Name:

Grade or Rank:

Duty Title:

Office Address:

Telephone:

Event:

Sponsor of Event:

Location of Event:

Date of Event:

Travel Dates:

Nature of Participation:

Non-Federal Source of Payment:

Nature of Payment:

Total Value of Benefits Received:

Attachment: 1353 Travel Approving Authority Determination

Attachment 2

INFORMATION PAPER

DAJA-SC
7 July 1997

SUBJECT: Use of First-Class Airline Accommodations on Official Travel

1. PURPOSE: To provide information regarding official travel using first-class airline accommodations.

2. FACTS:

a. The JTR and the JFTR were revised effective 29 October 1993, to reflect President Clinton's directive entitled "Government Fiscal Responsibility and Reducing Perquisites."

b. It is US Government policy that Federal employees on official business who use commercial air carriers for domestic and international travel shall use coach-class accommodations, with limited exceptions.

(1) First-class accommodations may be purchased with appropriated funds, with Secretary of the Army approval, when:

(a) No other reasonably available accommodations exist. "Reasonably available" means coach-class or premium-class (other than first-class) seats are available within 24 hours of proposed departure or arrival time. However, accommodations are not "reasonably available" if the employee will arrive at the duty site after the required reporting time, or depart earlier than the scheduled duty completion time.

(b) Travel by a disabled employee whose condition necessitates first-class travel. This must be substantiated in writing by competent medical authority. An attendant, whose services are required en route, may also fly first-class.

(c) Exceptional security circumstances. These include, but are not limited to, travel by agents-in-charge of protective details, couriers accompanying controlled pouches, and employees whose use of less than first-class would endanger their lives or Government property.

(2) Premium-class (other than first-class), such as business-class, may be used when:

(a) Regularly scheduled flights along the required route only provide premium-class seats.

(b) No space is available in coach and travel is urgent and cannot be postponed.

(c) Travel involves an employee with a disability substantiated in writing by competent medical authority. An attendant may accompany him in premium-class, if necessary.

(d) Security purposes or exceptional circumstances exist.

(e) When travel on a foreign flag carrier has been approved and the sanitation or health standards in coach are inadequate.

(f) When overall savings to the Government would result, such as avoidance of additional subsistence costs, overtime, or lost productive time incurred while waiting for available coach seats.

(g) When travel costs are paid by a non-federal source and properly accepted under statutory authority. Payments from a non-federal source may not be used for first-class travel, only coach or premium-class.

(h) When travel is in excess of 14 hours; however, it is Secretary of the Army policy is that such travel will not be routine, and must be fully justified, with a few exceptions (see subpara (j) below). When employees fly premium-class, they are not authorized rest periods en route or upon arrival.

(i) Frequent flyer benefits earned on official travel may be used for accommodations upgrades to premium-class on future official travel, but not to first-class.

(j) It is Secretary of the Army policy that three and four star general officers are authorized to travel in premium-class (less than first-class) while travelling overseas on official business. This authorization extends to the principal only.

c. The rules with respect to the use of frequent traveller benefits are:

(1) The preferred use of bonus miles and other such benefits earned on official travel continues to be the reduction of future official travel costs.

(2) For accomodations other than air line seats, (such car rentals or hotels) frequent flyer points earned on official travel may be used for upgrades.

d. "On-the-spot" upgrades.

(1) Upgrades may be accepted if generally available to the public, all Federal

employees, or all military members. They may not be accepted if offered because of a traveller's rank or official position.

(2) Military members should not accept upgrades to first-class while travelling in uniform because of the potential for adverse public perceptions of extravagance.

e. A person travelling on TDY may use his or her own personal travel benefits or funds to upgrade to first-class. Again, to avoid adverse public perceptions, upgrades to first-class should not be done when travelling in uniform.

Mr. Novotne/DSN 227-0921

Frequent Flyer Miles
& Other Travel-Related Benefits --
To Whom Do They Belong?

by

Mr. Michael J. Wentink
Army Standards of Conduct Office
Office of The Judge Advocate General

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I. Introduction

The Army Standards of Conduct Office has received many questions concerning the use of frequent flyer miles and related benefits received while on official Government temporary duty (TDY) orders. This is good, because the rules are not easy to understand; they are complicated (some would say Byzantine), and they are not always intuitive or logical. As a result, we encourage you to contact your Ethics Counselor to help resolve these issues. The purpose of the following article is to give you a basic understanding as to how to deal with these matters.

The travel industry is constantly coming up with innovative ideas to induce your business and create brand loyalty. For example, airlines give "mileage" that their customers can accumulate and use for free upgrades and tickets in the future. When you are "bumped" by an airline, you might receive a free overnight in a local hotel, meals and a coupon good for a free round-trip ticket; this "bump" might be voluntary or involuntary. When you pay your TDY expenses using your personal credit card, you might receive a rebate for each dollar charged, or you might be given a frequent flyer mile for each dollar charged.

However, by law and regulation, we must always have the best interests of the United States, our Service and the taxpayer in mind when conducting Government business; not how we can best benefit personally.

II. Frequent Flyer Miles

The mileage points received from an airline for traveling TDY on its aircraft belong to the U.S. Government. There are no exceptions. Even if the Government cannot use them (for example, you retire from Government service), you may not use them for your personal travel. You may not even donate them to a charity.

These mileage points can be used only in connection with official travel (*e.g.* TDY or official permanent change of station (PCS) travel). You may also use these mileage points if, after retirement, you are issued invitational travel orders for official travel. They may not be used for travel on permissive TDY or while on leave.

Department of Defense policy is to use mileage points to reduce the cost of future official TDY travel. However, you may also use them to upgrade your seat while on official TDY travel, but **not** to First Class. You may upgrade only to something less than First Class. If there are only two classes on the flight, the higher class is considered First Class, no matter what it might be called, and you may not

upgrade. If you use official TDY travel points to upgrade to business class for an overseas flight, but the first portion of your travel in the United States (*e.g.* from your origination point to the port of embarkation) has only two classes, you may not ride in the higher (first) class section during that portion of the trip.

It is not required, but recommended, that you maintain separate accounts for your personal travel benefits and those benefits earned while on official TDY travel. However, if you keep your personal and official miles in the same airline account, you must keep track of those that belong to you and the Government because the presumption is that all of the mileage belongs to the Government.

III. Upgrades to First Class Air

The rule set out in the Joint Travel Regulation (JTR) and Joint Federal Travel Regulation (JFTR) prohibits First Class air travel except in three narrowly construed situations. Secretary of the Army approval is required if any one of these exceptions is used. However, this does not mean that you may never upgrade yourself to fly First Class while on official Army travel. You may upgrade and fly First Class in the following situations:

a. You may use your own Frequent Flyer benefits, earned while on **personal** travel, to upgrade to First Class.

b. You may use your own funds to purchase an upgrade to First Class.

c. You may accept an on-the-spot upgrade that is **not** being offered because of your grade or position, but to anyone under the circumstances (for example, you arrive late and the aircraft is full except for a First Class seat which you are offered).

d. You may use a coupon that you received because you are a member of an airline "club" by virtue of the number of miles that you have flown with the airline, even if some or all were flown on TDY. However, this must be a "no cost" upgrade, meaning that you did not "cash in" official mileage points to gain membership to the club, or exchange official points for the coupon.

If traveling in first class in one of the above situations, to avoid inappropriate appearances, military personnel should not travel in uniform.

IV. Gifts Received When "Bumped"

If you are "bumped" from a flight, or there is some other delay, the airline might provide you with a room for the night, your meals, and a coupon for a round-trip ticket anyplace in the United States. All such benefits belong to the Government. Your TDY claim should reflect no cost for the hotel room and your *per diem* should be reduced accordingly for the meals provided. The coupon for a round-trip ticket can only be used for future Government travel. Similarly, if your flight is delayed for five hours and the airline gives each of the inconvenienced passengers a coupon for a free flight, that coupon also belongs to the Government.

However, if you **volunteered** to be "bumped" and received these benefits, they belong to **you**. Your delay, however, must not interfere with your mission, nor should the Government incur any additional costs because of your delay. You are considered to be on your own time, and your travel claim must reflect this personal time.

V. Credit Cards

Numerous credit card plans offer cash rebates, discounts on future purchases, and even airline mileage points, all calculated by how much you charge. If you use your personal credit card while on TDY to charge your meals, hotel rooms, and even travel tickets, the benefits extended to you by your credit card company belong to you. For example, if you have a VISA card that is affiliated with United

Airlines, and if you buy a $500 ticket for a TDY flight on United Airlines, you receive 500 miles from VISA credited to your United Airlines account. Those 500 miles belong to you. However, the 2,000 miles that are credited to your account for the 2,000 miles that you fly on that ticket belong to the Government.

VI. Conclusion.

Some of the rules concerning the use of frequent traveller benefits are easy to understand, *e.g.*, frequent flyer miles earned while on TDY belong to the Government. However, there are many permutations in this area, especially with so many different marketing schemes constantly being developed by the travel industry. Accordingly, you are encouraged to seek the advice of your Ethics Counselor.

Gifts of Travel and Related Expenses!
Are They Legal?
Sometimes.

by

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It happens all the time. Some non-Federal entity (NFE) wants you to attend, maybe even speak at or otherwise participate in, a meeting, seminar, symposium, or training or other similar event. The invitation usually comes from a not-for-profit association, but not always; it could come from any source, even a foreign government. You, your boss, or your public affairs officer think that it makes eminent sense, and that there would be a direct and substantial benefit to the Army for you to attend. Alas, there are no travel funds. But, never mind, the NFE wants you to attend bad enough, that it offers to pay your way! Is this legal? Maybe.

It is a fundamental principle of fiscal law that it is illegal to supplement the monies that Congress has appropriated for the Army. But, there are exceptions authorized by Congress. One of these exceptions is 31 U.S.C. § 1353 which, under certain limited circumstances, permits acceptance by an Army traveler of **unsolicited** gifts of official travel expenses from NFEs. The law and implementing regulations are quite specific as to what can be accepted, and under what circumstances. Acceptance is subject to prior approval and may generate reporting requirements. It is important that both the law and regulation are understood to avoid embarrassment to the Army or the traveler.

What Kind of Events May be Paid For by a NFE?

The travel must be to a "meeting or similar function," which is defined as a conference, seminar, speaking engagement, training course, or similar event that takes place away from the employee's official station. What is more important is what it does **NOT** include. It does **NOT** include travel and meetings for carrying out the Army's statutory and regulatory functions, such as investigations, inspections, audits, and site visits. It also does NOT include travel to promotional vendor training or other meetings held for the primary purpose of marketing the NFE's products.

Examples:

- It would be permissible for a senior officer or employee to accept a gift of free travel to and attendance at a symposium sponsored by a professional organization concerning issues of significant Army interest. However, if the officer would normally be accompanied by an aide, free travel may <u>not</u> also be accepted for the aide because the purpose of the aide's travel is not to attend a meeting or similar function, but to perform his or her duties as an aide.

- It would be permissible for an Army expert in battlefield digitization to accept free travel to and attendance at a seminar where the expert will speak and participate in a panel discussion. However, it would <u>not</u> be permissible for an officer from the Army Judge Advocate General's School to

accept free transportation from the Reserve Officers Association to attend and teach at a reserve on-site training weekend, because this is part of the mission and functions of the Army JAG School.

- It would be is permissible to accept free attendance at a formal "gala" (nonpolitical) event downtown (off the installation) to honor an historical military event and its participants. But, it probably would not be permissible to accept this free attendance if the event is a fund-raiser. Such events generally lack the requisite significant and direct Army interest for Army employees to attend a fund-raiser in their official capacities. This restriction is based on the rule that we may not officially participate in or endorse fund-raising with a few notable exceptions like the Combined Federal Campaign and the Army Emergency Relief.

However (read closely, this will get a bit complicated) if you were to give an OFFICIAL speech for the Army at the fund-raising event, you are deemed not to be participating in the fund-raiser and could accept the offer of free attendance. This is permissible because the Office of Government Ethics (OGE) has determined that such free attendance on the day that you speak on behalf of the Army is not a gift to you or the Army. Finally, if it is a fund-raiser, but you are not giving an Army speech, you still might be able to accept the gift of free attendance and attend in your personal and private capacity, IF the event could be considered a widely attended gathering (a large and diverse group), and your agency designee (supervisor) determines that there is an "agency interest" in your attendance. But, in such a case, you may only accept the offer of free admission. You may not accept any actual travel expenses (i.e., transportation and lodging expenses), nor may you submit a travel voucher for such

expenses since you attended in your personal and private capacity.

What Approval is Required?

Before an Army employee may accept an offer of free travel and related expenses to a meeting or similar function, two things must happen. First, the usual determinations and approvals must be obtained for the employee's official travel to and participation in the event. Like with any other situation, the duty assigned to the employee must be appropriate and the official travel must result in significant and direct benefit to the Army. Otherwise, the employee participates on his or her own time at his or her own expense. If there is some Army interest, however, the employee may be able to participate while on permissive TDY or other administrative absence, but the employee still must travel at his or her own expense (*i.e.*, 31 U.S.C. § 1353 does not apply). The employee should obtain the advice of his or her ethics counselor to determine whether he or she may accept this personal gift of free attendance in a private capacity.

Once the determination has been made to have the employee attend, participate and travel in his or her official capacity, the travel approving authority must authorize in writing the acceptance of the gift of free travel on behalf of the Army. The approval authority must first do a "conflict of interest analysis" and obtain the concurrence of his or her ethics counselor.

The "conflict of interest analysis" is an examination of the facts and circumstances surrounding

the offer of travel and related expenses, to include who is making the offer, to whom is the offer being made, whether there is some official or private relationship between the two, and the nature and significance of any issues before the Army affecting the offeror at the time. This analysis must result in the approval authority's determination that acceptance of the travel under the circumstances would not cause a reasonable person with knowledge of the relevant facts to question the integrity of agency programs or operations; if not, the acceptance may not be approved. For example, it would be inappropriate to approve the acceptance of a gift of travel offered by a competing contractor on a procurement for which the Army official is a member of the source selection evaluation board.

Officers or employees who are their own travel approving authority may approve their own acceptance of such offers of travel and related expenses, but it also must be in writing and have the concurrence of their ethics counselor. The concurrence of the ethics counselor is required by regulation. It must be obtained before the travel commences.

If your spouse is invited to attend the event with you, his or her attendance may be approved by your travel approving authority if his or her presence at the event is in the interest of the Army. However, if the invitation includes air travel or overnight accommodations for the spouse, his or her travel must be approved by the Secretary of the Army.

Finally, if the Army traveler will actually support the event, such as being one of the symposium speakers or chairing a panel discussion, the head of the employee's organization needs to make the

decision that this support is appropriate in accordance with the DOD Joint Ethics Regulation (JER), DOD 5500.7-R, paragraph 3-211. For example, DOD does not permit appropriated fund support to an event where an admission fee is charged beyond what will cover the reasonable costs of sponsoring the event.

III. What Reporting Requirements?

You may only accept payments in-kind or by a check or similar instrument payable to the Department of the Army. You may not accept cash or a check payable to you.

If the value of the payments from the non-Federal source exceeds $250 for you, or for you and your spouse combined, you must submit a report through your Ethics Counselor to the Army Standards of Conduct Office (SOCO). The requirements for the report are set out in the Joint Travel Regulation and Joint Federal Travel Regulation. Twice a year, Army SOCO forwards all the Army reports to OGE where they become available for public inspection.

Conclusion.

Any offer of free travel to, or free attendance at, an event from a non-Federal source requires approvals before it can be accepted, ***if*** it can be accepted. In addition, the concurrence of your ethics counselor is also required. Accordingly, if you receive such an offer and would like to accept it, see your ethics counselor FIRST!

Electronic Resources for Ethics

CW4 Chilton

NOTES

CONFLICTS OF INTEREST
1ST BASICS FOR ETHICS COUNSELORS WORKSHOP
THE JUDGE ADVOCATE GENERAL'S SCHOOL

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I. REFERENCES.

a. 18 U.S.C. §§ 201, 202, 203, 205, 206, 207, 208, 209.

b. *Standards of Ethical Conduct for Employees of the Executive Branch*, 5 C.F.R. Part 2635, Subparts D, E, F.

c. *Joint Ethics Regulation*, DOD 5500.7-R, Chapters 2 and 5.

d. 5 C.F.R. Part 2640, Interpretation, Exemptions and Waiver Guidance Concerning Acts Affecting a Personal Financial Interest; Proposed Rule: 60 Fed. R. 47208, *et seq.* (11 Sep 95); Final Rule: published 61 Fed. R. 66830, *et seq.* (18 Dec 96), effective 17 Jan 97. Section 2, Chapter 5, *Joint Ethics Regulation*. JER Appendix D Rescinded!

e. 62 Fed. Reg. 48746 (17 Sep 97) - technical corrections.

II. INTRODUCTION.

III. DEFINITIONS.

A. What is a "conflict of interest"?

1. A personal interest or relationship as defined by law or regulation

2. That conflicts with faithful performance of official Federal

duty.

B. What a conflict is not.

1. Presumption of bad motive

2. Assumption of dishonesty

3. Personal animosity.

C. Conflict of Interests - Multiple Types - Defined by Focus.

1. Internal Focus:

a. Official Federal matters conflicting or appearing to conflict with a private interest as opposed to private interests conflicting with a Federal matter.

b. Three Different Types of Internal Conflicts of Interests

(1) Actual: 18 U.S.C. § 208; 5 C.F.R. Part 2635, Subparts D & F;

(2) Appearances: 5 C.F.R. Part 2635, Subpart E;

(3) Hybrid: 41 U.S.C. § 423(c), FAR Subpart 3.104.

2. External Focus:

a. Private matters conflicting with official Federal interests.

b. Two Different Types of External Conflicts of Interests:

(1) Emoluments of all kinds:

(a) Bribery: 18 U.S.C. § 201;

(b) Improper supplementation of Federal pay: 18 U.S.C. § 209;

(c) Gifts from outside sources: 5 C.F.R. Part 2635, Subpart B

(2) Representation of others concerning Federal matters:

(a) Improper representation: 18 U.S.C. 205;

(b) Improper sharing in proceeds from representation: 18 U.S.C. § 203

IV. INTERNAL FOCUS - Official Federal Matters Conflicting with Private Interests.

A. Actual Conflict of Interests: 18 U.S.C. Sec. 208; 5 C.F.R. Part 2635, Subparts D & F.

1. "***An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.***"

a. 18 U.S.C. § 208 applies to officers and employees.

b. "Employee" in *Standards of Ethical Conduct* includes enlisted personnel (see JER 1-211c., d., and e.).

c. JER 5-301 applies to enlisted personnel: "***[E]xcept as approved by the DoD Component DAEO or designee, an enlisted member, including an enlisted special Government employee, shall not participate personally and substantially as part of his official DoD duties, in any particular matter in which he, his spouse, minor child, partner, entity, in which he is serving as officer, director, trustee, partner or employee or any entity with which he is negotiating or has an arrangement concerning prospective employment, has a financial interest***."

2. What does having a conflict of interest mean?

a. If own a stock in a company, disqualified from participating in matters that affect the company, e.g.:

(1) COR on contract with company;

(2) Supervising CORs on same contract.

(3) Working on a contract requirement for which the company is a logical source.

b. Fact that employee does not make final decision is not relevant.

c. Degree of employee's influence is not relevant.

d. Employee's honesty is not relevant.

e. Disqualified from ***participating***.

3. Definitions:

a. <u>Personally and Substantially</u>.

(1) Participating through decision, approval, recommendation, investigation, or rendering advice.

(2) Participation must be of material significance.

b. Particular Matter.

(1) Includes judicial or other proceeding, application, request for ruling, contract claim, controversy, charge, accusation, arrest or any matter that...

(2) Involves deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.

c. Direct & Predictable Effect.

(1) Close causal link between action in the official matter and any expected effect of the matter on the financial interest.

(2) Immediacy of effect is not important.

(3) Degree of effect is not important - no *de minimis* rule.

(4) Don't need to know the amount of the effect.

(5) Chain of causation attenuated = no D & P

(6) Effect contingent on occurrence of events that are speculative, or independent of, and unrelated to the matter = no D & P.

d. Financial Interests.

(1) Includes current and contingent ownership,

equity, or security interest in real or personal property or business; may include debts.

(2) Includes stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust and liens.

(3) Includes rights to purchase the above, such as stock option or commodity future.

(4) Does ***not*** include a future interest such as a a beneficiary of an estate not yet settled.

e. Imputed Financial Interests are the interests of the following:

(1) The employee's spouse and minor children;

(2) The employee's general partner;

(3) An organization or entity which the employee serves as officer, director, trustee, general partner, or employee;

(4) An organization with whom the employee is negotiating for or has an arrangement concerning prospective employment

f. Note that "imputed interests" do not automatically include a spouse's employer or one with whom the spouse is negotiating or has an arrangement concerning future employment. Depends on the facts:

(1) Does spouse own stock in the company?

(2) Is spouse earning pension rights in the company?

(3) What is nature of spouse's position?

(4) Will spouse's position be affected in any way by the official matter?

g. Even if not, might have "appearances" to consider. (Will discuss later)

4. Note that "seeking employment" with a company does not <u>impute</u> its financial interests to the employee - short of negotiation or having an understanding. But, see 5 C.F.R. Part 2635, Subpart F.

a. "***Unless the employee's participation is authorized in accordance with Sec. 2635.605, the employee shall not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he is seeking employment within the meaning of Sec. 2635.603(b).***"

b. Seeking employment includes any "unsolicited" communication regarding possible employment.

5. How know/find out if potential for a conflict?

a. OGE Form 450/SF 278.

b. Training.

c. Be alert.

d. Ask questions.

6. If an employee has a conflict between an official matter and his or her financial interests (or someone else's financial interests that are imputed to the employee). How to resolve a conflict?

a. Disqualification is ***<u>not</u>*** an option!

b. JER 2-204 may require written notice of disqualification.

c. Options include:

(1) Reassignment;

(2) Change duties;

(3) Divestiture:

(a) May defer taxes with a Certificate of Divestiture.

(b) Employee requests from OGE thru agency ethics chain.

(c) Limited Ethics Counselor assistance.

(4) Individual waiver - 18 U.S.C. § 208(b)(1):

(a) See JER 5-302 for processing

(b) Requires prior coordination with OGE

(c) Be judicious (not many sent to OGE).

(5) Regulatory exemptions, 18 U.S.C. § 208(b)(2)

7. Regulatory exemptions - 18 U.S.C. § 208(b)(2) - 5 C.F.R. Part 2640.

a. Diversified mutual funds and unit investment trusts.

b. Sector mutual funds (if the “offending” financial interest is not part of the sector that the mutual fund concentrates in).

c. Employee benefit plans.

d. Interests in securities:

(1) *De minimis* exemption for matters involving parties;

(2) *De minimis* exemption for matters of general applicability;

(3) Don't forget to aggregate!

e. Exemption for certain Federal Government securities.

f. Hiring decisions;

g. Employees on leave from institutions of higher education;

h. Multi-campus institutions of higher education;

i. Exemptions for financial interests arising from USG employment, or Social Security or veterans' benefits;

"An employee may participate in any particular matter, whether of general applicability or involving specific parties, where the disqualifying financial interest arises from Federal Government salary or benefits, or from Social Security or veterans' benefits, except":

may not ***make determinations*** that individually or specially affect his own Government salary or benefits, etc.,

may not ***make determinations, requests or recommendations*** that individually or specially affect the Government salary or benefits, etc., of any person whose interests are imputed to him.

(1) What about evaluators of proposals for an A-76 procurement?

(2) Conflict probably waived by 5 C.F.R. §

2640.203(d), but

(3) There might still be an "organizational conflict of interest" problem. *See* Comp. Gen. Decision B-281224 in the Matter of DZS/ Baker LLC, decided 12 Jan 99.

j. Commercial discount and incentive programs;

k. Mutual insurance companies;

l. Exemptions for SGEs on advisory committees.

B. Appearances of a Conflict of Interests: 5 C.F.R. Part 2635, Subpart E.

1. "***Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee...***".

a. Financial Interests of Members of Household:

(1) Not the Financial Interests of Spouse and Minor Children - Already Imputed to the Employee;

(2) Financial Interests of Grown Children, In-Laws, Roommates, etc. Who are Part of Household

(3) What if Rent a Room to Someone?

b. Employees have “Covered Relationships” (all-inclusive list?)

(1) With members of their household;

(2) With relatives (close personal relationship);

(3) With persons, organizations, entities where

(a) They have or seek some business, contractual, financial relationship;

(b) Spouse, parent or dependent child are seeking employment or other financial relationship;

(c) Employee served as a officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee within the last year;

(d) Employee is an “active participant”.

c. "Catch-all" - 5 C.F.R. § 2635.702(d).

2. Resolution of an apparent conflict of interest.

a. If it looks bad, again, disqualification is not an option.

(1) Employee is disqualified.

(2) Written notice is required (JER 2-204b).

b. Other options:

(1) Same as for actual conflict situations, except

(2) Authorization by Agency Designee.

3. Extraordinary Payments from Former Employer (5 C.F.R. § 2635.503):

a. Disqualified for 2 Years.

b. "Extraordinary" if value < $10,000 ***and*** not part of standard benefits program.

b. Waiver of Disqualification by Head of Agency.

C. The Hybrid Conflict of Interest - 41 U.S.C. § 423(c), FAR Subpart 3.104, The Procurement Integrity Law.

1. "If an agency official ... participating personally and substantially in a ... procurement for a contract in excess of the simplified acquisition threshold contacts or is contacted by ... a bidder or offeror ... regarding possible non-Federal employment ..., the official shall --

a. Promptly report the contact in writing to the official's supervisor and ethics official; <u>and</u>

b. Reject the possibility of employment; <u>or</u>

c. Disqualify him/herself from further participation until agency authorizes official to resume:

(1) The bidder or offeror is no longer participating; or

(2) All discussions have been terminated.

(3) But, may not resume participation without written authorization by Head of Contracting Activity, or designee.

2. In addition, if the official intends to make the contact, or to pursue a contact, the official must also submit a written notice of this disqualification to:

    a. HCA, or designee;

    b. Source selection authority;

    c. Contracting officer.

3. The notice must:

    a. Identify procurement;

    b. Describe nature of official's participation and dates;

    c. Identify the bidder or offeror and its interest in the procurement.

4. Agency Official includes

    a. Civilian employees, including special Government employees;
    b. Members of the uniformed services;

    c. Can include nonappropriated fund employees.

5. Agency Procurement means

    a. Acquisition of goods or services (including construction);
    b. By using competitive procedures and awarding a contract;
    c. With appropriated funds.

6. Participating ... in a Federal Agency Procurement means involvement in any of the following:

    a. Drafting, reviewing, or approving the specification or

statement of work for the procurement;

b. Preparing or developing the solicitation;

c. Evaluating bids or proposals, or selecting a source;

d. Negotiating price or terms and conditions of the contract;

e. Reviewing and approving the award of the contract.

7. Contacts Concerning non-Federal Employment is **not** defined (*see* FAR 3.104-8)

V. EXTERNAL FOCUS - Private Matters Conflicting with Official Federal Interests.

A. Bribery: 18 U.S.C. § 201.

1. Crime to corruptly give, offer or promise anything of value directly or indirectly to a public official with the intent

a. To influence any official act (§201(b)(1); or

b. To influence the commission of any fraud (including any aiding, abetting, collusion, permitting, or creating an opportunity for a fraud) § 201(b)(2).

2. Definitions.

a. "Public Official" includes anyone acting for or on behalf of the U.S.; can include persons who are not Federal employees.

(1) Includes enlisted personnel.

(2) Includes support contractor employees.

b. "Thing of Value" is used throughout "title 18, and is

broadly construed to include intangibles as well as tangibles. It is the worth attached to the bribe by the defendant, rather than its commercial value.

c. "Official Act" is essentially any matter or controversy in which the U.S. has an interest.

3. Intent. Proof must show two specific elements:

a. The offender must have acted "corruptly," that is, "willfully."

b. The offender must also have acted with the intent to influence, *i.e.*, there must be an actual or intended *quid pro quo*.

4. Lesser Included Offense - Unlawful Gratuities 18 U.S.C. § 201(c) - Must not offer or take anything of value for or because of any official act performed or to be performed.

a. Varying degrees of same conduct.

b. Primary difference between bribes and gratuities = Intent to Influence.

c. 1989 Ethics Reform Act gave OGE Authority to define exceptions to 18 U.S.C. § 201(c). *See* 5 C.F.R. § 2635.202(b).

d. EC Opinions are Important - Immunization from prosecution for Unlawful Gratuities.

B. Improper Supplementation of Federal Salary: 18 U.S.C. § 209.

1. Officers and employees may not receive any salary, or contribution to, or any supplementation of salary, for their services to the U.S. from any source other than the Government.

2. Exceptions:

   a. Contributions from treasury of a state, county or municipality.

   b. May continue to participate in a bona fide pension, retirement or other plan maintained by a former employer.

   c. Does not apply to SGEs.

3. Overlap with 18 U.S.C. § 201(c), Unlawful Gratuities

   a. Distinguishable?

   b. EC gift opinion immunizes as to § 209 also?

C. Improper Representation: 18 U.S.C. § 205.

1. Officers or employees may not

   a. Act as agent or attorney to prosecute any claim against the US, or receive any gratuity, or any share of any such claim, in exchange for assistance;

   b. Act as agent or attorney for anyone before any department concerning a covered matter in which the US is a party or has a direct and substantial interest.

2. A "<u>covered matter</u>" means virtually any matter, including contracts, claims, controversies, investigations, or "other particular matter." 18 U.S.C. § 205(h).

3. Exceptions:

   a. Special Government Employees are not covered so long as they are not switching sides on the same matter or appearing before the agency in which they serve (unless > 60 days). 18 U.S.C. § 205(c).

b. Federal employees may represent other Federal employees in personnel matters. 18 U.S.C. § 205(d).

c. Federal employees may represent parents, spouse, child, or any person for whom, or any estate for which, they serve as a fiduciary. 18 U.S.C. § 205(e).

(1) Not if participated personally and substantially;

(2) Not if under official responsibility.

d. Federal employees may give statements under oath. 18 U.S.C. § 205(g).

e. H.R. 782G, signed 6 Aug 96, amends § 205(d) to permit uncompensated representation of:

(1) Non-profit cooperative, voluntary, professional, recreational, or similar organizations, if

(2) Majority of members are current officers or employees of US or DC, or their spouses or dependent children; but

(3) No grant, contract, or other agreement for disbursement of Federal funds to organization.

f. Retired officers while not on active duty - 18 U.S.C. § 206.

D. Improper Sharing in Proceeds of Representation: 18 U.S.C. § 203.

1. May not demand, seek, or receive compensation for any representational services as agent or attorney rendered personally or by another while an officer or employee

a. In relation to a "particular matter"

b. In which the US is a party or has a direct and substantial interest

2. Exceptions:

   a. Special Government Employees - same as for 18 U.S.C. § 205.

   b. Representing family members or estate - same as for 18 U.S.C. § 205.

   c. Retired officers while not on active duty - 18 U.S.C. § 206.

3. OGE 86X9 (referred to in JER 5-401) -- Caution! Opinion is overreaching.

4. Note: 18 U.S.C. § 203 has post-Government employment implications!

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To: HQAMC-All-Personnel
cc:
Subject: ETHICS ADVISORY 98-06 -- Conflicts of Interests

What's a "conflict of interest?" Simply put, a "conflict of interest" is a situation where an Army employee has a financial stake in the outcome of an official Army matter. But, it can be a daunting task to know and recognize when such a financial stake exists.

Most of what USAMC does affects contractors, those trying to become contractors, and the alphabet soup of various professional, technical and scientific organizations that bring together various segments of the Federal and non-Federal communities (e.g., AUSA, AAAA, FBA, AFCEA, NDIA, IEEE, ASMC, etc.). There are a whole host of ways in which USAMC employees can end up with a financial stake in the official matters that affect these companies and organizations. Some of these are:

> If you own stock in a company, you are a part-owner and you have a financial interest in whether your company gets a USAMC contract, or how some dispute might be resolved. However, if the amount of stock that you own (including any owned by your spouse and minor children) in this company does not exceed $5,000, you are exempt from this conflict by Office of Government Ethics regulation. If more than one company is interested in the official matter (e.g., a statement of work or a request for proposals), the exemption applies only if the total amount of your financial interest in all the offerors does not exceed $5,000.
>
> If you own shares in a mutual fund, you are also part-owner in the companies that the mutual fund invests in and you have a financial interest in Army matters that affect these companies. However, if the mutual fund is "diversified," the OGE regulation exempts this conflict. But, this exemption does not apply to stock ownership in "sector" funds (a "sector" fund concentrates its investments in an industry, business, single country (other than the United States), or a single state). However, if the value of the sector fund shares does not exceed $5,000, the exemption mentioned above applies.
>
> If you are an officer or director of a professional organization, the law imputes the financial interests of the organization to you -- even if you are serving without pay. This means that you have a financial interest in whether USAMC provides a speaker or other support to an event sponsored by the organization, or whether USAMC intends to send employees to the event. There is no regulatory exemption for this conflict.
>
> If your spouse or your minor child is employed by a contractor, you have a financial interest in their continued employment because the law imputes their financial interests to you. Therefore, if your spouse is affected by a USAMC contract (*e.g.*, he or she works on it), then you have a financial interest in the issues involving this contract. There is no regulatory exemption for this conflict.
>
> If you are job-hunting, law and regulation impute the financial interests of the prospective employer to you. Again, that means that you may not participate in official matters that affect that company, and there is no regulatory exemption for this conflict.

How do we find out about these potential conflicts and what do we do about it? Through training and advisories such as these, employees should become sensitive to the issues. This means that they seek the advice of their supervisor and Ethics Counselors before participating the any official matter affecting any non-Federal entity where there might be an issue. In addition, this

is one of the purposes of financial disclosure reports. The reports provide a vehicle to identify and resolve potential conflicts. The resolution might be as simple as just not participating in the official matters affecting the financial interest and issuing a written notice of the potential conflict. If, however, the potential conflict will significantly affect your official duties, you might have to divest or your duties might have to be changed.

However, it is not a good idea to wait for the required time to file a financial disclosure report to deal with these issues. When an employee's duties change (*e.g.*, assigned to participate in the evaluation of proposals), whether or not the employee filed an annual report for last year, now is the time for the employee to examine his or her situation for a potential conflict. If unsure, the employee should seek the advice of his or her supervisor and Ethics Counselor.

If an employee is inclined to buy and sell stocks, options and other investment vehicles during the year, the employee would be wise to consider the potential conflicts of each purchase. For example, if the employee would really like to purchase Boeing, but the employee is currently involved in a matter involving Boeing, the employee probably should refrain from the purchase, or at least limit it to less than $5,000. If an employee marries during the year, he or she should examine the financial interests that are now imputed to the employee from the new spouse and discuss any potential conflicts with the supervisor and Ethics Counselor.

Don't wait on these issues! You don't want to wait until you have already participated in a matter where you were disqualified by the law, a federal criminal law. In the recent past, an Army employee pleaded guilty to violating this law (he participated in the administration of a contract and he owned stock in the contractor) and received a one year probation and a $1,000 fine. This employee even filed a financial disclosure report (OGE Form 450), but he neglected to list this particular stock.

All of this can be complicated. This is why you and your supervisors have an Ethics Counselor to help you deal with these issues. Let me know if I can help.

Mike Wentink, Room 7E18, 617-8003
Ethics Counsel

To: HQAMC-All-Personnel
cc:
Subject: ETHICS ADVISORY 98-07 -- Appearances of a Conflict of Interest

Last week, I sent an ETHICS ADVISORY on conflicts of interests explaining what it means to have a conflict (i.e., a financial interest or stake in the outcome of an official matter) and how such a financial interest might arise (e.g., owning stock in a contractor, being an officer or director of a private association, or having a spouse employed by a contractor.)

Now, what's an "*appearance of a conflict of interest*?" An "appearance" is where we don't actually have a financial interest either directly or through one of the relationships where the interest is imputed to us by law; but notwithstanding, it still looks bad for us to participate in the official matter because of some other relationship. This "appearance" rule is in the *Standards of Ethical Conduct for Employees of the Executive Branch* (Section 2, Chapter 2, DoD *Joint Ethics Regulation*, DoD 5500.7-R).

There is an inappropriate "appearance" where a reasonable person with knowledge of the relevant facts would question an employee's impartiality if the employee participates in a particular official Army matter. This can come about in a number of different ways. Some examples follow:

> We should not participate in official matters that affect the financial interests of a member of our household where it is going to look bad to this "reasonable person." This does <u>not</u> mean your spouse or minor children because their financial interests are already imputed to you by law and will create an <u>actual</u> conflict for you. Here, I am referring to your parents, in-laws or unmarried significant other who might be a member of your household. A couple of examples: there probably would be no perception of bias if you are drafting a statement of work for which General Electric is a potential bidder and your sister, who lives with you, owns 100 shares of GE stock; however, there probably would be a perception problem for you to sit on a source selection evaluation board for a major contract where Boeing is a competitor and your significant other, who lives with you, is an employee for the competing division of Boeing.
>
> We should not participate in official matters where someone with whom we have a "covered relationship" is a party or represents a party to the matter where it is going to look bad to this "reasonable person." What's a "covered relationship?" It includes the following:
>
>> Anyone with whom you are engaged in a non-routine financial or other business transaction. As an example, there is no issue for an employee who is a retail customer of IBM products; but there is an issue if the employee is a commercial photographer on the side and does marketing photographs for IBM under contract.
>>
>> Any entity where you were employed or served as an officer or director within the last year.
>>
>> Any organization where you are an "active participant." There will not be an issue if you participate in deciding whether to provide speakers or other support to an event sponsored by a private organization in which you are a member (you pay your dues, receive the monthly publication, and perhaps attend an annual dinner of the local chapter). However, it would be an issue if you chair one of the organization's committees.

A relative with whom you have a close personal relationship. There probably would not be a significant issue if you participate in an official matter involving an AMC contractor that employs your grown son living on his own and who does not work on AMC business, but there probably would be a significant issue if your Mother is a senior official in that same company.

All of this is neatly wrapped up in a *Standards of Ethical Conduct* proscription about misuse of position: "To ensure that the performance of his official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment, an employee whose duties would affect the financial interests of a friend, relative or person with whom he is affiliated in a nongovernment capacity shall comply with the applicable requirements of" the section dealing with inappropriate appearances (described above).

What do you do if you have one of these situations, or something similar where your participation in an official matter appears inappropriate? In such cases, you are disqualified from participating in that official matter unless your supervisor authorizes you to participate notwithstanding the appearances. Any such authorization must be in writing and coordinated with the Ethics Counselor.

If you are not sure whether you have an "appearance" issue, ask your supervisor. If you still are not sure, or need to resolve an "appearance," see your Ethics Counselor.

Mike Wentink, Room 7E18, 617-8003
Office of Command Counsel
Ethics Counselor

INFORMATION PAPER

AMCCC-G
24 February 1999

SUBJECT: Conflict of Interests

1. Purpose. To provide information concerning conflicts and appearances of conflicts of interests, and how to resolve them.

2. Facts.

a. Conflict of Interests. By Federal criminal law, Army officers or employees (and enlisted soldiers by regulation) may not participate in an official Army matter that affects their financial interests, such as:

(1) A company in which the employee or his or her spouse or minor children own stock (even 10 shares of IBM held in trust for an employee's child will create a conflict if the employee participates in official matters that affect IBM);

(2) The employment of a spouse, *e.g.*, if a spouse is site manager for his employer's contract with the Army, it would be a conflict for his wife, as an Army employee, to evaluate the deliverables under the contract;

(3) An organization which the Army employee serves as officer, director or employee in an off duty status (even if there is no compensation); or with which the employee is negotiating or has an understanding with respect to future employment;

(4) The financial interests of a general partner.

b. Appearances of Conflicts. By punitive regulation, employees may not participate in official Army matters when a reasonable person with knowledge of the relevant facts would question their impartiality. An employee could have an appearance of a conflict of interests as follows:

(1) The official matter is likely to affect the financial interests of a member of the employee's household, *e.g.*, grandparent, parents-in-law, or "significant other".

(2) Someone with whom the employee has a "covered relationship" is a party to the official matter, or represents a party to that matter. Examples of "covered relationships" are:

(a) A person with whom the employee has some sort of business or financial relationship (but, not as an employee because then there would be an actual conflict), *e.g.*, a supervisor should not participate in rating, training, and other employment decisions affecting an employee who rents his condominium;

(b) A relative with whom the employee has a close personal relationship, *e.g.*, an officer should not participate in the decision on his enlisted daughter's request for special schooling;

(c) A prospective or current employer of the employee's spouse, parent or dependent child (the situation here with respect to the Army employee's spouse or dependent child must be carefully examined to ensure that there is not an actual conflict);

(d) Any organization in which the employee served as an officer, director, or employee within the last year, *e.g*., the Army officer who was president of the local Chapter of AAAA last year, had an actual conflict situation; but, once he resigned, he will have an appearance of a conflict situation for one year;

(e) An organization in which the employee is an "active participant," *e.g*., an employee has a "covered relationship" with AUSA if he chairs the current membership drive for the local chapter.

(3) The matter would affect a friend, relative or other person with whom the employee is affiliated in a nongovernmental capacity. 5 C.F.R. § 2635.702(d).

c. Resolutions of Actual Conflicts or Appearances. In any one of the above situations, by law or regulation, the employee is **disqualified** and may not participate in the relevant official matters. Now the issue is what to do about it.

(1) The disqualification might be waived by regulation under authority of 18 U.S.C. 208(b)(2) (5 C.F.R. Part 2640), such as:

(a) The disqualifying interest is held in a diversified mutual fund or unit investment trust;

(b) The disqualifying interest(s) consist of publicly traded stock or shares of a sector mutual fund and the value does not exceed $5,000;

(c) When participating in a decision to hire someone from a company and the disqualifying interest is ownership of publicly traded stock in that company or participation in a vested pension plan from that company;

(d) When participating in any official matter where the disqualifying interest is Federal employment or benefits, with some exceptions.

(2) With supervisor's concurrence, accept fact of disqualification, adjust duties as required, shift responsibility for relevant official matters, and issue a written notice of the employee's disqualification to supervisor, subordinates, and others who should know, with a copy to Ethics Counselor.

(3) Divest the financial interest, *e.g*., sell the stock, sever negotiations concerning future employment, quit the job or dissolve the partnership (although the latter two actions will result in a lingering "covered relationship.")

(4) Appointing authority may waive actual conflicts, but only in limited circumstances and with prior coordination with the Office of Government Ethics.

(5) Supervisor may give written authorization to participate in official matters notwithstanding appearances of conflicts, after coordination with Ethics Counselor.

Mr. Wentink/DSN 767-8003

March 13, 1998
DO-98-007

MEMORANDUM

TO: Designated Agency Ethics Officials and Inspectors General

FROM: Stephen D. Potts
Director

SUBJECT: 1997 Conflict of Interest Prosecution Survey

This Office has recently completed its annual survey of prosecutions involving the conflict of interest criminal statutes (18 U.S.C. §§ 203, 205, 207, 208, 209) for the period January 1, 1997 through December 31, 1997. Information on nine new prosecutions by U.S. Attorneys' offices and the Public Integrity Section of the Department of Justice's Criminal Division was provided to us with the assistance of the Executive Office for United States Attorneys in the Department of Justice. Attached are summaries of the prosecutions reported to this Office.

Attachment

1997 Conflict of Interest Prosecution Survey

1. United States v. Michael Leingang
United States v. Arthur Picou
United States v. Brent M. Smith
United States v. Brent Q. Smith -- Leingang and Brent Q. Smith were employees of the Internal Revenue Service (IRS). Picou and Brent M. Smith were co-owners of Payless Car Rental (Payless).

Payless was experiencing serious financial problems and had substantial Federal employment tax delinquencies. The co-owners of Payless, Picou and Brent M. Smith (the co-owners), met Leingang who introduced them to Brent Q. Smith. Brent Q. Smith told the co-owners how they could get their tax case transferred from the IRS office where it was pending to the IRS office where Brent Q. Smith was employed. At that point, Brent Q. Smith would permit Payless to remain in business and pay a minimal amount of its tax deficiency. The co-owners of Payless agreed to a payment of $1,000 per month for this service. During this time period, the co-owners provided Leingang and Brent Q. Smith with free rental cars and a paid vacation to Florida. Brent Q. Smith also invested money in Payless and acquired an interest in the company.

In a separate scheme, Brent Q. Smith signed a one-year contract with the Orleans Levee Board to perform an economic study. The contract called for Smith to be paid $85 per hour; he received approximately $38,000 over the following year. At the same time, the Orleans Levee Board had tax disputes pending under Smith's supervision at the IRS. Smith did not disclose this fact to his supervisors at the IRS.

Leingang and Picou each pled guilty to violating 18 U.S.C. § 203, offering compensation to a Government employee for representational services rendered in a particular matter before a department or agency of the United States. Leingang received one year probation and a $250 fine. Picou was sentenced to five years probation and $90,191 restitution. Brent Q. Smith pled guilty to violating 18 U.S.C. § 208(a), taking official action in matters affecting a personal financial interest, as well as 18 U.S.C. § 201(b)(2) (bribery); he was sentenced to twelve months in jail, three years supervised release, and a $3,000 fine. Brent M. Smith pled guilty to violating 18 U.S.C. § 201(b)(1)(A) (bribery) and was sentenced to five years probation and a $3,000 fine.

Prosecution handled by the United States Attorney for the Eastern District of Louisiana.

2. United States v. Marvin Runyon -- Runyon was appointed the Postmaster General of the United States Postal Service (USPS) on May 4, 1992. From 1977 through 1984, before becoming a Government employee, Runyon had acquired shares of stock in the Coca-Cola Company (Coca-Cola).

Beginning in 1994, marketing personnel with USPS began exploring a potential "strategic alliance" between USPS and Coca-Cola. The Postmaster General's role was to advise the Board of Governors in connection with their consideration of the strategic alliance. Between January and August of 1996, Runyon attended approximately six meetings during which the strategic alliance between USPS and Coca-Cola was discussed. On July 15, 1996 and August 20, 1996, Runyon directed a USPS employee to prepare a financial impact analysis of the proposed alliance with Coca-Cola so that the Management Committee could consider taking the matter to the Board of Governors for approval.

On or about August 22, 1996, Runyon was advised by an attorney from the General Counsel's Office of USPS that his participation in matters relating to the proposed alliance with Coca-Cola was improper in light of his ownership of Coca-Cola stock. The following day, Runyon formally recused himself from participation in consideration of the alliance with Coca-Cola. On or about September 10, 1996, Runyon sold his Coca-Cola stock.

Pursuant to 18 U.S.C. § 216, the United States filed a civil complaint against Runyon alleging a violation of 18 U.S.C. § 208, taking official action in matters affecting a personal financial interest. On October 30, 1997, the parties signed a settlement agreement in which Runyon denied liability but agreed to make a payment of $27,550 to the United States in exchange for the dismissal of the United States' complaint against him. The amount of the payment represented the increase in the value of Runyon's Coca-Cola stock from the date he signed his public financial disclosure form, listing Coca-Cola stock among his assets, and the date of his formal recusal.

Prosecution handled by the Public Integrity Section of the Department of Justice's Criminal Division and the United States Attorney for the District of Columbia.

3. United States v. Andrew Pitt -- Pitt was an Assistant United States Attorney for the Central District of California.

On numerous occasions between April 1993 and July 1995, Pitt made favorable recommendations to the court, the probation office, and other prosecuting offices on behalf of cooperating witnesses and defendants in exchange for hundreds of thousands of dollars. For example, Pitt accepted $98,000 from a cooperator who had previously been convicted in the Northern District of Texas and on whose behalf Pitt had argued for leniency at the sentencing hearing. In addition, Pitt used his official position to secure entry into the United States of foreign nationals whom Pitt believed would make substantial investments in a company in which he and his wife had a controlling financial interest. Once the foreign nationals entered the United States, two Iranian companies with which they were affiliated loaned a total of $860,000 to Pitt's company.

On June 16, 1997, Pitt pled guilty to one felony conflict of interest count, 18 U.S.C. § 208, and two counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346. On September 8, 1997, Pitt was sentenced to two years in prison plus three years of supervised release and fined $7,500.

Prosecution handled by the Public Integrity Section of the Department of Justice's Criminal Division. The United States Attorney for the Central District of California was recused from this case.

4. United States v. Kenneth Stevenson -- Stevenson was an engineer in the Contracts Department at Patrick Air Force Base.

Along with former military personnel and former Government employees, Stevenson started a business called DS&R, the "S" in DS&R standing for his last name. Stevenson was a major shareholder in DS&R.

DS&R submitted a contract to Patrick Air Force Base and Stevenson provided the technical evaluations on the contract. Through the bidding process, DS&R was awarded the contract.

Stevenson was charged with participating personally and substantially in a particular matter in which he had a financial interest, in violation of 18 U.S.C. § 208. Pursuant to 18 U.S.C. § 216(a)(1), he pled guilty to a misdemeanor violation of § 208 on July 31, 1997. On October 23, 1997, Stevenson was sentenced to nine months probation and fined $2,500.

Prosecution handled by the United States Attorney for the Middle District of Florida.

5. United States v. Robert Atwell -- Atwell was a Colonel in the U.S. Army assigned as Program Manager for the development of the Longbow Apache attack helicopter built by McDonnell Douglas Helicopter Systems (MDHS).

During August 1995, Atwell talked with the senior vice-president and general manager of MDHS about going to work for MDHS. At the same time, Atwell was the principal briefer at three meetings of high-level Army officials whose role was to consider, based on the briefings, whether to request that the Undersecretary of Defense (DOD) commit $1.2 billion to MDHS for full-scale production of the helicopter. During the briefings, Atwell recommended that the Army make the request of DOD. On August 23, Atwell submitted an employment application and resume to MDHS. The head of MDHS requested authorization from the president of its parent company, McDonnell Douglas Aerospace, to hire Atwell for the position of program manager for the development and marketing of its commercial helicopters.

Atwell was charged with violating 18 U.S.C. § 208, participating personally and substantially in a particular matter in which an organization with which he was negotiating for employment had a financial interest. He was also charged with violating 18 U.S.C. § 641, theft of public money not exceeding $1,000, by using a Government issued telephone calling card to make personal long-distance telephone calls. On October 27, 1998, Atwell pled guilty to both counts. He is awaiting sentencing.

Prosecution handled by the United States Attorney for the District of Arizona.

6. United States v. Pavol Forgac -- Forgac was an inspector for the Federal Aviation Administration (FAA) and reviewed the applications of aircraft component manufacturers.

Forgac was the FAA representative on a flight test of a Ground Proximity Warning System (GPWS) manufactured by Sunstrand Data Control/Allied Signal. A GPWS is a device which shows pilots whether they will fly into a mountain or hit the ground. In the course of his duties for the FAA, Forgac obtained access to information submitted to the FAA by the GPWS' manufacturer and intended for FAA use only. At the same time, Forgac was developing and marketing his own GPWS for sale to the public.

Forgac was charged with a violation of 18 U.S.C. § 208, participating personally and substantially in the FAA's test flight of a GPWS while developing his own GPWS; he pled guilty to the charge on June 30, 1997. He was sentenced to three year's probation and is appealing his conviction based on issues unrelated to the conflict of interest statute (i.e., counsel and discovery issues).

Prosecution handled by the United States Attorney for the Western District of Washington.

7. United States v. James Pike and Robert Miracle -- Pike was the cafeteria manager and contracting officer at the U.S. Naval Surface Warfare Center in Crane, Indiana. Miracle, Pike's father-in-law, started a computer equipment business for the purpose of making money with Pike.

Miracle and Pike concocted a scheme whereby Miracle bought computer equipment from a third party vendor through a computer supply magazine and Pike agreed to steer Government contracts to Miracle to purchase the computer equipment. Miracle and Pike overcharged the Government for the equipment and

split the overcharge. Through the Government contract, Miracle was paid $29,000 for $11,000 worth of computer equipment. Pike and Miracle shared the $18,000 overcharge.

Miracle pled guilty to a misdemeanor violation of 18 U.S.C. § 209 which prohibits the payment of supplementation to a Government employee's salary and Pike pled guilty to wire fraud and mail fraud. In their pre-indictment plea agreements, Miracle agreed to pay $18,000 restitution and Pike agreed to pay an amount of restitution to be determined at the sentencing hearing. Both defendants are awaiting sentencing.

Prosecution handled by the United States Attorney for the Southern District of Indiana.

8. United States v. Naftali Applebaum -- Applebaum was not a Government employee; he owned the Elite Cab Company.

From 1989 until 1992, Applebaum conspired with Ronald Stokes, the Chief of the D.C. Office of Taxicabs, to provide illegal taxicab drivers' licenses to unqualified drivers. The drivers paid money to Applebaum who took the money and the drivers' names to Stokes. Stokes prepared the illegal licenses. Applebaum also paid Stokes money for other illegal favors, such as registering vehicles that should not have been registered.

Applebaum was charged with supplementing the salary of a Government employee, in violation of 18 U.S.C. § 209. On September 23, 1997, Applebaum pled guilty to the § 209 violation and agreed to testify against Stokes. Stokes was convicted of nine felony counts, including accepting bribes and gratuities in violation of 18 U.S.C. § 201. Applebaum is scheduled to be sentenced on May 20, 1998.

Prosecution handled by the United States Attorney for the District of Columbia.

CONFLICTS OF INTEREST CHEAT SHEET

18 USC § 208(a) - Basic COI prohibition

- **208(b)(1) - Individual waiver via OGE**
- **208 (c)(2)- Regulatory Exemptions now in**
  - **5 CFR 2640**
- **JER 5-301 applies to enlisted personnel**

5 CFR 2635.402 - implements 208

- **Applies to all employees including enlisted personnel**

5 CFR 2635.502 - Appearance concerns for matters affecting or involving members of employee's household or those in a covered relationship with employee

- **Catch-all 5 CFR 2635.702(d)**

5 CFR 2635.702(a) - Public office for private gain

18 USC 201(b) - Bribery
18 USC 201(c) - Illegal Gratuity
18 USC 205 - Improper Representation w/o Compensation
18 USC 203 - Improper Compensation for Representation
18 USC 209 - Improper Supplementation of Federal Salary

Job-Hunting:

- **18 USC 208 - Disqualified if negotiating or have an understanding as to future employment**
- **5 CFR Part 2635, Subpart F - Disqualified if Seeking Employment**
- **41 USC 423(c) - Procurement Integrity Act - employment contacts**
- **FAR 3.104-4(c) - PIA - employment contacts**

INFORMATION PAPER

DAJA-SC
13 August 1998

SUBJECT: Conflicts of Interest in Active Duty Assignment of Reservists

1. PURPOSE: To summarize conflict of interest issues in active duty assignment of reservists.

2. FACTS:

a. The *Joint Ethics Regulation*, DOD 5500.7-R, para. 5-408, requires reservists to disclose information to their superiors necessary to ensure that no conflict exists between their active duty assignment and their private interests. Commanders are required to screen Reservists assigned to their command, and cannot assume that no conflicts exist. When a Reservist is assigned to position affecting non-Federal parties, he is required to file an OGE Form 450. The supervisor should review the OGE Form 450 before approving the assignment.

b. Use of Non-Public Information. Reservists shall not be assigned to duties where they will obtain information that they or their employers may use to gain unfair advantage over competitors. Reservists may use inside or classified information to perform their assigned Federal duties, but should not be exposed to information which would have particular value to their civilian employer. This may include:

(1) Information not made available to the general public;

(2) Information not authorized to be made available to the public on request under the Freedom of Information Act;

(3) Information protected under the Privacy Act, Trade Secrets, and classified material;

(4) Contractor bid information, cost estimates, labor rates, or proprietary information; and

(5) Source selection information, such as, bid prices before bid opening, proposed costs or prices, source selection plans, cost or price evaluations, competitive range determinations, ranking of bids, proposals, reports of Source Selection Evaluation Boards, and other information marked: "SOURCE SELECTION INFORMATION - SEE FAR 3.104)"

Mr. Novotne/DSN 425-6713
Novotah@hqda.army.mil

1st Basics For Ethics Counselors Workshop

FINANCIAL DISCLOSURE

Standards of Conduct Office (SOCO)DoD General Counsel October 15, 1999

I. REFERENCES

A. **(Public Financial Disclosure --SF 278)**

1. Ethics in Government Act of 1978, 5 U.S.C. App 4 (Pub. L. 95-521)
2. Ethics Reform Act of 1989, 5 U.S.C. App 4 (Pub. L. 101-194)
3. 5 C.F.R. 2634.101 to 805
4. DoD 5500.7-R, Joint Ethics Regulation (JER) 7-200 to 7-209
5. Public Financial Disclosure: A Reviewer's Reference (OGE, 1994)
6. "Public Financial Disclosure: A Closer Look" OGE video emphasizing importance of completing SF 278 accurately and completely
7. SF 278 software: Dept of Interior homepage: http://www.ios.doi.gov/ethics/ethics.html

B. **(Confidential Financial Disclosure --OGE Form 450)**

1. 5 C.F.R. 2634.901 to 1004
2. JER section 7-300 to 7-310
3. OGE Form 450 Review Guide (OGE, 1966)
4. OGE DAEOGRAM DO-97-028 (5-25-97)
5. Final Rule, OGE Optional Form 450-A, Fed. Reg. Vol 62, No. 121, June 24, 1997, p. 33972
6. OGE Form 450 software: Department of Interior homepage: http://www.ios.doi.gov/ethics/ethics.html

N.B: Most of the above references, including all of the Office of Government Ethics (OGE) publications and disclosure forms, are available on the OGE homepage: http://www.usoge.gov. The JER is available on the DoD SOCO homepage: http://www.defenselink.mil/dodgc/defense_ethics/.

II. ROLE OF FINANCIAL DISCLOSURE

A. Prevent conflicts of interest (18 U.S.C. 208, and 5 C.F.R. 2635.402 and 502).

B. A means, not an end.

C. Program requires **complete follow through** to be effective.

III. BENEFITS OF FINANCIAL DISCLOSURE

A. **For the employee:** By completing the form, employees **identify** their financial interests. Hopefully, they **recognize** whether these interests may conflict with their official duties, and **remember** their interests should a potential conflict arise in the future.

B. **For the supervisor:** By reviewing the form, supervisors **identify** financial interests that may conflict with their employees= official duties.

C. **For the ethics official:** By reviewing the form, the ethics official ensures its technical compliance and identifies financial interests that may conflict with a filer's official duties.

By sending warning letters to filers, the ethics official **reminds** them of their financial interests, **identifies** potential conflicts of interest for them, and **demonstrates** official interest in their potential conflicts of interest.

D. The financial disclosure process provides excellent evidence of knowledge if violations occur and are prosecuted.

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V. CONFIDENTIAL FINANCIAL DISCLOSURE (OGE Form 450 and OGE OF 450A)

A. Your Job - Review the Report

1. DoD conducts program reviews to OGE audit standards.

   a. The purpose of OGE audits is to ensure that reports are complete so that a good conflict of interest analysis may be made. All reviews should use that standard all the time.

   b. **STOP THE CLOCK!** - Get a preliminary review conducted ASAP to meet the 60 day review deadline. Technical deficiency review is sufficient. Question verification and DoD contractor review may be done later.

2. Preliminary Information - Common Problems

   a. Reports pertain to the wrong reporting period - if an employee files for the first time during the annual cycle, it is an annual report because of the reporting period. You need either to collect a new entrant report, even though it would be late, or document a determination that filing is now required.

   b. Appointment date is not included on new entrant reports.

   c. Annual OGE Form 450s signed and/or filed prior to September 30th.

   d. Report fails to receive supervisory review. After conducting preliminary review, return it to the employee, and request that corrections be made as appropriate, and that the employee submit it to the supervisor after corrected.

   e. The date received is not noted on the report - this date is critical to start your 60 day review time. Some commands use the supervisory review to stop the 60 day review clock, but the supervisor must note the date received on the report.

   f. Recommend putting initial/preliminary review date on the form, in the database, or both to make it easy to document for auditors that the 60 day review deadline is met.

3. Sample Entries - What is the correct information and why it is needed?

   a. Although 5 C.F.R. 2640.202 exempts certain financial interests from the Apersonal and substantial participation≅ prohibition, in accordance with 18 U.S.C. 208, those interests must still be reported if they meet the reporting threshold - CATCH 22.

b. Annotate corrections on the form with your initials and date. Recommend inserting next to, or referenced to, the entry. Use comment box for substantive comments, such as waiver or disqualification attached.

c. Partnerships, closely-held corporations, and small business ventures (not publicly traded) - Reports fail to include name, location, and nature of business.

d. Pensions - If the employee, especially an SGE, reports a salary, is there a pension reported? If not, inquire. Can the employee control the pension? If not, just report name of company and that there is Ano control.≅ If so, report assets.

e. IRAs - Reports fail to identify underlying assets. If IRA reported at bank, with interest as the type of income, you may assume it is a money market or CD.

f. Mutual funds - identify family and fund name.

g. 401(k) - Continuing role for EIFs - don=t forget about them! (Widely held, no control, and either publicly traded or widely diversified) Even though not publicly traded, most defined contribution plans and 401(k)s, etc, are either invested in publicly traded mutual funds or held in pooled accounts maintained by financial institutions, independently managed, and widely diversified. Identify the underlying assets by identifying the mutual funds or by naming the independent manager and the name of the pool, usually the type of investment option selected, such as fixed, growth, etc.

h. Managed stock/brokerage account - employees argue that they don=t control, so they shouldn=t report assets! - don=t believe them. Recommend employees attach statements and white-out values and account numbers.

i. **Variable** annuities or life insurance - may be invested in EIFs, like fixed, growth.

j. Reports fail to include income and investments of spouses and dependent children. This may be hard to determine.

4. Over-reporting - Put ANR≅ or similar notation on the report. If you have the time, follow-up by informing the individual of the over-reporting.

   a. Reports indicate income from the Federal Government, dollar amounts, account numbers, cash accounts in financial institutions, money market funds, CDS, etc.

   b. Personal residence and its mortgage.

c. Reports sometimes include gifts of travel accepted by the Government in accordance with 31 U.S.C. 1353. (Make sure you have information on the travel for your travel report!)

5. Cross-Pollination

a. Filer fails to check "none" box where appropriate.

b. If a position is reported in Part III, is it a compensated position? If so, is it reported in Part I? If income for a position is reported in Part I, be sure that the position is also reported in Part III.

c. Reports fail to list outside positions even though they provide no compensation. This one is hard - almost requires your personal knowledge or comes out during questioning on other problems.

d. If rental property is reported in Part 1, is there a mortgage reported in Part II? There may not be a mortgage, but you need to find out. Or, if there is a mortgage, is there an investment asset reported in Part I? If not, you have to check. If the mortgage is for a personal residence, put ANR≅ on the entry.

e. If a pension or an ongoing, compensated outside position is reported in Part I or Part III, is it reported in Part IV?

6. Letters of Warning - After conducting the preliminary review, check the $25K or local list for DoD contractors and get answers to questions. If interests in DoD contractors are reported, send employees a letter of warning, sample attached. If an actual or potential conflict is revealed, have the employee complete a written disqualification statement.

B. Your Job - Manage Your Program

1. New Entrant Reports

a. Ensure that you identify, notify and collect reports from new employees - emphasized by OGE. The report should cover the previous 12 month period. You may grant extensions up to 90 days.

(1) Work with Personnel to get at least monthly, preferably bi-weekly, reports of new employees, SGEs, and changes to covered positions.

(2) Try to see new employees during orientation to get information and give them a form.

(3) If a determination as to filing needs to be made, don=t forget to notify Personnel to update the notation on official rolls.

(4) Recommend 2 late notices if employee doesn=t file, 1 at 10 and 1 at 20 days.

(5) Follow up with supervisor if employee fails to file within 30 days, the required time period.

b. Ensure that there is a system in place to identify individuals who transfer into your organization and who filed a 450 with their former organization. Make sure that you get a copy.

c. Ensure that there is a system in place to identify personnel whose duties change to require filing and that they file a new entrant report within 30 days of assumption of the new duties. This may be very difficult.

(1) Develop relations with Personnel to inform you of new PDs with a filing requirement. Encourage Personnel to seek your assistance on new PDs to determine if there should be a filing requirement.

(2) As a last resort, they will probably be identified during the annual review cycle.

d. SGEs and reservists must file prior to assuming duties - good luck! One of the most difficult things to accomplish, and OGE will review! Although your review time is still 60 days, recommend that supervisor=s and your review be conducted as soon as possible, else why should the forms be filed before starting work?

2. Time Lines - In the annual cycle, from notification to update list of required filers (position review), to filing, to review - sufficient time? In the new cycle, from notice that employee started to notification to filing? When do you send late notices? Recommend written procedure, so new personnel can pick up the system easily. What deadline for annual filing do you use? 10/31 or 11/30 (DoD automatic 30 day extension)? May be extended up to 1/31, but with a request! Annual reporting period is 10/1 through 9/30.

3. Documentation - Can you document that the system functions properly?

    a. Develop a good tracking system that can alert you of impending deadlines, such as review date of 60 days from date received, and late filings. This enables you to review in time and send late notices. Document any granted extensions. Think now as if you had to prepare for an audit and prove to OGE that you met all time deadlines, etc. How would you do it with your system? If there are problems, fix them now while you have time.

    b. Make sure that everyone files - reconcile lists from Personnel, lists from position review and your database. Document why employees were dropped - did they leave the Agency? Did you get a new entrant report for each first time annual filer? If not, document the determination that filing is now required.

4. Time Management - Make the procedure work more quickly and smoothly. The best improvement comes with reduced reporting errors. Investigate how to help your employees find the correct information and then report it accurately.

    a. Sample Memos to Administrative Officers (AOs), Instructions to Employees on how to complete, Instructions to Supervisors on how to review, and Sample Completed OGE Form 450s, with Notes of Explanation, are now on the SOCO web site.

    b. The $25K DoD Contractor List is on the DoD web site. Can you make your local list available to your employees?

    c. Consider offering training on how to complete the report.

    d. Offer available software.

    e. Be available to answer questions while employees are filling out the report, including on-line (e-mail) assistance.

    f. When requested, provide copy of previous OGE Form 450, but recommend that employees make a copy before filing current year=s report.

5. Are the Right People Filing? - In your spare time, you may want to meet with AOs and review PDs . Are too many employees filing? Can you exempt some positions? If you can honestly reduce the number of filers, this will also reduce the overall workload. Big time investment up front, but payoff over the years.

   a. Who files:

      (1) Personnel in covered positions: (Including personnel detailed to these positions.)

         (a) Commanding officers, heads, deputy heads, and executive officers of: Navy shore installations with 500 or more employees; and all Army, Air Force, and Marine Corps installations, bases, air stations or activities.

         (b) Special Government Employees (see exceptions in JER section 7-300).

         (c) Civilian employees at grade GS-15 and below (or comparable pay level), and military members below grade 0-7 when:

            (1) they participate **personally and substantially**, through decision or exercise of **significant judgment**, in taking an official action for:
               (a) contracting or procurement,
               (b) administering or monitoring grants, subsidies, licenses, or other Federal benefits,
               (c) regulating or auditing any non-Federal entity, or
               (d) other activities in which the final decision may have a **direct and substantial economic impact** on the interests of any non-Federal entity. (Catch-all)

            (2) determined by the supervisor.

         (d) Personnel **serving on detail** under the Intergovernmental Personnel Act.

   b. Who Is Excluded?

      (1) Personnel in positions excluded by the component head because

         (a) the possibility that the employee will be involved in a real or apparent conflict of interest is remote,

         (b) the effect on the integrity of the Federal Government is inconsequential, or

         (c) there is a substantial degree of supervision and review.

(2) Personnel not employed in contracting or procurement who have authority to make purchases less than $2,500 per purchase and less than $20,000 cumulatively per year.

(3) Personnel who file OGE Optional Form (OF) 450-A, ACertificate of No New Interests.≅ (Excluded from filing OGE Form 450, not from filing altogether!)

c. Finality of Determination: An agency head or designee decides who shall file. There is no grievance procedure. 5 CFR 2634.906, 63 Fed. Reg. 15274, March 31, 1998.

d. Methods to identify who files:

(1) Use historical data.

(2) AZero-based≅ analysis - review every position de novo!

(3) Use CPOC/G-1 Support - Personnel offices for civilians and military.

6. Confidentiality of the Process - Protect confidentiality during your procedure, especially if you have labor unions. This is a concern of employees. Be sure to instruct supervisors to put reviewed reports in sealed envelope addressed to you.

7. Train your legal support staff.

8. Y2K - In 2000, you must train all 450 and 278 filers and review full 450s, not 450As!

C. Collection/Enforcement

1. Tough!

2. Ultimate threat - reassignment/removal. First be sure the position requires filing. If so, and the employee refuses to file, he or she is failing to meet the requirements of the position, and so must be reassigned to a position that does not require filing. If no position is available, removal may be the only option.

3. If report is late, request the supervisor to take administrative action and inform you of the result.

4. Get Command Support - If supervisors not willing to discipline employees for late or non-filing, your job is a killer.

D. Reporting Requirements - Report the number of filers and number of delinquent filers by December 15th. (JER section 7-309)

IV. Public Financial Disclosure (SF 278)

A. Who Files:

1. Civilian Presidential Appointees

2. Generals and admirals

3. Senior Executive Service (SES)

4. Personnel appointed under the Intergovernmental Personnel Act (5 U.S.C. 3371-3376)

5. Civilian employees (not on the General Schedule) who earn more than 120% of GS 15, step 1 (based on the entry level salary for the position)

6. Persons appointed on Schedule C (political appointees)

7. Civilians detailed to positions 3 through 6, above.

B. Role of ethics officer: assist filer

1. Great opportunity to gain credibility with boss

2. Ensure that filers file correctly and on time ($200 late filing fee)

   a. **New entrant report** (report covers year of report up to entry date, plus previous calendar year)

      (1) Nomination (Complete schedules A, C, and D)

      (2) Promotion (not frocking)

      (3) Reserve and National Guard officers file only if they spend over 60 days on active duty that year (new provision in Change 3 of JER)

   b. **Annual report** (covers previous calendar year)

      (1) Filed on or before May 15

      (2) Filed only if filer performed duties of office for over 60 days during calendar year.

c. **Termination Report** (covers period from last report to termination)

(1) not earlier than 15 days before and not later than 30 days after actual termination. (Separation leave is active duty)

(2) Filers who assume another covered position within 30 days of termination do not file termination reports.

3. Hints for success:

a. Give filer copy of previous SF 278.

b. Review SF 278 before forwarding it.

c. Give filer copy of SF 278 for filer's record.

d. Request reviewing ethics official to contact you if there are questions.

C. Role of ethics official: review the SF 278

1. Compare SF 278 with SF 278 of previous year.

2. Resolve questions quickly and informally. Annotate the SF 278.

3. If you are not the final reviewer, forward it promptly.

4. Report must be reviewed within 60 days of filing (5 C.F.R. 26354.605)

D. Hints and Suggestions

1. Ethics counselors must annotate the date the SF 278 is received (use the "Agency Use Only" box), and the date the report is reviewed (signed by the ethics counselor).

2. The filer should type or print clearly when filling out this form. Do not use a pencil. If the reviewer cannot decipher the SF 278, it should be returned to the filer for clarification.

3. For annual filers, report transactions only for the calendar year being reported. Just like income taxes, this period is January 1 through December 31.

4. On Schedule A, mark the value, type and amount of income for each asset. Do not include assets that had a fair market value of less than $1,000 at the close of the reporting period and did not generate over $200 in income during the reporting period. If the value is more than $1 million, or if the asset earned more than $1 million, specify whether the asset is

worth (or earned) between $1-5 million, between $5-25 million, between $25-50 million, or more than $50 million.

5. Mutual Funds and IRAs. Some filers list a mutual fund company only and not the individual funds held. Please provide the full name of each mutual fund held. For IRAs, provide the location of the holding and the underlying assets of each IRA if not in a local bank or credit union.

6. On Schedule A, do not list the Federal Thrift Savings Plan or retirement plan that is part of Federal employment. Also, the filer should not report his Federal salary, or the amount of income received by his spouse (the source of income must still be reported).

7. Employment by or ownership of a business by the filer must be reported in Schedule A with the actual amount earned (if more than $200), and also in Schedule D, Part I.

8. If assets appear or disappear from one year to the next on Schedule A, a transaction should be listed on Schedule B, Part I. If the gain or loss of an asset is due to something other than a normal purchase or sale (e.g. gift, inheritance, the asset becomes worthless), or if the transaction is $1,000 or less, please add a note in the "Comments of Reviewing Officials" on page 1 of the SF 278 explaining the circumstances.

9. Schedule B, Part I. Assets sold and purchased and listed here should also be listed in Schedule A. Ensure the filer provides the month, day and year f each transaction.

10. Schedule D, Part II. If the filer is an incumbent or terminal filer, nothing should be marked. Part II is for new filers only.

11. Over reporting. Remind your filers that this is a public report, and it is not necessary to report that new car or board or beach house unless the asset is used to produce income.

E. How the SF 278 Differs from the OGE 450

1. Filing is based on the status of the person, not the discretion of supervisor.

2. Reporting Periods Differ From Schedule to Schedule on the report .

3. Include value of assets on Schedule A, and more detail on other schedules.

4. Need for reporting of transactions (Schedule B).

5. Certification by the DAEO or Reviewing Official.

6. $200 Late Filing Fee for reports filed more than 30 days late, unless waiver is granted by OGE.

7. Specific Procedure for Granting Extensions of up to 45 days and 90 days.

8. In some instances, review by Senate Armed Services Committee or OGE.

January 29, 1999

HELPFUL HINTS TO SURVIVE AN OGE AUDIT
FOR DOD ORGANIZATIONS

TRACKING

1. FINANCIAL DISCLOSURE - Ensure that the date the report was received "receipt date" is on the cover page of the report. In addition, keep track of the initial review date - either on the form, in your database, or both. By keeping track of both the initial review and receipt date, the auditors can easily determine if the report was reviewed within the required 60 days. If a paralegal or ethics specialist reviews the reports for technical deficiencies prior to the ethics official's legal review, the technical review date may be used as the initial review date. OGE also allows the supervisor's review date to be used as the initial review date. If you use the supervisor's review date as the initial review date, please remind your supervisors that they must indicate their receipt date on the financial disclosure report.

2. FINANCIAL DISCLOSURE - Every year your databases should be reconciled with the previous year to ensure that all reports that were required to be filed were in fact filed. For example, once you have established a list of current annual filers, you should compare your current list of names to your previous year's list. If there are new names on the current annual requirement, you should ensure that you obtained new entrant reports from those individuals or have some documentation that the individual was not required to file a new entrant report. For your SF-278 database, you should ensure that any names in your prior database that are not in your current database either have corresponding termination reports or documentation that they transferred to another "covered position" with another agency. If you cannot reconcile your databases, you have probably not obtained all the reports that were required.

3. FINANCIAL DISCLOSURE - OGE requires appointment dates to be included on all SF-278 reports - not just new entrant reports. However, section 3-2 of OGE's Public Financial Disclosure Reviewer's Guide expressly states that if the appointment date is not easily accessible, the reviewer need not add the date. Notwithstanding this "out", OGE auditors have noted in a few audit reports that the appointment dates were not included on the financial disclosure reports. I've discussed this issue with OGE and have been advised that reviewers should at least ensure that appointment dates are on new entrant reports and the first annual report. "Appointment date" is defined as the date the individual was appointed to his or her current position - not the date the individual first started filing financial disclosure reports. The auditors review appointment dates to ensure that new entrant reports are filed in a timely manner. For example, when an auditor reviews an annual report which reflects an appointment date of seven months earlier, if the filer did not file a new entrant report, the auditor will automatically assume that the agency failed to obtain the new entrant report. However, there may be a good reason a new entrant report was not required, e.g. - the individual transferred into your agency from another "covered position". Therefore, ensure that you have appropriate documentation for any "transferees". At a minimum, you should obtain a copy of their prior financial disclosure report when they transfer into your agency so that you can address any potential conflicts arising from their new position. Examples of appointment dates are as follows:

(a) New SES - the date of promotion to SES
(b) General/Admiral - the date of appointment of current position (not grade)

(c) SES from other agency - date transferred into current position
(d) Newly promoted BG or RADM(L) - promotion date (not frocking date)

OGE requires appointment dates only for new entrant Form 450 filers.

4. TRAINING - To facilitate tracking ethics training, you may decide to add appropriate training fields to your financial disclosure database since your database usually contains your universe of individuals required to receive annual training. Please keep in mind that you must indicate the "type" of training - whether the filer received in-person training or received written materials. Although individuals who transfer into your agency from another "covered position" are not required to file new entrant reports, you should add the individual to your database with a note that the new entrant report is not required so that you can track the training requirement.

5. FINANCIAL DISCLOSURE - Coordinate with your personnel office to ensure that you are receiving adequate information to accurately track your financial disclosure requirement. An easy way to track both the Form 450 and SF-278 requirement is to receive monthly reports from your personnel office covering, at a minimum, (a) new employees appointed to "covered positions" requiring either a SF-278 or Form 450, (b) newly appointed or renewed special Government employees, (c) departing SF-278 filers, (d) in-house promotions to "covered positions", and (e) individuals whose duties change within your organization to require a new entrant Form 450. In addition to the above, I receive copies of OPM Forms 1390 "Executive Personnel Transaction" which document SES promotions, departures, changes in duties, transfers, etc. from the personnel office every pay period.

COMMON PROBLEMS - FINANCIAL DISCLOSURE

1. Failure to list the underlying assets of a brokerage account. Some filers mistakenly believe that since their broker has discretionary control of the account, they need not report the underlying assets. Reminder: Brokerage statements may be attached to the financial disclosure report if the statements contain all required information . However, please remind your filers to delete all personal information for their own protection. (e.g., social security number and account number).

2. Reports contain information that is not reportable (e.g., amount of spouse's salary (SF-278), cash accounts (Form 450 only), TSP, Government retirement benefits). We suggest that you either delete the entry (with the filer's permission) or annotate "N/R" (not required) next to the entries. OGE considers overreporting a technical error.

3. Failure to check "none" or "not applicable" where appropriate. OGE considers the schedule incomplete if the filer writes "none" or "not applicable" but fails to check the box.

4. Failure to itemize the investments of a 401(k) plan. Generally, these plans are invested in mutual funds and/or the former employer's stock. Each holding must be listed as a separate line item on the financial disclosure report. In some cases, a financial manager may have discretionary control over the investments. In such cases, the money is usually invested in a widely diversified portfolio which meets the definition of an excepted investment fund. In this case, the filer need not report all underlying assets but must include the appropriate information about the financial manager.

5. Reports pertain to wrong reporting period - For example, Schedule A of a new entrant SF-278 report should cover the preceding calendar year plus the current year, and Schedule D should cover the two preceding years and the current year. Many filers fail to read the instructions and report information covering only the current year. Regarding Form 450s, some agencies often identify new entrant filers during the annual cycle. These particular reports are "annual" reports because they cover the annual reporting period. They may not be annotated "new entrant" reports. The filer should be required to file two reports - one covering the annual period and one covering the new entrant period.

6. Failure to report certain assets that were sold during the reporting period. If an asset is sold and produced more than $200 in income during the reporting period (to include capital gains derived from the sale), it should be included on either Schedule A (SF-278) or Part I (Form 450).

7. Failure to include name, location, and nature of business of partnership, closely-held corporations, and similar business ventures. If the business is not publicly traded, this information must be included.

8. Failure to include investments of spouse or dependent children.

9. Including gifts of travel accepted in accordance with 31 U.S.C. 1353. Gifts accepted pursuant to this statute are considered gifts to the Government - not to the individual. You should ensure that acceptance was coordinated with your office and include this gift in your semi-annual
31 U.S.C. 1353 report (if you have not already done so).

10. Failure to obtain supervisory review and certification of financial disclosure reports. The supervisor knows better than anyone else the matters in which the reporting individual is involved. Therefore, the supervisory review is essential to identify potential conflicts.

11. Failure to indicate exact amount of income when the Aother@ column is used to report an asset (SF-278 only). The filer may not check a Acategory of amount@ of income when, for example, salary, fees, or partnership distributions are reported.

12. Failure to list outside positions even though the position provides no compensation.

13. Failure to report the highest amount of liability owed during the reporting period (SF-278 only).

14. Failure to report the specific name of mutual funds, as opposed to just listing the name of the fund family. For example, listing AT. Rowe Price fund@ instead of AT. Rowe Price Income and Growth fund@.

15. Failure to identify the nature of business of a limited partnership (LP) interest if the LP is not publicly available (Form 450). If the LP is an "investment" LP (such as a venture capital LP) and is not publicly available, the underlying investments must be listed separately on Part I.

16. Failure to identify the nature of business of a LP if the LP does not meet the definition of an excepted investment fund (SF-278). If the LP is an "investment" LP (such as a venture capital LP) and does not meet the definition of an excepted investment fund, the underlying investments must be listed

separately on the financial disclosure report.

17. Failure to report interest rate or term of loan (SF-278 only).

18. Reviewing officials - SF-278 - Failure to compare prior year=s filing with current year=s filing (required by JER 7-206.a.(2)). The SF-278's schedules are structured to provide enough information to provide a meaningful audit trail from one year to the next. For example, if an asset was reported on the previous report on Schedule A, but is not on the current submission, there should probably be a sale transaction reported on Schedule B. If not, you should ask the filer if information was inadvertently omitted. Comparing reports is especially important for SF-278s since these reports are publicly available. Form 450s are not as easy to compare because transactions are not reportable. In addition, we have found most agencies who have a lot of Form 450 filers do not have the resources to devote to this.

G:\socgc\Robin\helpful hints.wpd
October 15, 1999

(This guidance was prepared by the Standards of Conduct Office, Office of the General Counsel, DoD. (703) 697-9309)

INFORMATION PAPER

DAJA-SC
8 August 1997

SUBJECT: Preparation of Confidential Financial Disclosure Reports (OGE 450)

1. **PURPOSE:** To provide information on the OGE 450.

2. **FACTS:**

a. Who Must File?

(1) A report must be filed when a Federal employee below the grade of GS-15, or the rank of Colonel, has significant duties involving:

(a) Contract administration or procurement.

(b) Administration of grants, subsidies, or licenses.

(c) Regulation or audit of any non-Federal entity.

(d) Activities which will have a direct and substantial economic impact on a non-Federal entity (*e.g.* an engineer who monitors permit compliance of on-post contractors).

(e) Confidential or sensitive duties which, in the judgment of the commander or agency, requires the filing of a confidential report (*e.g.* an undercover CID agent).

(f) Commanders, heads and deputy heads, and executive officers of Army installations, bases, or air stations.

(g) All Special Government Employees (SGE)(as defined in 18 U.S.C. § 202), except those listed in *Joint Ethics Regulation*, para. 7-300(a)(2).

(2) The employee or soldier's immediate supervisor has primary responsibility for determining whether the duties of the position require filing a report.

(3) The determination shall be reflected on all job descriptions, job announcements, and postings. Coordination with the local CPO is required.

b. Filing Time.

(1) **New Entrant**: Employees must file within 30 days of beginning duty in a covered position.
(2) **Annual:** Is filed 30 November, with information to be current as of 30 September.

c. Filling Out the Form.

(1) Bank accounts, CDs, money market mutual funds, and U.S. Government bonds or securities do not have to be reported.

(2) Reports cover the preceding year. Even if an asset has been sold, it must be reported if it produced more than $200 income during the year.

(3) For stock broker accounts containing separate stocks, mutual funds and other investment products, all assets must be reported individually. This is true even if the broker has the authority to make trades without the filer's approval.

(4) Assets in IRA accounts are reportable. The fact that they do not result in actual receipt of income by the filer does mean that the asset did not earn income and does not exclude them from being reportable assets.

(5) Outside investments and employment of spouses and dependent children must be reported. The employer and nature of the business must be identified.

(6) As of 24 June 1997, the Office of Government Ethics has authorized the use of a form, OGE 450A, certifying that no changes have occurred since the last filing.

(a) The form may only be used in three year increments.

(b) In order to use the form, filers must first be instructed on what is a reportable interest.

(c) DoD implementation of this option will require that filers retain a copy of their original OGE 450 to attach to the certificate. The purpose for this requirement is preservation of meaningful supervisor review.

(7) **NOTE**: The old SF 450 may not be used after 31 August 1997.

Mr. Novotne/DSN 227-0921

Approved by:

COL RAYMOND C. RUPPERT

INFORMATION PAPER

DAJA-SC
8 August 1997

SUBJECT: Common Errors in Preparation of Public Financial Disclosure Reports (SF 278)

1. **PURPOSE:** To identify common errors in SF 278 reports.

2. **FACTS:**

a. Failure to list the specific name of each mutual fund and money market fund, as opposed to just listing the name of the fund family. For example, "Fidelity" does not sufficiently identify an asset, but "Fidelity Magellan" does.

b. Failure to list underlying assets of an investment or broker's account. All stocks independently traded in a broker's account must be reported even if the broker is making the trades. A statement from the broker may be attached as long as it provides all the information required on the SF 278.

c. Failure to identify the name, location, and nature of business of all nonpublic partnerships, closely-held corporations, and similar private business ventures.

d. Failure to report the assets of a partnership which is not an "excepted investment fund." Partnerships can be reported as an "excepted investment fund" only when the interest is a limited partnership which is publicly available, and purchased from a broker.

e. Failure to report income in an IRA account. Even though income is not withdrawn from an IRA, if it accrues and retains income, it must be reported.

f. On annual reports, assets which appear on Schedule B as sales transactions may still have to be reported on Schedule A, if the asset produced more than $200 income during the year, or if the sale resulted in more than $200 in capital gains.

g. Using abbreviations and acronyms which do not fully identify the financial interest.

h. Failure to check "None" or "Not Applicable". Reviewer cannot assume failure was an oversight.

i. **TAKE NOTICE!** Mutual fund and bank account numbers, as well as Social Security numbers, should not be disclosed. Remember that these reports are available for public inspection.

Mr. Novotne/DSN 227-0921
Approved by:
COL RAYMOND C. RUPPERT

(DATE)

MEMORANDUM FOR

SUBJECT: Potential Conflicts of Interest Between Your Financial Interests and Your Official Duties

Ref: (a) 18 U.S.C. § 208
(b) 5 C.F.R. § 2635.502
(c) DoD 5500.7-R, Joint Ethics Regulation

This office has reviewed your Confidential Financial Disclosure Report (OGE Form 450), and has found that, given the nature of your current duties, the information contained in the report discloses no actual or apparent conflicts of interest under references (a) or (b).

You reported on your OGE Form 450, that you, your spouse, or dependent children hold financial interests in commercial entities that do business with the Department of Defense. As you know, reference (a), a criminal statute, prohibits Federal employees from taking official action on any particular matter in which they have a financial interest. Therefore, should a matter involving any commercial entity in which you have a financial interest or its parent corporation or subsidiary, come before you for official action, you must refrain from taking any action, and forward the matter to your supervisor.

A copy of this memorandum has been attached to your financial disclosure report in accordance with section 7-306 of reference (c).

Please contact Ms. Johannah Eubanks or myself at (703) 697-5305 if you have any questions regarding your disclosure statement or potential conflicts of interest.

Gail D. Mason
Deputy Designated Agency Ethics Official

Copy to:
OGE Form 450 File

warning.ltr
8-24-97

SUPERVISOR'S DETERMINATION OF REQUIREMENT TO FILE
CONFIDENTIAL FINANCIAL DISCLOSURE REPORT
STANDARD FORM 450

_____
NAME

_____
GRADE

_____
POSITION

_____
AGENCY, BUILDING, ROOM NO. AND PHONE NO.

I have reviewed the duties of the individual identified above and have determined that the official responsibilities of this person's position:

DO DO NOT

require the individual to participate personally and substantially through decision or the exercise of significant judgment in taking Government action regarding contracting or procurement; administering or monitoring grants, licenses or other federally conferred financial or operational benefits; regulating or auditing any non-federal entity; or other activities which will have a direct and substantial economic effect on the interests of any non-federal entity.

If the individual does have such responsibilities, l have advised that person of the requirement to file an OGE Form 450 within 30 days, in accordance with 5 C.F.R. Part 2634, and have noted the annual filing requirement on his OER Support Form (DA Form 67-8-1), NCO-ER Support Form (DA Form 2166-7), Senior System Civilian Evaluation Report Support Form (DA Form 7222-1), or Base System Civilian Evaluation Report (DA Forrn 7223-1).

_____ _____
SUPERVISOR'S NAME SUPERVISOR'S SIGNATURE

_____
DATE

When completed, this form should be forwarded through your organization 's Ethics Point of Contact to:

The Judge Advocate General Corps
Army Standards of Conduct Office
Room 2D439, ATTN: Ms. Fran Anderson
2200 Army Pentagon
Washington, D.C. 20310-2200
Extension (703) 697-0921

OUTSIDE ACTIVITIES

Outline of Instruction

I. REFERENCES

A. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, Subparts G & H.

B. DoD 5500.7-R, Joint Ethics Regulation, Chapters 2, 3, 5 & 6.

C. Political Activities of Federal Employees, 5 C.F.R. Part 734.

D. DoD Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty.

II. INTRODUCTION

A. There are many general and specific limitations placed on the outside activities of Federal personnel depending upon status (military or civilian, career or noncareer, senior or junior). These limitations focus on five goals:

1. Prevent conflicts of financial interests.
2. Prevent the misuse of Government resources.
3. Prevent the misuse of Government position.
4. Maintain an effective workforce.
5. Prevent conflicts of political interests.

B. Many of these concepts are discussed in greater depth elsewhere in the deskbook. In such cases, they will only be briefly cited in this section.

III. CONFLICTS OF FINANCIAL INTERESTS

A. Employees may not engage in outside activities that conflict with their official duties if such activities are prohibited by statute or regulation, or would require the employee's disqualification from matters critical to his office. (5 C.F.R. § 2635.802)

1. In DoD, financial disclosure filers **must** obtain prior approval from their "Agency Designee" before working for a prohibited source. Permission shall be granted unless the outside activity involves conduct prohibited by statute or regulation. (5 C.F.R. § 2635.803; JER § 2-206).

2. Agency Designees may require prior approval of outside employment or activities, and may prohibit such activities if they will detract from readiness or pose a security risk. This authority is derived from SecDef's Title 10 authority to maintain military readiness and must be tied to a legitimate military mission requirement. (JER § 2-303).

B. Moonlighting in a second government position

1. No regular officer on active duty may hold a Federal, state, or local civil office. Acceptance of civil office terminates military appointment. Does not include state notary public office. (10 U.S.C. § 973(b)).

2. Military personnel may not accept compensation for holding another Federal position since their military duties make them "on call" 24 hours a day. Civilian employees may hold separate and distinct offices. (5 U.S.C. § 5536).

C. Moonlighting in non-governmental positions

1. Active duty officers may not accept outside employment that interferes with their performance of military duties. (10 U.S.C. § 973(a)).

2. Note: as a result of the National Defense Authorization Act for FY-99 (P.L. 105-261), 10 U.S.C. § 974 has been repealed. This statute previously placed restrictions on active duty enlisted members engaging in compensated outside employment where interfering with employment of local civilians.

3. Members of military bands are restricted in the degree to which they may compete off-base with civilian musicians. 10 U.S.C. §§ 3634, 6223, 8634; JER § 3-304.

D. Appearing as an expert witness. Employees may not appear as expert witnesses, other than on behalf of the United States, in any proceeding

before a Federal agency or court in which the United States is a party or has a direct and substantial interest. (5 C.F.R. § 2636.805).

1. May testify w/o compensation with DAEO approval.

2. Does not apply to fact witnesses when subpoenaed by appropriate authority.

E. Acceptance of gifts from prohibited sources or given because of official position. (See chapter on gifts).

F. Outside earned income limitation for **covered noncareer employees**. (5 C.F.R. 2636, subpart C).

1. "Covered noncareer employees" include noncareer employees whose basic pay equals lowest level of SES. Does not include career SES, admirals, or generals.

2. Limits annual outside earned income to 15% of Executive Level II ($20,505 in 1998).

3. No outside earned income for Presidential appointees. Executive Order 12674.

4. No compensation from activities involving a fiduciary relationship (e.g., outside law practice).

5. No compensation for serving as officer or member of the board of directors.

6. DAEO authorization required for compensation for teaching.

G. The Government may not award contracts to Federal employees or business owned or controlled by them. (48 C.F.R. § 3.601)

H. Employees may not represent others to agencies of the Government on any matter in which the United States is a party or has a direct and substantial interest. (18 U.S.C. §§ 203, 205) (See chapter on conflicts of interest).

I. Employment by a foreign government. The Emoluments Clause of the Constitution (Article I, section 9, clause 8) prohibits Federal employees from accepting employment from a foreign state without the consent of Congress.

J. Employment by a foreign principal. Federal employees may not act as agents for foreign principals registered under the Foreign Agents Registration Act of 1938 (18 U.S.C. § 219) or lobbyists registered under the Lobbying Disclosure Act of 1995. (Pub. L. 104-65).

IV. MISUSE OF GOVERNMENT RESOURCES

A. Use of nonpublic information. Employees may not use nonpublic information to further their own private interests or that of another. (5 C.F.R. § 2635.703).

1. Nonpublic information is information that is not available to the general public. Includes information not releasable under FOIA, protected by Privacy Act, classified (18 U.S.C. § 798, 50 U.S.C. § 783(b)), protected by procurement integrity law (41 U.S.C. § 423), or Trade Secrets Act (18 U.S.C. § 1905).

2. Assignment of Reservists. Commanders have affirmative obligations to guard against assigning duties in which reservists may obtain information and gain unfair advantage over competitors. (JER § 5-408)

B. Use of Government property. (See chapter on Use of Government Resources) (5 C.F.R. §§ 2635.704 and 705, JER § 2-301).

V. MISUSE OF GOVERNMENT POSITION

A. Honoraria: The ban on accepting honoraria set out in 5 C.F.R. Part 2636, subpart B (now deleted), was struck down by the Supreme Court in National Treasury Employees Union v. United States, 115 S. Ct. 1003 (1995). The Office of Legal Counsel, Department of Justice, issued an opinion on February 26, 1996, that the honoraria prohibition cannot be enforced against any Government employee. (See OGE DAEOGRAM, DO-96-012 (2-28-96)).

B. Teaching, speaking, or writing **that relates to official duties**. (Not the same as honoraria!)

1. 5 C.F.R. § 2635.807 prohibits the acceptance of compensation for teaching, speaking, or writing when:

a. The activity is undertaken as part of the employee's official duties;

b. The invitation was extended because of the employee's official position rather than his/her expertise;

c. The invitation is from a person whose interest may be affected by the employee's official duties;

d. The presentation is based on nonpublic information;

e. The topic deals with the employee's current duties or those during the previous year; or

f. The topic deals with a policy, program, or operation of the employee's agency.

2. Rationale: prevent employees from selling to others what the Government already pays him/her to do.

3. "Compensation" includes all payments, including travel expenses, royalties, meals, but excludes gifts that could be accepted from prohibited sources and free attendance at the event in which the speaking or teaching takes place.

4. Certain rules have different application to special Government employees.

5. Does not preclude matters within the employee's discipline or expertise based on education or experience.

6. Does not preclude teaching certain courses.

7. As a result of Sanjour v. United States, 7 F. Supp. 2d 14 (D.D.C. 1998), OGE in DAEOGRAM DO98-034 (11-25-98) advised that the speaking, teaching, writing prohibition will not be enforced against employees:

   a. Who are "below the senior executive service level of employment";

   b. For travel expenses, and;

   c. Incurred in activities "related to duties."

8. Disclaimers: DoD employees who permit the use of their military grade, title, or position while teaching, speaking, or writing regarding DoD policies, programs, or operations shall indicate that the views are those of the speaker and not DoD or its components. (JER § 2-207)

9. Policy & Security Reviews: A lecture, speech, or writing that pertains to military matters, national security issues, of subjects of significant DOD concern shall be reviewed for clearance by appropriate security and public affairs offices. (JER § 3-307)

D. Fundraising: Fundraising in both an employee's official and personal capacities is sharply limited, especially in the workplace. (See chapter on non-Federal entities for discussion.) (5 C.F.R. § 2636.808; JER §§ 3-210, 3-211, 3-212, 3-300).

E. Endorsement: Employees may not use or permit the use of their Government positions, titles, or authority in a manner that could be reasonably construed to imply official endorsement or sanction of personal activities or of non-Federal entities. (5 C.F.R. § 2635.702, JER § 3-209).

1. Exception for entities that have statutory authority, such as those found in JER § 3-210.

2. Rank and service are considered terms of address and do not imply official endorsement. ("Pvt J. Jones, U.S. Army").

3. Military personnel may not endorse a product, service, or other commercial enterprise, while in uniform (see DOD ltr to USAA).

F. Solicited Sales: DoD employees shall not make solicited sales to DoD personnel who are junior in rank, grade, or position, or their family members. (JER §§ 2-205, 5-409).

1. Includes solicited sales of insurance, stock, mutual funds, real estate, housewares.

2. Does not include sale or lease of employee's non-commercial property.

3. Does not include commercial sales solicited and made in a retail establishment during off-duty time.

4. Absent coercion or intimidation, sales made because the junior approaches the senior are not prohibited.

5. Rules do not apply to spouses, but ethics officials should counsel employees to avoid inappropriate solicitations.

G. Use of military title by retirees and Reserves: Retired military members and Reserves, not on active duty, may use their military titles in connection with commercial enterprises provided they indicate their retired or inactive status. They may not use military titles to discredit DoD or give the appearance of official DoD sponsorship. (JER § 2-304).

H. Civilian Federal employees may not accept fees for jury duty or witness fees in Federal or District of Columbia courts. (5 U.S.C. § 5537, DOD Financial Management Regulations, Volume 8, Chapter 5, § 0513). For military members, see DOD Directive 5525.8 and service regulations (e.g., SECNAVINST 5822.2).

VI. EFFECTIVE WORKFORCE

A. Individuals convicted of inciting, aiding, or promoting a riot or civil disorder may not be employed by the Federal Government for 5 years after conviction. (5 U.S.C. § 7313).

B. Employees may not:

1. Advocate the overthrow of our constitutional form of government;

2. Participate in or assert the right to strike; or,

3. Become a member of an organization that does the above. (5 U.S.C. § 7311).

C. Individuals who habitually use intoxicating beverages to excess may not be employed in the competitive service. (5 U.S.C. § 7352).

D. Gambling: Gambling is prohibited on all Federally owned or leased property or while on official duty time. (JER § 2-302). Exceptions:

1. Activities by groups composed primarily of DoD employees or dependents for the welfare of DoD employees and dependents, if permitted by local law (where installation is located in the proprietary or concurrent jurisdiction of the state) and approved by Component Head or designee.

2. Private wagers in private quarters.

3. Law enforcement duties.

4. State licensed lottery tickets.

Games for money, gambling, lotteries, and pools are prohibited on Federal property managed by GSA. (41 C.F.R. § 101-20.306).

VII. CONFLICTS OF POLITICAL INTERESTS

A. General Statutory Restrictions

1. Limitations on amount of political contributions (2 U.S.C. §441a).

2. No solicitation of fellow Federal employees for campaign contributions (18 U.S.C. §602).

3. No contributing to any other Federal employee who is the contributor's employer or employing authority. (18 U.S.C. § 603).

4. No threats or intimidation to secure contributions. (18 U.S.C. §§601, 606).

5. No solicitation or receipt of contributions in any room occupied in discharge of official duties, or in any navy yard, fort, or arsenal (18 U.S.C. §607).

6. No paying/receiving of pay to vote or withhold vote. (18 U.S.C. § 597).

7. No promising of benefits which are dependent upon an Act of Congress, as reward for political activity. (18 U.S.C. § 600).

8. No intimidation of voters (18 U.S.C. §594).

9. No coercing political activities of Federal employees. (18 U.S.C. § 610).

10. No interference with rights under Uniformed and Overseas Citizens Absentee Voting Act (18 U.S.C. §608).

11. No assembling troops at polls (18 U.S.C. §592).

12. No election interference by armed forces (18 U.S.C. §593).

13. No polling of armed forces (18 U.S.C. §596).

14. No use of military authority to influence votes of other military members (18 U.S.C. §609).

15. No military officer may campaign for or hold civil office. (10 U.S.C. § 973).

B. Political Activity of Military Members

1. Governed by DoD Directive 1344.10 (reprinted in JER Chapter 6)

2. Spirit and intent of Directive prohibits activity that may be viewed as directly or indirectly associating DoD with partisan politics.

3. Does not preclude personal participation in local nonpartisan political activities, so long as:

a. not in uniform;

b. no use of Government property or resources;

c. no interference with duty;

d. no implied Government position or involvement.

4. Permitted political activities include:

a. Register, vote and express personal opinions;

b. Encourage other military members to exercise voting rights;

c. Join a political club, and attend political meetings and rallies as a spectator when not in uniform;

d. Make monetary contributions to a political organization;

e. Sign petitions for specific legislative action or place candidate's name on the ballot;

f. Write letters to the editor expressing personal views;

g. Bumper stickers on private vehicles.

5. Prohibited political activities. A military member may not:

a. Use official authority to influence/interfere;

b. Be a candidate for civil office;

c. Participate in partisan political campaigns, speeches, articles, TV/radio discussions;

d. Serve in official capacity/sponsor a partisan political club;

e. Conduct political opinion survey;

f. Use contemptuous words (10 U.S.C. § 888);

g. March or ride in partisan parades;

h. Participate in organized effort to transport voters to polls;

i. Promote political dinners or fundraising events;

j. Attend partisan events as official representative of Armed Forces;

k. Display large signs/banners/posters on private vehicles.

C. Political Activity of Civilian Employees (5 C.F.R. Part 734; JER 6-200)

1. Participation in non-partisan activities. May:

a. Express opinion on political subjects;

b. Be politically active in non-partisan questions;

c. Participate in non-partisan civic, community, social, labor, or professional organizations;

d. Participate fully in public affairs where no compromise of efficiency or integrity of the employee or agency.

2. Participation in political organizations. May:

a. Serve as officer of political party or group;

b. Attend/participate in nominating caucuses;

c. Organize a political organization or group;

d. Participate in political conventions, rallies, or other gatherings.

3. Participation in political campaigns. May:

a. Display pictures, signs, stickers, buttons, etc.;

b. Initiate/circulate nominating petitions;

c. Canvass votes;

d. Endorse or oppose partisan candidates in political advertisements;

e. Address a convention, caucus, or rally;

f. Take active part in managing political campaigns;

g. Be a candidate in nonpartisan election;

h. Attend political fundraiser

i. Under certain limited circumstances, solicit and accept political contributions.

4. Participation in Elections: May:

a. Serve at polling places;

b. Serve as election judge or clerk;

c. Drive voters to polling places for partisan candidate, group, party.

5. **May not**:

a. Be a candidate for election to partisan political office. Exception: in certain, specifically designated locales (5 C.F.R. Part 733), may run as an independent for partisan political municipal office.

b. Use official authority to interfere/influence;

c. Use official authority or title to fundraise;

d. Personally solicit political contributions from the general public (e.g., in a fundraising speech);

e. Participate in political activity while on duty, while wearing insignias identifying employing agency, or while in or using Government resources.

6. Additional rules exist for political appointees, career members of the SES, and employees of NSA and DIA (see 5 C.F.R. Subpart D; JER § 6-202; DEPSECDEF memo of 2 Nov 94).

D. Role of U.S. Office of Special Counsel (OSC)

1. OSC's Hatch Act Unit provides advisory opinions on political activity of Federal employees.

2. Advisory Opinions online - http://www.osc.gov/hatchact.htm.

E. Use of DoD Resources During Campaign Years

1. SECDEF 271505ZMAR98, Public Affairs Policy Guidance -- Election Year 1998.

2. Command newspapers - no campaign news, partisan discussions, cartoons, editorials, or commentaries.

3. No use of installations and/or facilities by any candidate for any activity that can be considered as political in nature.

4. Offbase political events - no support, except joint color guards at

national events.

5. Speeches, articles, and public comments of military personnel in capacity as service representatives must not contain political material.

6. POC for policy questions -- OASD(PA), (703) 697-9845/DSN 227-9845.

F. Lobbying

1. "Anti-Lobbying Act", 18 U.S.C. §1913.

2. Prohibits grass roots lobbying efforts.

3. Does not prohibit agency officials expressing views regarding merits or deficiencies of legislation.

4. Recurring appropriation provisions - e.g., DOD Appropriations, 1999, P.L. 105-262, §§ 8001, 8012.

   a. No use of appropriated funds for "publicity or propaganda purposes not authorized by Congress."

   b. No use of appropriated funds to "influence congressional action on any legislation or appropriation matters pending before the Congress."

August 13, 1998
DO-98-023

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts
Director

SUBJECT: Regulatory Removal of Honoraria Rules

At 62 Fed. Reg. 48746-48748 of September 17, 1997, the Office of Government Ethics published minor amendments to the standards of ethical conduct (5 C.F.R. part 2635). Those amendments removed references to the former honoraria ban (5 U.S.C. app., § 501(b)), which was declared inoperative in 1996 by the Department of Justice. See DAEOgram DO-96-012 of February 28, 1996. The amendments also made several technical cleanup changes, such as removing superseded provisions about previously grandfathered agency rules on outside employment and prohibited financial interests; updating citations to the statute on procurement integrity; and adding new cross-references to the rules implementing 18 U.S.C. § 208 at 5 C.F.R. part 2640.

A follow-up rulemaking, published at 63 Fed. Reg. 43067-43069 (August 12, 1998), has now completed the process of eliminating obsolete rules concerning the former honoraria ban, by amending references and text throughout 5 C.F.R. part 2636 and by entirely removing subpart B of part 2636, effective immediately. Subpart B had contained substantive provisions interpreting the honoraria ban for the executive branch. It had also implemented for the executive branch the supplemental disclosure requirements of the financial disclosure statute at 5 U.S.C. app., § 102(a)(1)(A), for certain payments to charitable organizations in lieu of honoraria, though the effective date for that section of the regulation had been deferred indefinitely.

The supplemental disclosure portion of subpart B for SF 278 filers that was removed by this rulemaking is being preserved in capsule form as part of the overall financial disclosure rules at 5 C.F.R. part 2634. It will, however, be stayed and remain dormant, pending further review of its legal viability. We will, of course, advise the ethics community of any decision to activate this supplemental disclosure provision.

February 28, 1996
DO-96-012

MEMORANDUM TO: Designated Agency Ethics Officials, General Counsels and Inspectors General

FROM: Stephen D. Potts Director

SUBJECT: Honoraria

On February 26, 1996, the Office of Legal Counsel (OLC) at the Department of Justice issued an opinion concerning the decision of the United States Supreme Court in National Treasury Employees Union v. United States, 115 S. Ct. 1003 (1995) (NTEU). In NTEU, the Court found that the honoraria ban at 5 U.S.C. app. э 501(b) violated the First Amendment rights of persons on whose behalf the case was brought. During the course of the litigation, the parties stipulated that the case was being brought on behalf of persons "below grade GS-16." In its opinion, OLC concluded that the Supreme Court's ruling "effectively eviscerated" the honoraria prohibition and that no remaining applications of the statute exist. In accordance with OLC's interpretation, the Department of Justice has determined that the honoraria prohibition cannot be enforced against any Government employee, including employees of the legislative and judicial branches and high-level executive branch officials.

Consequently, you may advise employees that they may now receive honoraria held in escrow accounts established in accordance with the guidelines described in our DAEOgram of June 24, 1991. We also recommend that you remind employees that they remain subject to other statutory and regulatory provisions that restrict their ability to accept honoraria under certain circumstances. These restrictions include the prohibition at 5 C.F.R. э 2635.807 on receiving compensation for teaching, speaking and writing that relates to an employee's official duties; the limitations on outside earned income described in 5 U.S.C. app. э 501, as implemented in 5 C.F.R. э 2636.301 et seq., for certain noncareer officers and employees; and the bar, in Executive Order 12674, on any outside earned income for certain Presidential appointees. A summary of these restrictions can be found in our DAEOgram of March 3, 1995 (DO-95-011).

A copy of the OLC opinion will be attached to this DAEOgram on our electronic bulletin board (TEBBs).

November 25, 1998
DO98-034

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts Director

SUBJECT: District Court Decision on Remand in Sanjour v. Environmental Protection Agency

The United States District Court for the District of Columbia has issued its decision on remand in Sanjour v. Environmental Protection Agency. The decision impacts enforcement of section 2635.807(a) of the Standards of Ethical Conduct, 5 C.F.R. part 2635, and its prohibition on employee acceptance of travel expenses in connection with "teaching, speaking, or writing [that] relates to . . . official duties," under section 2635.807(a)(2)(i). Insofar as this travel expenses prohibition applies to employees "who work below the grade level of senior executive service," the district court declared it unconstitutional and permanently enjoined its enforcement. The decision is reported at 7 F. Supp.2d 14 (D.D.C. 1998).(1)

The Justice Department, with the concurrence of the defendants, the Office of Government Ethics (OGE) and the Environmental Protection Agency (EPA), has decided not to appeal the district court decision. OGE will now undertake to amend section 2635.807(a) to bring it into compliance with the district court ruling. Notice of regulatory changes will be provided to agencies as soon as possible.

We discuss below the history of the Sanjour litigation, the most recent decision in the case, and its significance for enforcement of section 2635.807.

Background

The Sanjour case began in the early 90's when two EPA employees filed suit challenging the regulatory prohibition on employee acceptance of travel expenses from non-Government sources in connection with speech undertaken in a private capacity but related to official agency duties.(2) The district court rejected the plaintiffs' claims that the prohibition violates the First Amendment, 786 F. Supp. 1033 (D.D.C. 1992), as did the court of appeals on its first hearing of the case, 984 F.2d 434 (D.C. Cir. 1993). On May 30, 1995, however, the court of appeals, in a 5-4 en banc decision on rehearing, sustained the employees' First Amendment challenge and held invalid "the no-expenses regulations." 56 F.3d 85, 88 (D.C. Cir. 1995). The court reasoned that, since a regulation of the General Services Administration (GSA), 41 C.F.R. § 304-1.3(a), allows travel reimbursements in connection with official speech, whereas section 2635.807(a) prohibits travel reimbursements in connection with unofficial speech, the regulatory scheme poses a risk of censorship based on viewpoint. 56 F.3d at 97. At the same time, however, the court noted that "the balancing of interests relevant to senior executive officials might present a different

constitutional question" and, therefore, explicitly reserved judgment on the constitutionality of the regulations as applied to "senior executive employees." Id. at 93.

Subsequently the Solicitor General decided not to petition for further review in the Supreme Court and the case was remanded to the district court for entry of a final order. The parties were unable to agree, however, upon the relief to which the plaintiffs were entitled as a result of the court of appeals decision. Among numerous disagreements were questions regarding the impact of the court of appeals decision on the GSA regulation and on the various types of speech deemed related to official duties. The plaintiff employees argued that the appellate court's ruling required an injunction against enforcement of the GSA regulation and the section 2635.807(a) prohibition on acceptance of travel expenses in connection with all types of speech related to duties under 5 C.F.R. § 2635.807(a)(2)(i). The Government defendants took the position that the court should not enjoin enforcement of the GSA regulation and that the prohibition on acceptance of travel expenses in section 2635.807(a) was only in issue as applied to teaching, speaking, or writing that "relates to . . . official duties" under section 2635.807(a)(2)(i)(E)(2), i.e., the subject of which "deals in significant part with . . . [a]ny ongoing or announced policy, program or operation of the agency.(3)

Pending issuance of a district court order resolving these issues, OGE originally advised executive branch employees to continue to comply in full with the requirements of section 2635.807. This decision was based on our understanding that Sanjour was not a class action and that, as a result, the decision would have immediate applicability only to the named parties before the court. OGE anticipated that, after the district court issued its ruling clarifying the reach of the court of appeals opinion, the Office would amend section 2635.807 to give executive branch-wide effect to the ruling. See DAEOgram DO-95-026 (June 26, 1995). With the passage of time, however, and on further review, OGE decided to issue an interim policy limiting enforcement of section 2635.807. See DAEOgram DO-97-025 (May 21, 1997). Consistent with the Office's position on the reach of the en banc ruling, the policy addressed only the prohibition on acceptance of travel expenses for unofficial teaching, speaking, and writing that is considered related to duties under section 2635.807(a)(2)(i)(E)(2) because it "deals in significant part with . . . [a]ny ongoing or announced policy, program or operation of the agency." Pending issuance of a final order on remand in Sanjour and until further notice, ethics officials were asked not to enforce this prohibition against executive branch employees other than those senior officials covered by the definition of "covered noncareer employee" in 5 C.F.R. § 2636.303(a).

District Court Decision on Remand

The district court's decision on remand makes clear that, with respect to enforcement of section 2635.807(a) against "employees below the senior executive service level of employment," the court of appeals ruling invalidates the ban on travel expenses in connection with all types of teaching, speaking, and writing related to duties under section 2635.807(a)(2)(i), not just those related to duties under section 2635.807(a)(2)(i)(E)(2). The court agreed with the Government defendants,

however, that enforcement of the GSA regulation need not be enjoined to vindicate the plaintiffs' interests. According to the court, "[o]nce the prohibition on travel expense reimbursement for unofficial speech . . . is lifted, then there can be no possible constitutional objection to allowing agencies to accept travel reimbursements from outside sources for official travel."(4)

Enforcement of Section 2635.807(a)

In light of the district court decision, agencies may no longer enforce against employees "below the senior executive service level of employment" section 2635.807's prohibition on acceptance of travel expenses in connection with any type of teaching, speaking, or writing "related to duties" under section 2635.807(a)(2)(i).(5) Pending amendment of section 2635.807(a), OGE advises ethics officials to continue enforcement of the ban on travel expenses only against senior executive branch officials who are "covered noncareer employees" under 5 C.F.R. § 2636.303(a).

As defined in section 2636.303(a), and consistent with the provisions of the Federal Employees Pay Comparability Act of 1990 (FEPCA), the term "covered noncareer employee" covers a variety of noncareer employees who are in positions "above GS-15," including certain Presidential appointees, noncareer members of the Senior Executive Service (SES) or other SES-type systems, and Schedule C or comparable appointees.(6) The term excludes special Government employees, Presidential appointees to positions within the uniformed services, and Presidential appointees within the foreign service below the level of Assistant Secretary or Chief of Mission. 5 C.F.R. § 2636.303(a). OGE's decision to limit application of the travel expenses ban to "covered noncareer employees" comports with the stated inapplicability of the Sanjour decision to senior executive employees. It also accords with the higher standards to which the Ethics Reform Act, along with related and other regulations, hold senior officials who are "covered noncareer employees," particularly with regard to their outside activities. See 5 U.S.C. appendix, §§ 501(a), 502; 5 C.F.R. §§ 2635.804 and accompanying note 2635.807(a)(2)(i)(E)(3) and example 6 2636.301-.307.

Regarding enforcement of other applications of 5 C.F.R. § 2635.807(a), ethics officials should be aware that the travel expenses addressed in Sanjour are only one form of "compensation" prohibited by section 2635.807(a). The term "compensation," as defined in section 2635.807(a)(2)(iii), goes well beyond payments for "transportation, lodgings and meals" to cover "any form of consideration, remuneration or income." Employees "below the senior executive service level of employment" remain subject, along with other employees, to the prohibition on acceptance of compensation that is, for example, in the form of fees for speech "related to duties."

It may be helpful to illustrate some of these distinctions, as follows:

Example: Suppose that Alan, a GS-13, and Sarah, a noncareer member of the Senior Executive Service, are invited to speak, in their private capacities, at an interest group meeting to be held in Seattle. Assume that the sponsor of the meeting offers to reimburse each of them for their travel expenses and to pay each a $200 speaker's fee. Assume further that,

given the source of the payment, the subject matter of the speeches, or some other reason, the speaking "relates to . . . official duties" under section 2635.807(a)(2)(i).

Question: May Alan and Sarah accept the payments?

Answer: Alan may accept the travel expenses but not the $200 fee. Sarah may accept neither the expenses nor the fee. If Sarah were a career member of the Senior Executive Service she would be able to accept the travel expenses but not the fee.

Finally, please note, as indicated, that Sanjour does not affect enforcement of the GSA travel regulation, 41 C.F.R. § 304-1.3(a). This regulation, which concerns only official travel, authorizes agencies to accept travel expenses from non-Federal sources in connection with an employee's attendance at certain meetings and similar functions relating to the employee's official duties. Agencies may continue to use the GSA regulation in appropriate cases without regard to whether the employee traveling on behalf of the agency is below or above "the senior executive service level of employment."

* * *

As explained above, OGE will provide agencies with notice of the changes we anticipate making to section 2635.807(a) in order to bring it into compliance with the district court decision. In the meantime, please feel free to contact Kay Richman at OGE (ext. 1202) if you have questions about the Sanjour case or enforcement of section 2635.807.

1. The district court decided the case in April but, for reasons that remain unclear, neither the Department of Justice nor the defendants in the case learned of the ruling until September. Recognizing the failure of timely notice, the court issued an order on October 28 which allowed defendants until November 12 to decide whether to appeal.

2. The prohibition, originally set forth in 5 C.F.R. § 2636.202(b), was later incorporated in section 2635.807(a) of the uniform Standards. Section 2636.202(b) has since been removed from the Code of Federal Regulations. See 63 Fed. Reg. 43067, 43069 (Aug. 12, 1998).

3. The plaintiff employees also sought legal expenses and costs, which the Government defendants opposed.

4. The court also ruled against plaintiffs on the question of attorneys' fees and costs. Although plaintiffs "prevailed" on their First Amendment claim, the court held that the Government's position was "substantially justified" in regard to both the underlying action that gave rise to the civil litigation and the conduct of the litigation. Plaintiffs thus failed to meet the standard for an award of fees and costs under the Equal Access to Justice Act.

5. Ethics officials should be aware, however, that, under certain circumstances, authorities other than section 2635.807(a) may limit or entirely preclude acceptance of travel expenses by employees, including

nonsenior employees. For example, in an appropriate case 18 U.S.C. § 209 might preclude an employee's acceptance from a non-Government source of travel expenses incurred in connection with official travel. Moreover, while Sanjour dictates that nonsenior employees may no longer be disciplined for accepting travel expenses in connection with a speech that is related to duties under section 2635.807(a)(2)(i)(D), i.e., because the speech "draws substantially on . . . nonpublic information," employees should be aware that the underlying disclosure of the nonpublic information remains punishable for other reasons. Together with 5 C.F.R. § 2635.703(a), a variety of Federal statutes prohibit unauthorized disclosure of nonpublic information. See 5 C.F.R. § 2635.902.

6. The triggering rate of pay, i.e., the rate of pay at or above which an employee must be paid to be considered a "covered noncareer employee," is set forth in section 2636.303(a) as the "annual rate of basic pay in effect for GS-16, step 1 of the General Schedule." However, the FEPCA eliminated the GS-16, 17, and 18 classifications and replaced them with a new pay structure for positions classified "above GS-15." Under the new pay structure set by the FEPCA, the rate of basic pay for positions "above GS-15" can be no less than 120 percent of the rate of basic pay for GS-15, step 1. 5 U.S.C. § 5376.

INFORMATION PAPER

DAJA-SC
13 August 1998

SUBJECT: Outside Speaking, Teaching, and Writing

1. PURPOSE: To provide information on the rules for outside speaking, teaching, and writing.

2. FACTS:

a. Federal employees are prohibited from receiving compensation for outside speaking, teaching, or writing which relates to their official duties. 5 C.F.R. § 2635.807.

b. In essence, employees are not allowed to "re-merchandise" work they do for the government. Thus, employees may not receive compensation for teaching, speaking, or writing on anything:

(1) Prepared as part of their official duties; or

(2) Dealing with an activity related in significant part to the employee's official duties (current duties or duties performed within the last year).

c. One exception to this rule is that employees may accept travel expenses for unofficial teaching, speaking, or writing that is related to their duties when it "deals in significant part with . . . [a]ny ongoing or announced policy, program or operation of the agency." 5 C.F.R. § 2635.807(a)(2)(i)(E)(2).

d. This rule also does not prohibit receiving payment for:

(1) Teaching at an accredited educational institution even if the instruction is based upon work done for the government; or

(2) Teaching, speaking, or writing which is based upon general professional training or educational background, even when the topic falls within the employee's area of employment. *For example*, a rocket scientist can be paid for presenting a paper on orbital physics, so long as it is prepared on his own time and does not draw substantially from work he has done for the government. Academic information and material which would otherwise be available to the public may be used.

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CONTACTS BY FORMER SENIOR OFFICERS OR EMPLOYEES SEEKING INFORMATION OR OTHER ASSISTANCE

Mr. Michael J. Wentink
Standards of Conduct Office
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(U)

Periodically, Army employees seek the advice of their Ethics Counselors because a former officer or employee has contacted them and is seeking information or other assistance. Many times, this contact comes from a former senior Army official who may even have been the employee's commander or supervisor before he or she left Government service. As a result, they feel somewhat compelled or even pressured to respond as if that senior official was still in Government service.

This article is written to explain to you the ethical issues and parameters of such contacts.

You or any other agency employees who are contacted by a former officer or employee, such as a retired General Officer, for information or other assistance, need to ask and answer two questions:

(1) Does this contact violate any of the post-Government employment restrictions?

(2) Is it appropriate to provide the information or other assistance as requested?

Part I - Basic Restrictions on Contacts

Your first concern should be whether the former official should be making the contact at all. There are criminal restrictions on certain types of contacts by former Government personnel. The most relevant are as follows:

(1) For one year after leaving Government service, all former General Officers, members of the Senior Executive Service (Levels V and VI), and other former senior officials are prohibited from making any contact with or appearance before any official of the Government Agency in which they served in their last year, to attempt to influence any official action on behalf of someone else. If the senior official was paid at Level I of the Executive Schedule, the restriction is even broader.

(2) All former officers and employees, regardless of their rank, are prohibited forever from "switching sides" and representing someone else to attempt to influence official Government action concerning any particular matter involving a specific party in which they participated personally and substantially as a Government officer or employee. The prohibition lasts for only two years if they did not participate in this particular matter, but they were supervising the action, *i.e.*, it was under their official responsibility.

(3) In addition, most senior appointees have taken a pledge not to lobby any officer or employee of their agency for five years after they leave Government service.

Not all contacts with Army officials will be criminal or violate the pledge, not even those by a former senior Army official during his first year after leaving Army service. For the contact to be improper, representation of someone (*e.g.* contractor, consultant, labor union, professional association, or some other private organization) is required, along with an attempt to influence an official Army action.

A former officer or employee contacting you to merely seek information, even information that relates to a particular matter with which he/she was involved as an Army officer or employee, might not violate the strict letter of the law. However, you might want to consider that "discretion is oft-times the better part of valor" and discourage such contacts to avoid inappropriate appearances. Contacts like these, especially those by former senior officers and employees during their first year after leaving the Government, could result in embarrassment or worse, such as Inspector General or criminal investigations, contract protests or suspension and debarment actions, and other litigation. The closer to the "line," the more likely that there will be unwanted issues.

Because of this, ethics attorneys routinely advise former senior personnel, for the first year after leaving the Army and government service, not to attend symposia and similar gatherings where active duty Army personnel are sure to congregate. We also suggest that they generally avoid most other contacts with Army personnel during this first year; but, if they must, they need to ensure that the circumstances that make the contact legally correct are clear. Some legal contacts are: purely social activities; dealings to help conclude an official matter that may have been left hanging upon departure; or an overture to suggest that the former senior employee, in his or her personal capacity, be put on contract (here, the former employee representing him or herself, not <u>someone else</u>).

Part II - Contacts Seeking Information

One value of former Army officials to their new employers is their knowledge of the Army: its systems and processes, its personnel, and how to obtain and interpret information. However, former

Government officials are required to protect and not exploit classified, proprietary, contractor bid or proposal, and other "inside information" (*i.e.*, information obtained as part of his Government position which the Army would not release to the public under the Freedom of Information Act (FOIA)). Beyond that, they are free to market and use this valued experience for their own benefit and that of their new employers.

However, one of the capabilities that former Army officials may not, or *should* not, attempt to market to their new employers is ***access***! As a practical matter, retired senior officers or former officials certainly do have access to former colleagues and offices. As retired officers, they have access to military installations and organizations. Retired General Officers have even more access to current officials and information, even briefings, so that they are prepared to work with and assist the Army in the event of an emergency. Notwithstanding this legitimate access, former Army officials may not use, exploit or market this access to their civilian employer.

What if they do and they use their former positions to gain access to current Army officials and information that would not otherwise have been available to the public? Unless they do something illegal, such as violating the procurement integrity law, they are not subject to personal sanction. However, the current Army officials they approach and from whom they receive preferential treatment certainly are. The former Government employee puts the current employee at risk of being disciplined. In some cases, the result can be litigation that delays the agency action and where the only winners are the lawyers.

Army officials' exposure for giving preferential treatment by providing information to former officials include the following possible violations:

- Not adhering to basic obligations of public service as set out in Executive Order 12674.

- Use of public office for the private gain of friends or others with whom the employee is affiliated, or inducing others, such as subordinates, to provide some benefit to persons with whom the official is affiliated in a private capacity.

- Use of nonpublic information to further someone else's private interest, whether through advice or recommendation, or by knowing unauthorized disclosure.

- Unauthorized release of information protected by the Procurement Integrity law.

When a former officer or employee wishes to meet with you or asks you for information, it is your responsibility to ensure that honoring the request will not violate law or regulation. In addition, you should also ensure that those who work for you, especially those who might be intimidated by a request, which sounds like a demand, from a former high-ranking official, understand that it is not only permissible, but expected of them, to question the validity of responding to the request if they have any doubt. They should be encouraged to seek the advice of their supervisor, commander and Ethics Counselor.

Part III - "OK" & NOT "OK" Requests for Information

Here are some examples of **"OK"** requests for information and **"NOT OK"** requests for information. We assume that none of the post-Government employment restrictions apply that would "criminalize" the contact with you in the first instance.

- **"OK" Request.** A retired officer contacts the Standards of Conduct Office to determine the ethics implications of a private organization's proposal to invite current active duty officers to participate in a fundraising effort in support of an Army museum renovation. Any contacts to obtain ethics information and advice are proper.

- **NOT "OK".** After being advised of the ethics implications of active duty officers participating in his organization's fundraising effort in support of an Army museum, the retired officer requests research, analysis and an opinion concerning how the Army authorizes and establishes museums on its installations. Although the retired General was entitled to assistance with the ethics issues, Government resources may not be used to provide him and his organization legal advice concerning Army rules and policies concerning the operation of its museums.

- **"OK" Request.** A retired officer contacts a program manager for a briefing on his program to assist the retired officer in performing a study and writing the report that the Army has contracted with his employer to do. This is a perfectly reasonable and routine request that we would honor in the normal course of business.

• **NOT "OK".** The retired officer requests the same briefing so that he can better understand the program as he helps his employer put together its proposal in response to the Army's request for proposals.

• **"OK" Request.** A former senior employee, thirteen months after retirement, contacts an Army employee, a contracting officer who was one of her subordinates when she worked for the Army, and requests a meeting to try and resolve issues between her new employer and the Army concerning contract disputes that arose after she left her position. This contact involves dialogue and an exchange of information that would and should occur in the normal course of business. And the contracting officer needs to treat her fairly: no better and no worse because of the former employee's senior position with the Army.

• **NOT "OK".** The former senior employee attempts to circumvent the system and makes contacts with other employees to engender inappropriate or accidental disclosures of information, or to bring pressure to bear on the contracting officer. That is not to say that, as an executive in her new company, she cannot attempt to have the issues elevated within the appropriate channels in the Army for discussion and resolution. But, it would not be proper for her to attempt to have high-level Army officials bring pressure on the contracting officer to decide in her favor.

• **"OK" Request.** A retired senior officer contacts his former deputy to obtain information to brief the Chief of Staff, Army, (CSA) on an issue that arose after he retired on which the CSA requested his input. It would even be **"OK"** if it related to a matter that he was involved in prior to his retirement

because there is no attempt to influence official action on behalf of someone else. It would even be **"OK"** if the retired officer was now employed by an Army contractor; however, now the appearances might be such that "discretion is the better part of valor" and it would be better if the meeting did not take place.

In summary, providing information or assistance is appropriate if, at the time of the request, you would readily release this information to any other member of the public, or there is some other official Army reason that the former official is entitled to the information. It is **not** appropriate to release information or provide assistance if the only reason is that the requester is a former colleague or senior official (the operative term here is "former"). Even if it is appropriate to release the information, it is not appropriate to provide an analysis, create additional information, or do projections if you would not do the same for others; the requester may have been entitled to your research and analysis as his or her former subordinate or colleague, but not just because he or she is a former senior officer or employee. In addition to the various possible violations of law and regulation, such favoritism creates terrible appearances and impugns the integrity of Army operations.

When you receive a contact and request for official information or other action from a former Army official, if you have any doubt as to the appropriateness of the contact or how you should respond, you should seek the advice of your Ethics Counselor.

CHAPTER I

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CHAPTER 18

INTRODUCTION TO FISCAL LAW

I. INTRODUCTION.

A. The Appropriations Process.

1. U.S. Constitution, Art. I, ∋ 8, grants to Congress the power to ". . . lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . ."

2. U.S. Constitution, Art. I, ∋ 9, provides that "[N]o Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law. . . ."

B. Historical Perspective.

1. For many years after the adoption of the Constitution, executive departments exerted little fiscal control over the monies appropriated to them. During these years, departments commonly:

a. Obligated funds in advance of appropriations.

b. Commingled funds and used funds for purposes other than those for which they were appropriated.

c. Obligated or expended funds early in the fiscal year and then sought deficiency appropriations to continue operations.

2. Congress passed the Antideficiency Act (ADA), 31 U.S.C. ∋ 1301, 1341, 1342, 1350, 1351, and 1511-1519 to curb the fiscal abuses by the executive departments which frequently created "coercive deficiencies" that required supplemental appropriations. The Act consists of several statutes that authorize administrative and criminal sanctions for the unlawful obligation and expenditure of appropriated funds.

II. KEY TERMINOLOGY.

A. Fiscal Year. The Federal Government's fiscal year begins on 1 October and ends on 30 September.

B. Period of Availability. Most appropriations are available for obligation for a limited period of time, e.g., one fiscal year for operation and maintenance appropriations. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation thereafter.

C. Obligation. An obligation is any act that legally binds the government to make payment. Obligations represent the amounts of orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. DFAS-IN Reg. 37-1, para. 9-1; OMB Cir. A-34; DoD Manual 7220.9-M, ch. 24, para. B.3.a.(1).

D. Budget Authority.

1. Congress finances federal programs and activities by granting "budget authority." Budget authority is also called obligational authority.

2. Budget authority means ". . . authority provided by law to enter into obligations which will result in immediate or future outlay involving government funds . . . ." 2 U.S.C. ∋ 622(2).

a. Examples of "budget authority" include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. OMB Cir. A-34 (Dec. 1995), ∋ 11.2.

b. "Contract Authority," as noted above, is a limited form of "budget authority." Contract authority permits agencies to obligate funds in advance of appropriations but not to pay or disburse those funds absent some additional appropriations authority. See, e.g., 41 U.S.C. ϶ 11 (Feed and Forage Act).

3. Agencies do not receive cash from appropriated funds to pay for services or supplies. Instead they receive the authority to obligate a specified amount.

E. Authorization Act.

1. An authorization act is a statute, passed annually by Congress that authorizes the appropriation of funds for programs and activities.

2. An authorization act does not provide budget authority. That authority stems from an appropriations act.

3. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.

F. Appropriations Act.

1. An appropriations act is the most common form of budget authority.

2. An appropriation is a statutory authorization "incur obligations and make payments out of the U.S. Treasury for specified purposes." The Army receives the bulk of its funds from two annual Appropriations Acts: (1) the Department of Defense Appropriations Act and (2) the Military Construction Appropriations Act. DFAS-IN Reg. 37-1, para 6-8.

3. The making of an appropriation must be stated expressly. An appropriation may not be inferred or made by implication. Principles of Fed. Appropriations Law, Vol. I, p. 2-13, GAO/OGC 91-5 (1991).

G. Comptroller General and General Accounting Office (GAO).

1. Investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds.

2. Established by the Budget and Accounting Act of 1921 (31 U.S.C. э 702) to audit government agencies.

3. Issues opinions and reports to federal agencies concerning the obligation and expenditure of appropriated funds.

III. ADMINISTRATIVE CONTROL OF APPROPRIATIONS.

A. Methods of Subdividing Funds.

1. Formal subdivisions: Appropriations are subdivided by the executive branch departments and agencies.

a. These formal limits are referred to as apportionments, allocations, and allotments.

b. Exceeding a formal subdivision of funds violates the ADA. 31 U.S.C.э 1517(a)(2); DFAS-IN Reg. 37-1, para. 7-5b.

2. Informal subdivisions: Agencies may subdivide funds at lower levels, e.g., within an installation, without creating an absolute limitation on obligational authority. These subdivisions are considered funding targets. These limits are **not** formal subdivisions of funds.

a. These targets also may be referred to as allowances.

b. Incurring obligations in excess of a target is not necessarily an ADA violation. If a formal subdivision is breached, however, an ADA violation may occur, and the person responsible for exceeding the target may be held liable for the violation.
DFAS-IN Reg. 37-1, para. 7-5c.

c. Army policy allows formal subdivisions of funds at the Major Command (MACOM) level and above. DFAS-IN Reg. 37-1, para. 6-15; See Army Law., Apr. 1988, at 62.

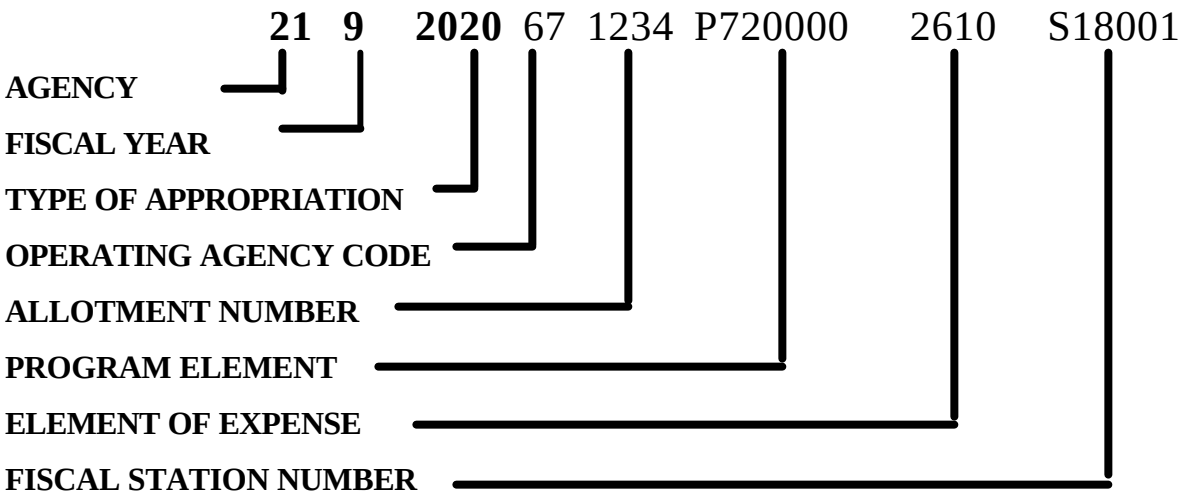
B. Accounting Classifications.

1. Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to help ensure funds are used correctly.

2. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN 37-100-XX, The Army Mgmt. Structure, provide a detailed breakdown of Army accounting classifications. The XX, in DFAS-IN 37-100-XX, stands for the last two digits of the fiscal year, *e.g.*, DFAS-IN 37-100-99 is the source for accounting classification data for FY 1999 for the Department of the Army. DFAS-IN 37-100-XX is published annually.

C. Understanding an Accounting Classification.

1. The following is a sample fund cite:



a. The first two digits represent the military department. The "**21**" in the example shown denotes the Department of the Army.

b. Other Department codes are:

(1) 17 - Navy

(2) 57 - Air Force

(3) 97 - Department of Defense

c. The third digit shows the Fiscal Year/Availability of the appropriation. The “9” in the example shown indicates Fiscal Year (FY) 1999 funds.

(1) Annual appropriations are frequently used in installation contracting.

(2) Other fiscal year designators which are encountered in installation contracting, less frequently, include:

(a) Third Digit = X = No Year appropriation, which is available for obligation indefinitely.

(b) Third Digit = 5/9 = Multi-Year appropriation, in this example, funds appropriated in FY 1995 and available for obligation through FY 1999.

d. The next four digits reveal the type of the appropriation. The following designators are used within DOD fund citations:

```
                            ARMY      NAVY/MC    AIR FORCE    OSD
 )))))))))))))))))))))))))0)))))))))0)))))))))0)))))))))))0))))))
Military Personnel        * 2010    *1453/1105*  3500     *  N/A *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Reserve Personnel         * 2070    *1405/1108*  3700     *  N/A *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
National Guard Personnel * 2060    *   N/A   *  3850     *  N/A *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
O&M*                      * 2020    *1804/1106*  3400     * 0100 *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
O&M, Reserve              * 2080    *1806/1107*  3740     *  N/A *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
O&M, National Guard       * 2065    *  N/A    *  3840     *  N/A *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Procurement (Aircraft)    * 2031    *  1506   *  3010     *  N/A *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Procurement (Missiles)    * 2032    *  N/A    *  3020     *  N/A *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Procurement (Weapons &    *         *         *           *      *
  Tracked Vehicles)       * 2033    *  1507   *  N/A      *  N/A *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Procurement (Ammunition) * 2034    *  1508   *  3011     *  N/A *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Shipbuilding & Conversion* N/A     *  1611   *  N/A      *  N/A *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Other Procurement         * 2035    *1810/1109*  3080     * 0300 *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Research, Development,    * 2040    *  1319   *  3600     * 0400 *
Test & Evaluation (RDT&E)*          *         *           *      *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Military Construction     * 2050    *  1205   *  3300     * 0500 *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Family Housing Constr.    * 0702    *  0703   *  7040     * 0706 *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Reserve Construction      * 2086    *  1235   *  3730     * N/A  *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
National Guard Constr.    * 2085    *  N/A    *  3830     * N/A  *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Environmental Restoration* 0810    *  0810   *  0810     * 0810 *
 )))))))))))))))))))))))))3)))))))))3)))))))))3)))))))))))3))))))1
Wildlife Conservation     * 5095    *  5095   *  5095     * N/A  *
 )))))))))))))))))))))))))2)))))))))2)))))))))2)))))))))))2))))))-
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*Operations and Maintenance: This appropriation provides funding for the operation and maintenance of most Army activities and facilities, to include training, supplies, and some equipment.

IV. LIMITATIONS ON THE USE OF APPROPRIATED FUNDS.

A. General Limitations on Authority.

1. The authority of executive agencies to spend appropriated funds is limited.

2. An agency may obligate and expend appropriations only for a proper **purpose**.

3. An agency may obligate only within the **time** limits applicable to the appropriation (*e.g.*, O&M funds are available for obligation for one fiscal year).

4. An agency must obligate within the **amounts** appropriated by Congress and formally distributed to or by the agency.

B. Limitations Based Upon Purpose.

1. 31 U.S.C. ∋ 1301(a), the "Purpose Statute," provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. See also DFAS-IN Reg. 37-1, para. 9-5c.

2. Three-Part Test for a Proper Purpose. Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).

a. Expenditure of appropriations must be for a specified purpose, or **necessary and incident** to proper execution of the general purpose of the appropriation.

b. The expenditure must not be prohibited by law.

c. The expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation.

3. Appropriations Acts. DOD has nearly one hundred separate appropriations available to it for different purposes.

a. Appropriations are differentiated by service (Army, Navy, etc.) and component (Active, Reserve, etc.), as well as purpose (Procurement, Research and Development, etc.). The major DoD appropriations provided in the annual appropriations act are:

(1) Operation & Maintenance -- used for the day-to-day expenses of training exercises, deployments, operating, and maintaining installations, and civilian pay;

(2) Personnel -- used for military pay and allowances, permanent change of station travel, etc.;

(3) Research, Development, Test and Evaluation (RDT&E) -- used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment; and

(4) Procurement -- used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and "other procurement."

b. DOD also receives smaller appropriations for other specific purposes (*e.g.*, Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA), Chemical Agents and Munitions Destruction, etc.).

c. Congress appropriates funds separately for military construction.

4. Authorization Acts.

a. Annual authorization acts generally precede DOD's appropriation acts.

b. The authorization act may clarify the intended purposes of a specific appropriation, or contain restrictions on the use of the appropriated funds.

5. Legislative History.

a. Legislative history is the record of congressional deliberations that precede the passage of a statute. It is not legislation. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

b. The legislative history is not necessarily binding upon the Executive Branch. If Congress provides a lump sum appropriation without restricting what may be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions. SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD & 30; LTV Aerospace Corp., B-183851, Oct. 1, 1975, 75-2 CPD & 203.

6. The Necessary Expense Rule.

a. The Purpose Statute does not require Congress to specify every item of expenditure in an appropriation act, although it does specify the purpose of many expenditures. DOD has reasonable discretion to determine how to accomplish the purpose of an appropriation. Internal Revenue Serv. Fed. Credit Union--Provision of Automatic Teller Mach., B-226065, 66 Comp. Gen. 356 (1987).

b. The standard for measuring the propriety of a particular expenditure, if not specified in the statute, is:

(1) Whether it is reasonably necessary to carry out an authorized function; or

(2) Whether it will contribute materially to the effective accomplishment of that function.

c. A necessary expense does not have to be the only way or even the best way to accomplish the object of an appropriation. Secretary of the Interior, B-123514, 34 Comp. Gen. 599 (1955). A necessary expense, however, must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).

C. Limitations Based upon Time.

1. Appropriations are available for limited periods. An agency must incur a legal obligation to pay money within the period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations.

a. Expired funds retain their "fiscal year identity" for five years after the end of the period of availability. During this time, the funds are available to adjust existing obligations or to liquidate prior valid obligations, but not to incur new obligations.

b. There are several important exceptions to the general prohibition against obligating funds after the period of availability.

(1) Protests. 31 U.S.C. э 1558. This statutory provision is incorporated at FAR 33.102(c). See also DFAS-IN Reg. 37-1, para. 9-5k.

(2) Terminations for default. DFAS-IN Reg. 37-1, para. 9-5h; See Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976).

(3) Terminations for convenience, pursuant to a court order or agency determination of erroneous award. DFAS-IN Reg. 37-1, para. 9-5i; Matter of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988). Navy Replacement Contract, B-238548, 91-1 CPD & 117.

2. Appropriations are available only for the *bona fide* needs of their periods of availability. 31 U.S.C. ∋ 1502(a). See Magnavox -- Use of Contract Underrun Funds, B-207453, Sept. 16, 1983, 83-2 CPD & 401; To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953).

3. In analyzing the *bona fide* need for a given item or service, the following factors are appropriate for consideration:

   a. The required delivery date in the contract.

   b. The normal rate of consumption.

   c. When the government will make facilities, sites, or tools available.

   d. Whether the government controls when the contractor may begin the work.

   e. Normal weather conditions when planning for outdoor construction or renovation projects.

4. Supplies.

   a. Supplies are generally the *bona fide* need of the period in which they are needed or consumed. Orders for supplies are proper only when the supplies are actually required. Thus, supplies needed for operations during a given fiscal year are *bona fide* needs of that year. To Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965).

   b. The Comptroller General has held that supplies ordered in one fiscal period that an activity will not use until a subsequent fiscal period are *bona fide* needs of the first period under two circumstances:

(1) The stock level exception. A *bona fide* need for supplies exists when there is a present requirement for supply items to meet authorized stock levels (replenishment of operating stock levels, safety levels, mobilization requirements, authorized backup stocks, etc.); and

(2) The lead time exception. If goods or materials will not be obtainable on the open market at the time needed because the time required to order, produce, fabricate, and deliver them requires that they be purchased in a prior fiscal year, such supplies are a *bona fide* need of the year of purchase.

5. Services.

a. Services are presumed to be "severable" and, hence, *bona fide* needs of the fiscal year in which they are performed. Examples are janitorial, gardening, and transportation services. As a general rule, use current funds to obtain current services and do not use current funds to obtain future services.

b. There are statutory exceptions to the general rule. 10 U.S.C. э 2410a permits DOD agencies to award severable service contracts for a period not to exceed 12 months at any time during the fiscal year, funded completely with current appropriations. This statutory exception essentially swallows the general rule. Non-DOD agencies have similar authority. 41 U.S.C. § 2351. For the Coast Guard the authority is found in 10 U.S.C. § 2410a(b).

c. If the services are **nonseverable**, i.e., for a single undertaking, agencies must obligate funds for the entire undertaking at contract award, even though performance will occur during the next fiscal year. See Incremental Funding of U.S. Fish & Wildlife Serv. Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (work on an environmental impact statement properly crossed fiscal years).

6. Maintenance and Repair. The government may obligate current funds for one-time maintenance and repair contracts near the end of the fiscal year, even if performance may not begin until the next fiscal year.
DFAS-IN Reg. 37-1, Table 9-1, fn. 6 (performance must begin NLT 1 January of the following fiscal year).

D. Limitations Based Upon Amount.

1. The Antideficiency Act, (31 U.S.C. ээ 1341- 44 & 31 U.S.C. ээ 1511-17) prohibits any government officer or employee from:

a. Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. э 1341(a)(1)(A).

b. Making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. э 1514(a).
See 31 U.S.C.э 1517(a)(2).

c. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. э 1341(a)(1)(B).

d. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. э 1342.

2. Investigating violations. If a violation occurs, the agency must investigate to identify the responsible individual. The agency must report the violation to Congress through the Secretary of the Army. Violations could result in administrative and/or criminal sanctions. See DOD 7000.14-R, Financial Management Regulation, Vol. 14 (Aug. 1995); DFAS-IN Reg. 37-1, paras. 7-5 through 7-7, 29-13; Memorandum, Assistant Secretary of the Army (FM), subject: Change to AR 37-1, Chapter 7, Administrative Control of Appropriations and Financing of Requirements.

a. The commander must submit a flash report within fifteen working days of discovery of the violation.

b. The MACOM commander must appoint a "team of experts," including members from the financial management and legal communities, to conduct a preliminary investigation.

c. If the preliminary report concludes a violation occurred, the MACOM commander will appoint an investigative team to determine the cause of the violation and the responsible parties. Investigations are conducted pursuant to AR 15-6, Procedure for Investigating Officers and Boards of Officers.

d. The head of the agency must report to the President and Congress whenever a violation of 31 U.S.C. ∋ 1341(a), ∋ 1342, or ∋ 1517 is discovered. OMB Cir. A-34, para. 32.2; DoD Dir. 7200.1, Encl. 5, para. R.

3. Individuals responsible for an Antideficiency Act violation shall receive disciplinary action commensurate with the circumstances and the severity of the violation. See DOD Directive 7200.1, Administrative Control of Appropriations (4 May 1995), paragraph D.5. See also 31 U.S.C. ∋∋ 1349(a), 1518.

V. COMMON PROBLEMS.

A. Using Appropriated Funds for Personal Expenses.

1. Food.

a. Generally, appropriated funds (APFs) are unavailable for government employees' food or refreshments at their official duty stations. Expenditures by the Department of Veterans Affairs Medical Center, Oklahoma City, Oklahoma (II), B-247563, Dec. 11, 1996 (unpub.) (APFs not available for employee breakfasts or meetings); Pension Benefit Guaranty Corp.--Provision of Food to Employees, B-270199, Aug. 5, 1996 (unpub.) (APFs not available for food and drink provided during organizational effectiveness sessions); Department of the Army--Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (coffee/doughnuts unauthorized).

b. Exceptions.

(1) Formal meetings and conferences. 5 U.S.C. ∋ 4110. The government may pay for meals while employees are attending formal meetings or conferences if meals are incidental to meeting, attendance of employees at meals is necessary for full participation in meeting, and employees are not free to take meals elsewhere without being absent from essential business of meeting. This exception does not apply, however, to purely internal business meetings/ conferences sponsored by government agencies. Meals for Attendees at Internal Government Meetings, B-230576, 68 Comp. Gen. 604 (1989); Floyd F. Terranova, B-171321, 50 Comp. Gen. 610 (1971).

(2) Training. 5 U.S.C. ∋ 4109. Activities may provide meals if necessary to achieve the objectives of a training program. Coast Guard--Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.). Agency characterization of a meeting as "training," however, is not controlling. Corps of Engineers -- Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (1993) (quarterly managers meetings of the Corps do not constitute "training"); Meals for Attendees at Internal Government Meetings, B-230939, 68 Comp. Gen. 606 (1989).

(3) Award Ceremonies. 5 U.S.C. § 4503 (civilian incentive awards); 10 U.S.C. § 1124 (military cash awards); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use APFs to pay for refreshments incident to employee awards ceremonies [applies to both 5 U.S.C. §4503 and 10 U.S.C. § 1124 which expressly permit agency to "incur necessary expense for the honorary recognition..."]); Defense Reutilization and Marketing Serv. Award Ceremonies, B-270327, Mar. 12, 1997 (agency may spend $20.00 per person for luncheons provided at award ceremony) (NOTE: 10 U.S.C. § 1125 authorizes medals, trophies, badges, etc. for members/units of armed forces for accomplishments. This statute does not have the express "incur necessary expense" language of 5 U.S.C. § 4503 or 10 U.S.C. § 1124.)

2. Entertainment. APFs generally are not available to pay for entertainment. HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989); See also To the Honorable Michael Rhode, Jr., B-250884, Mar. 18, 1993 (unpub.) (working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds); Navy Fireworks Display, B-202518, Jan. 8, 1982, 82-2 CPD & 1 (fireworks unauthorized entertainment).

3. Licenses and Certificates.

a. General Rule. Agencies may not use APFs to pay employees' license or certificate fees. A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to court of appeals).

b. Exception When obtaining the license is necessary to comply with state-established environmental standards. Air Force--Appropriations--Reimbursement for Costs of Licenses or Certificates, B-252467, June 3, 1994 (unpub.).

4. Business Cards.

a. General Rule. Agencies may use appropriated funds for business cards if the agency head or delegee determines that the purchase is a "necessary expense." See To Mr. Jerome J. Markiewicz, B-280759, Nov. 5, 1998 (unpub.).

b. Current Army policy permits the use of government computers, programs, and paper to print business cards for official use. Commercial printing is authorized only if the use of cards is required in the performance of official duty and to facilitate mission-related business communications. (Normally, only investigators and recruiters fall within this category). See Memorandum for Principal Officials of Headquarters Department of the Army, subject: Printing of Business Cards (1 October 1998).

5. Christmas Cards.

a. Holiday greeting cards are a personal expense, and use of appropriated funds to purchase them is improper. See Expenditures by the Department of Veterans Affairs Medical Center, Oklahoma City, Oklahoma (II), B-247563.4, December 11, 1996 (unpub.).

b. Greeting cards are distinguishable from business cards. The former are used normally as goodwill gestures; the latter facilitate business communications and are linked with mission accomplishment.

B. Improper Augmentation of Appropriations.

1. General rule -- Augmentation of appropriations is prohibited.

a. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. This generally results in expenditures by the agency in excess of the amount originally appropriated by Congress.

b. Basis for the augmentation rule. Augmentation normally violates one or more of the following provisions:

(1) The United States Constitution, Article I, ϶ 9, Clause 7: "No money shall be drawn from the treasury except in consequence of appropriations made by law."

(2) 31 U.S.C. § 1301(a) (Purpose Statute): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

(3) 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute): "Except as . . . [otherwise provided] . . . an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim.

C. Expense/Investment Threshold Issues.

1. Expenses are costs of resources consumed in operating and maintaining DOD, and are normally financed with O&M appropriations. See DOD 7000.14-R, Fin. Mgmt. Reg., vol. 2A, ch 1. Expenses generally include:

a. Labor of civilian, military, or contractor personnel;

b. Rental charges for equipment and facilities;

c. Food, clothing, and fuel;

d. Maintenance, repair, overhaul, and rework of equipment;

e. Real property maintenance, repair, and O&M-funded minor construction projects.

f. Assemblies, spare and repair parts, and other items of equipment not designated for centralized management and costing less than $100,000.

2. Investments are the acquisition costs of DOD capital assets and are normally financed with procurement appropriations. These costs benefit future periods and tend to have a long-term character. See DOD 7000.14-R, Fin. Mgmt. Reg., vol. 2A, ch 1. Investments generally include:

a. All items of equipment, including assemblies, ammunition, explosives, modification kits, and spares and repair parts not managed by the Defense Working Capital Fund (formerly Defense Business Operations Fund), that are subject to centralized item management.

b. All equipment items having a system unit cost equal to or greater than $100,000.

c. Construction, including equipment installed and made an integral part of the facilities.

3. Audits have revealed problems of activities using O&M appropriations to acquire computer systems costing more than the expense/investment threshold. This constitutes a violation of the Purpose Statute and may result in a violation of the Antideficiency Act. The Army subsequently amended its regulations to address this problem. See DFAS-IN 37-100-99, Appendix A.

a. Agencies must consider the "system" concept when evaluating the procurement of Information Technology (IT) end items. The determination of what constitutes a "system" must be based on the primary function of the hardware and software to be acquired, as stated in the approved requirements document.

b. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.

c. Agencies may purchase multiple end items of equipment (*e.g.*, computers), and treat each end item as a separate "system" for funding purposes, if the primary function of the end item is to operate independently.

d. Include standard off-the-shelf software as part of the total system cost when purchased as part of initial acquisition of equipment.

e. Fragmented or piecemeal acquisition of a documented requirement may not be used to circumvent the "system" concept.

D. Military Construction Using O&M Appropriations.

1. Congressional oversight of the Military Construction Program is extensive and pervasive. For example, no public contract relating to erection, repair, or improvements to public buildings shall bind the government for funds in excess of the amount specifically appropriated for that purpose. 41 U.S.C. э 12.

2. There are different categories of construction work with distinct funding requirements.

3. Military construction (MILCON) projects costing over $1.5 million.

a. Congress authorizes these projects by location and funds them in a lump sum by service.

b. Congressional reports identify individual projects specifically.

4. Unspecified Minor Military Construction (MMC) Program--military construction projects costing between $500,000 and $1.5 million. 10 U.S.C. э 2805(a).

a. Congress provides annual funding and approval to each military department for minor construction projects that are not specifically identified in a Military Construction Appropriations Act.

b. The Service Secretary concerned uses these funds for minor projects not specifically approved by Congress.

c. Statute and regulations require approval by the Secretary of the Department and notice to Congress before a minor military construction project exceeding $500,000 is commenced.

5. Minor Military Construction projects costing less than $500,000. 10 U.S.C. ∋ 2805(c); DOD Dir. 4270.36; AR 415-15, para. 1-6.c.(1) (30 Aug 94).

a. Congress expressly authorizes the services to fund these projects with O&M appropriations.

b. Construction includes alteration, conversion, addition, expansion, and replacement of existing facilities, plus site preparation and installed equipment.

c. The $500,000 limitation applies to each minor construction project. A project includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. 10 U.S.C. ∋ 2801(b).

d. Project splitting is prohibited. The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (Air Force improperly split into multiple projects, project involving a group of twelve related buildings).

e. Using O&M funds for construction in excess of the $500,000 per project limit violates the Purpose Statute and may result in a violation of the Antideficiency Act. See DOD Accounting Manual 7220.9-M, Ch. 21, para. E.4.e; DFAS-IN Reg. 37-1, para. 7-5b; AFR 177-16, para. 23c; The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

6. Maintenance and repair projects.

a. DOD funds these projects with O&M appropriations.

b. "Maintenance" is routine, recurring work that prevents deterioration and preserves the facility for its intended purpose. See AR 420-10, sec. II, Terms.

c. DOD guidance. Memorandum, Office of the Secretary of Defense, Comptroller, 2 July 97, subject: Definition for Repair and Maintenance.

(1) Repair means to restore a real property facility, system, or component to such a condition that it may be used effectively for its designated purpose.

(2) When repairing a facility, the components of the facility may be repaired by replacement, and the replacement may be up to current standards or codes. For example, Heating, Ventilation, and Air Conditioning (HVAC) equipment may be repaired by replacement, be state-of-the-art, and provide for more capacity than the original unit due to increased demand/standards. Interior rearrangements (except for load-bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (for example, accessibility, health safety, or environmental) may be included as repair.

(3) Additions, new facilities, and functional conversions must be done as construction. Construction projects may be done concurrent with repair projects as long as the projects are complete and usable.

d. Army guidance. See AR 420-10 (Management of Installation Directorates of Public Works). See also DA Pamphlet 420-11 (Project Definition and Work Classification).

(1) A facility must be in a failed or failing condition to be considered for a repair project.

(2) When repairing a facility you may bring it (or a component of a facility) up to applicable codes or standards as repair. An example would be adding a sprinkler system as part of a barracks repair project. Another example would be adding air conditioning to meet a current standard when repairing a facility. Moving load-bearing walls, additions, new facilities, and functional conversions must be done as construction.

(3) Bringing a facility (or component thereof) up to applicable codes or standards for compliance purposes only, when a component or facility is not in need of repair, is construction.

e. When construction and maintenance or repair are performed together as an integrated project, each type of work is funded separately unless the work is so integrated that separation of construction from maintenance and repair is not possible. In the latter case, fund all work as construction.

f. Improperly classifying work as maintenance or repair, rather than construction, may lead to exceeding the $500,000 project limit.

7. Exercise-related construction. See The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.).

a. Congress has prohibited the use of O&M for minor construction outside the U.S. on Joint Chiefs of Staff (JCS) directed exercises.

b. All exercise-related construction projects coordinated or directed by the JCS outside the U.S. are limited to unspecified minor construction accounts of the Military Departments. Furthermore, Congress has limited the authority for exercise-related construction to no more than $5 million per Department per fiscal year.
10 U.S.C.э 2805(c) (2). Currently, Congress funds exercise-related construction as part of the Military Construction, Defense Agencies, appropriation.

c. DOD interpretation allows only truly <u>temporary</u> structures, such as tent platforms, field latrines, shelters, and range targets that are removed completely once the exercise is completed, from the definition of exercise-related construction. DOD funds the construction of these temporary structures with O&M appropriations.

d. Congress requires the Secretary of Defense to give prior notice of the plans and scope of <u>any</u> proposed military exercise involving U.S. personnel if the amounts expended for construction, either temporary or permanent, are projected to exceed $100,000. Military Construction Appropriations Act, 1996, Pub. L. 104-32, э 113, 109 Stat. 283 (1995).

8. Operational Construction - Use of O&M appropriations. The Deputy General Counsel (Ethics & Fiscal), Department of the Army, has concluded that O&M funds may be used for materials and/or erection of structures of a temporary operational nature and intended to be used only for a temporary period by operational forces to facilitate combat operations. Structures may not be built to sustain permanent or contingency operations at the conclusion of the combat. MILCON appropriations criteria apply in all other situations.

E. Improper Year-End Spending.

1. Overstocking supplies.

2. Entering into contracts for maintenance, repair, and construction although work cannot begin until the spring.

3. Inappropriate offloading using interagency orders.

a. Several statutes authorize federal agencies to obtain goods and services from other agencies. See 31 U.S.C. ∋ 1535 (Economy Act); 41 U.S.C. ∋ 23 (Project Order Statute). See also FAR Subpart 17.5; DFARS Subpart 217.5.

b. Activities must avoid using interagency acquisitions to circumvent the law. See, e.g., DOD Inspector General Audit Report Nos. 94-008 (Oct. 20, 1993), 93-068 (Mar. 18, 1993), 93-042 (Jan. 21, 1993), 92-069 (Apr. 3, 1992), 90-085, (June 19, 1990).

c. General officer approval is required before issuing an Economy Act order to a supplying activity outside DOD.

VI. CONCLUSION.

Use of Government Resources

I. References.

A. 10 U.S.C. §§ 974; 2012; 2541-2553; 2632; 2637.

B. 31 U.S.C. § 1301; 1344; 1349.

C. Exec. Order No. 12674 (Apr. 12, 1989) as amended by Exec. Order No. 12731, Principles of Ethical Conduct for Government Officers and Employees (Oct. 17, 1990).

D. DoD 5500.7-R, Joint Ethics Regulation, with Change 4, dated 6 August 1998.

E. DoD 4500.36-R, Management, Acquisition, and Use of Motor Vehicles (29 Mar. 1994).

F. DoD 4515.13-R, Air Transportation Eligibility, November 1994.

G. DoD Directive 5410.18, Community Relations (Jul. 3, 1974).

H. DoD Directive 1100.20, Support and Services for Eligible Organizations and Activities Outside the Department of Defense (Jan. 30, 1997).

I. DoD Instruction 5410.19, Armed Forces Community Relations (Jul. 19, 1979).

J. Office of Management and Budget (OMB) Circular A-126, "Improving the Management and Use of Government Aircraft," 22 May 1992.

K. 5 C.F.R. Part 251, Agency Relationships with Organizations Representing Federal Employees and Other Organizations (1998).

L. 41 C.F.R. Subpart 101-20.4, Occasional Use of Public Buildings (1997).

M. 41 C.F.R. Subpart 101-35.2, Authorized Use of Long Distance Telephone Services (1997).

N. AR 1-211, Attendance of Military and Civilian Personnel at Private Organization Meetings (1 June 1984).

O. AR 58-1, Management, Acquisition, and Use of Administrative Use Motor Vehicles (C1, 1 March 1981).

P. AR 210-1, Private Organizations on Department of the Army Installations (15 July 1981).

Q. Secretary of Defense Memorandum, DoD Policy on the use of Government Aircraft and Air Travel, 1 October 1995.

R. Secretary of the Army Memorandum, Policy for Travel by Department of the Army Officials, December 8, 1995.

II. Introduction.

A. Methodology for Determining Permissible Uses of Government Resources.

(1) The Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, acknowledge that "there may be circumstances when an employee may properly use Government property or official time for activities other than the performance of the official duties of the employee's position." Office of Government Ethics (OGE) Letter to General Counsel, Office of Personnel Management, dated March 21, 1997.

(2) Under 5 C.F.R. 2635.704, an employee must protect and conserve Government property and refrain from using or allowing its use for purposes other than those for which it is made available to the public *or those authorized in accordance with law or regulation*. This section was intended to make it clear that "authorized purposes" may be purposes that do not strictly relate to the performance of official duties.

(3) Thus, by definition, employees who use government property in accordance with applicable laws and regulations do not violate the standards. OGE Informal Advisory Letter 95 X 13, 1995 WL 855438 (Dec. 1, 1995).

B. Authority to Regulate the Use of Government Property.

(1) General Services Administration (GSA) and the Office of Personnel Management (OPM) are authorized to promulgate executive branch-wide regulations governing the use of government resources.

(2) Except as limited by statute or regulation, federal agencies possess the discretion to promulgate departmental regulations governing the use of government resources. OGE Informal Advisory Letter 93 X 6, 1993 WL 721226, Mar. 10, 1993.

(3) The Office of Government Ethics (OGE) does not have the authority to promulgate any expansion or limitation of other regulations governing the use of government property.

OGE Informal Advisory Letter 95 X 13, 1995 WL 855438, Dec. 1, 1995.

III. Fiscal Underpinnings.

A. Appropriated funds are available only for the objects for which the appropriations were made. 31 U.S.C. § 1301(a) (the "Purpose Statute").

B. Congress cannot specify every item of expenditure in agency appropriation acts. Thus, under the "necessary expense rule," appropriations made for particular objects, by implication, confer authority to incur expenses that are reasonably necessary or incident to the proper execution of those objects. *See* 71 Comp. Gen. 527 (1992).

(1) Application of the "necessary expense rule" is a matter of agency discretion.

(2) In reviewing the propriety of an expenditure, the Comptroller General considers whether, under the circumstances, the relationship between the authorized function and the expenditure is so attenuated as to take it beyond the agency's legitimate range of discretion. *See* Ms. Comp. Gen. B-257488 (Nov. 6, 1995).

C. The Comptroller General of the United States retains authority under 31 U.S.C. 3529 to issue decisions to disbursing or certifying officers and heads of agencies on matters involving the use of appropriated funds that do not specifically involve settling a claim or other functions transferred to the Director of the Office of Management and Budget by section 211 of the Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, 109 Stat. 514, 535 (1995). Ms. Comp. Gen. B-275605 (Mar. 17, 1997).

IV. General Restriction. Employees must protect and conserve Government property and use it (or allow its use) only for authorized purposes. 5 C.F.R. § 2635.704(a).

A. This restriction is based on the general principle set forth at 5 C.F.R. § 2635.101(9) and Exec. Order No. 12674, April 12, 1989, as amended by Exec. Order No. 12731, October 19, 1990, Part I(i) ("Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.")

B. "Government property" includes real or personal property in which the government has any property interest, and any right or other intangible interest (including contractor services) purchased with government funds. 5 C.F.R. § 2635.704(b)(1). Also, any benefit resulting from expenditure of appropriated funds belongs to the government, and may not be accepted for personal use. 5 C.F.R. § 2635.204(c)(3).

C. "Authorized purposes" are purposes for which government property is made available to the public, or purposes authorized under law or regulation. 5 C.F.R. § 2635.704(b)(2).

D. Duty to protect and conserve government property and to use it only for authorized purposes is attended by an obligation to disclose waste, fraud, abuse, and corruption to appropriate authorities. *See* 5 C.F.R. § 2635.101(11).

V. Restrictions on Use of Particular Types of Government Resources.

A. *Official Time.* Employees must use official time in an honest effort to perform official duties, unless authorized under law or regulation to use official time for other purpose. 5 C.F.R. § 2635.705(a).

B. *Official Authority.* ***"An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations.***" 5 C.F.R. § 2635.702. "Official authority" (i.e., position, title or any authority associated with public office) may not be used to:

(1) Coerce or induce any person to provide any benefit to the employee or any person with whom the employee is affiliated in nongovernmental capacity. 5 C.F.R. § 2635.702(a).

(2) Imply official endorsement of personal activities. 5 C.F.R. § 2635.702(b).

(3) Endorse any product, service or enterprise except as statutorily authorized, or pursuant to agency programs that recognize accomplishments or compliance with agency standards.

C. *Nonpublic Information*. Information gained through federal employment that the employee knows or should know has not been made publicly available may not be used in financial transactions, or to further private interests. 5 C.F.R. § 2635.703.

D. *Subordinates.*

(1) ***"An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation."*** 5 C.F.R. 2635.705(b).

(2) ***DoD employees, such as secretaries, clerks, and military aides, may not be used to support the unofficial activity of another DoD employee in support of non-Federal entities, nor for any other non-Federal purposes, except as provided in subsections 3-211 and 3-300.b" of the JER.*** Section 3-

305b, JER.

(3) Enlisted aides. AR 614-200. See Army Info Paper on Do's and Don'ts, and regulation extract in the Appendix.

E. *Communication Systems.* ***Federal Government communication systems and equipment (including Government owned telephones, facsimile machines, electronic mail, internet systems, and commercial systems when use is paid for by the Federal Government) shall be for official use and authorized purposes only.*** Section 2-301, JER. (*See* 41 C.F.R. Subpart 201-21.6 re: use of Government telephone systems.)

(1) "Official use" includes emergency communications; communications deemed necessary in the interest of the Government; and "morale and welfare" communications by DoD employees on extended deployments. Section 2-301a(1), JER.

(2) "Authorized purposes" include:

(a) Brief calls home while TDY to notify family of official transportation or schedule changes.

(b) Personal communications from the work place that are most reasonably made while at the work place when the Agency Designee determines that such communications:

(i) Do not adversely affect official duty performance;

(ii) Are of reasonable duration and frequency, and made during personal time whenever possible;

(iii) Serve a legitimate public interest (such as keeping employees at their desks, enhancing professional skills of the employees; job searching in response to downsizing.

(iv) Do not reflect adversely on DoD; and

(v) Do not overburden the communication system and create no significant additional cost to DoD (including long distance telephone charges).

(c) Other examples include checking with spouse or minor children, scheduling doctor and auto or home repair appointments, brief internet searches, e-mailing directions to visiting relatives.

(3) Government telephones in personal residences. Permitted when necessary for national defense purposes. 31 U.S.C. 1348. DoD Instruction 5335.1.

(4) Civilian Employees' Use of Online Tax Preparation.

(a) The standard corporate discount is offered to civilians who choose to use the service, which is free to military.

(b) Use of Government computer to file may be approved by supervisors on a non-interference basis.

F. *Use of E-Mail and Internet*. See article on "Use of Government E-Mail Accounts & Internet Access" by Mike Wentink, TJASGA draft policy, Army memo on "Permissible Use of Federal Government Communications Resources, and the "Ten Commandments for Computer" in the Appendix.

(1) "Army e-mail …will not be used in a way that would interfere with official duties, undermine readiness, reflect adversely on DoD or the Army (such as chain letters; unofficial advertising, soliciting or selling via e-mail; and other uses that are incompatible with public service), or further any unlawful activity or personal commercial purposes." SAIS message on Inappropriate Use of Electronic Mail, dated 151106Z Apr 98), in the Appendix. See also Army memos on "Mass Electronic Mail Distribution" and "Personal Use of Telephones, E-mail and the Internet" in the Appendix.

(a) Interfering uses include:

(i) Sending e-mail chain letters;

(ii) "Spam" – exploiting listservers or other group broadcast systems for purposes beyond their intended scope to provide widespread distribution of unsolicited e-mail;

(iii) Broadcast unnecessary advertisements of Army services;

(iv) "Letter-bomb" – send same e-mail repeatedly to interfere with recipient's use of e-mail. See Washington Post article, "Defense Worker Gets Jail for E-Mail" in the Appendix.

(v) Broadcast e-mail messages of daily quotations, jokes, or other similar transmissions. (Beware of jokes in general;

you never know who may be offended. See Washington Post articles on e-mail humor in the Appendix.

(vi) Broadcast unsubstantiated virus warnings;

(vii) Direct messages to large audiences and sending repeated messages as "reminders."

(2) Other potential practices that may create unacceptable strain on the automation systems include the attachment of large video files to personal messages and live video and audio links. Certain screen saver programs, such as "Pointcast," and other files linked to the Internet may create security breaches.

(3) Official website links to private websites.

(a) Include a disclaimer. See sample from the Defense Finance and Accounting Agency in the Appendix.

(b) Don't imply official DoD endorsement.

(c) Don't play favorites - include links to similar organizations.

(4) Use of Government systems indicates consent to monitoring. Be aware of developing privacy interests in this area. 18 U.S.C. 2510 (The Electronic Communications Privacy Act); 50 U.S.C. 1809; 18 U.S.C. 1030 (Computer Fraud and Abuse Act)(The Hacker Statute); *O'Connor v. Ortega*, 480 U.S. 709 (1987)(ad hoc approach to reasonableness); Army Reg. 380-19 (Information Systems Security), Appendix G, para G-1.b; Army Reg. 380-53 (Information System Security Monitoring), para 2-1.b.

(5) May use official e-mail to notify DoD personnel of events of common interest sponsored by non-Federal entities. JER para. 3-208.

G. *Business Cards*. See DoD and DA memos on Printing of Business Cards in the Appendix.

(1) DoD Policy: In-house printing of business cards using existing software and commercially purchased card stock is permitted.

(2) Limitations:

(a) Cards should contain only the necessary business information.

(b) Color or customized cards must be purchased at the employee's expense.

(3) Commercially purchased cards

(a) Authority to approve commercial purchase has been delegated to general officers and SES employees.

(b) Purchase may be approved when use is required in the performance of official duties or to facilitate mission-related business communications.

(c) In the Army, commercial cards would be authorized generally only for recruiters and investigators

H. *Holiday Cards*. Are not considered official. Use of Government resources to produce holiday greeting cards is not permitted. See DA OGC Memo, Christmas Cards, in the Appendix.

VI. Personal Use of Government Resources (other than communications systems).

A. Section 2-301b, JER authorizes limited **personal** use of government resources (equipment and property such as typewriters, calculators, and libraries), if the agency designee determines that such use meets the following criteria. See sample use guidelines from DoD OGC, Guidelines For the Use of Laptop Computers, in the Appendix.

(1) Does not adversely affect official duty performance;

(2) Is of reasonable duration and frequency and occurs only during the employee's personal time;

(3) Serves a legitimate public purpose (such as supporting local charities or volunteer services to the community, developing professional skills, job searching in response to downsizing);

(4) Does not reflect adversely on DoD; and

(5) Creates no significant additional cost to DoD.

B. Use of official time and Government equipment for Guard or Reserve duty purposes may be

authorized. 5 C.F.R. § 251.202. See DoD OGC letter to the Office of Personnel Management in the Appendix. See also Comp. Gen. Letter, B-277678, January 4, 1999.

C. **Remember - the use always requires supervisor approval**

VIII. Enforcement.

A. Military members. Penalties for violating the rules republished in, and prescribed by, the JER include the full range of applicable criminal, civil and administrative sanctions for current DoD employees, including punishment under the UCMJ for military members. Section 10-100, JER.

(1) The regulations at 5 C.F.R. 2635 in subsection 2-100 of the JER apply to enlisted members pursuant to section 1-300.b, JER and DoD Directive 5500.7, Standards of Conduct, para. B.1a (Aug. 30, 1993).

(2) The prohibitions and requirements printed in bold italics in the JER are general orders and apply to all military members without further implementation. DoD Directive 5500.7, Standards of Conduct, para. B.2a (Aug. 30, 1993).

B. Civilian employees.

(1) The Merit Systems Protection Board regards misuse of government resources as a serious charge. The Board has upheld suspensions of 30 days or more for sustained charges of misuse of government resources. Barcia v. Department of the Army, 47 M.S.P.R. 423 (1991) (30-day suspension was reasonable for appellant's use of government computer to maintain private business records and contact computer firms by modem).

(2) The agency is not required to prove intent to sustain a charge of misuse of government property. Sternberg v. Department of Defense, Dependents Schools, 52 M.S.P.R. 547 (1992).

(3) Charge of misusing government property can be sustained regardless of whether the employee paid for such usage. Wenzel v. Department of the Interior, 33 M.S.P.R. 344 (1987).

DAJA-SC (600-50a) 8 January 1997

MEMORANDUM FOR OFFICE OF THE JUDGE ADVOCATE GENERAL PERSONNEL

SUBJECT: Permissible Use of Federal Government Communications Resources

1. Reference: Department of Defense (DOD) 5500.7-R, *Joint Ethics Regulation* (JER), 30 August 1993 (w/ch2).

2. Use of Federal communication resources (including Government owned and leased telephones, facsimile machines, electronic mail (e-mail) and other access to the internet) "shall be for official use and authorized purposes only." (JER 2-301). "Authorized purposes" may include personal use as permitted by "Agency Designees" within specified parameters.

3. I hereby establish the following policy for personal use of Federal Government communications resources by Office of The Judge Advocate General personnel. Supervisors may issue more restrictive guidance.

4. The following personal communications are permitted:

> Those communications that are most reasonably made from your normal work place, such as checking in with spouse or children, making medical, home and automobile repair and similar appointments; or making a bank or other financial transaction.

5. In order to ensure that such use does not adversely affect the performance of official duties and serves a legitimate public interest, this permission is subject to the following:

a. Whenever possible, do it before or after your work hours or during lunch or other authorized breaks;

b. If made during your normal work hours, keep the communications <u>infrequent</u> and <u>short</u>;

c. You may not incur any long distance tolls or other usage fees chargeable to the Government; you must use toll-free numbers or charge the communications or access or other fees to your personal credit card;

d. This permission does not extend to personal communications to solicit business, advertise, or engage in other selling activities in support of private business enterprises; fundraising activities (other than those permitted by JER 3-210); or any other use that would reflect adversely on the Army or which is incompatible with public service.

e. You may not send group electronic mailings to offer items for sale or other personal purposes (*e.g.*, selling an automobile or renting a private residence). You may not send group electronic mailings to announce events sponsored by a non-Federal entity without the prior approval of your supervisor.

6. In addition, the internet provides a tremendous resource of information interchange and other communication through such vehicles as mail list servers, databases, files, and web sites. Subject to the restrictions in subparagraph 5c through e, above:

a. You have permission to use your computers to access and use these internet resources for professional development purposes, subject to ensuring that your primary duties and mission are accomplished;

b. You also have permission to use your computers to access and use these internet resources for any other personal reason, such as routine e-mail correspondence with your children away at college, reading a business magazine website or checking stock quotes; but you may do this only before and after work hours, or during your lunch period or other authorized break during the work day.

7. In appropriate cases, your supervisor may also authorize you to use e-mail and other internet access in support of your personal and private participation in non-Federal and not-for-profit professional organizations (*see* JER 3-305), subject to the limitations in paragraph 5, above.

8. You should be aware that any use of Government communications resources is with the understanding that such use is generally not secure, not anonymous, and serves as consent to monitoring.

MICHAEL J. NARDOTTI, JR.
Major General, US Army
The Judge Advocate General

TJAGSA **DRAFT** POLICY: USE OF FEDERAL GOVERNMENT COMMUNICATION SYSTEMS AND RESOURCES

1. Introduction. This establishes TJAGSA's policy on the use of TJAGSA's communication systems and other government resources.

2. Policy. Federal Government communication systems and equipment shall be for official use and authorized purposes only. Any nonofficial use by employees of Federal Government communication systems must first be approved by the employee's supervisor. Supervisors will grant permission for authorized purposes only. Employees shall use Federal Government communication systems with the understanding that such use is generally not secure, is not anonymous, and serves as consent to the monitoring of any type of use, including incidental and personal uses, whether authorized or unauthorized. Employees shall not disclose communication system access data (such as passwords) to anyone (unless such disclosure is authorized).

3. Definitions.

A. "Communication systems" include telephones, facsimile machines, electronic mail, internet systems, and any other electronic communication systems.

B. "Official use" includes emergency communications and communications that are necessary in the interest of the Federal Government.

C. "Authorized purposes" include authorized "incidental uses." Examples of "incidental use" would include (if authorized):

1. A traveler's brief communication to family, notifying them of schedule changes.

2. Personal communications from the employee's usual work place that are most reasonably made during working hours, such as:

a) Checking in with a spouse or minor children,

b) Scheduling medical appointments,

c) Arranging for auto or home repairs,

d) Brief internet searches, and

e) E-mailing directions to visiting relatives.

D. Supervisors must make the following determination before approving requests to use Federal Government communication systems. The communications:

1. Do not adversely affect official duties.

2. Are of reasonable duration and frequency, and whenever possible, made during the employee's personal time.

3. Serve a legitimate public interest. For example, the use:

a) Keeps employees at their desks.

b) Educates employees on the communication system.

c) Enhances professional skills.

d) Assists in job searches in response to downsizing.

E. Do not reflect adversely on DOD. For example, the use may not involve pornography, chain letters, group mailings, unofficial advertising, soliciting, selling, illegal activities, inappropriately handled classified materials, or uses incompatible with public service.

1. Do not overburden the communication system.

2. Do not create significant additional cost to DOD. Long distance charges must be charged to a non-DOD number.

1. Federal Government Resources. Federal Government resources, including equipment, personnel, and property, shall be used by DOD employees for authorized purposes only, to include:

F. Supervisors may permit employees limited use of computers, typewriters, calculators, libraries, and other similar resources and facilities, if the supervisor determines that the use:

1. Does not adversely affect official duties.

2. Is of reasonable duration and frequency, made only during the employee's personal time.

3. Serves a legitimate public interest. For example, the use:

a) Enhances professional skills.

b) Assists in job searching resulting from downsizing.

4. Does not reflect adversely on DOD. For example, the use may not involve pornography, chain letters, group mailings, unofficial advertising, soliciting, selling, illegal activities, inappropriately handled classified materials, or uses incompatible with public service.

5. Does not create significant additional cost to DOD.

1. TJAGSA's Blanket Authorization to Employees. The Commandant, as agency designee, has determined that the following uses of Federal Government resources will be permitted for personal communications: (1) those communications that are most reasonably made from your normal work place, such as checking in with spouse or children; (2) e-mailing a short message to a fellow employee; (3) receipt of e-mail, as long as a comparable receipt would be acceptable via telephone, and the use is no more disruptive than a telephone call; (4) making medical, home and automobile repair, and similar appointments; and (5) making a bank transaction. Any other use must be authorized by the employee's supervisor.

G. Supervisors may revoke this authorization, or parts thereof, for any perceived misuse of TJAGSA resources. To ensure that such use does

not adversely affect the performance of official duties and serves a legitimate public interest, this permission is subject to the following:

1. **Whenever possible, do it before or after your work hours or during lunch or other authorized break;**

2. **If made during your normal work hours, keep the communications** infrequent **and** short**;**

3. **The Federal Government must not incur any long distance charges or other fees for these communications; you must use toll-free numbers or charge the communications to your own personal credit card;**

4. **This permission does not extend to personal communications to solicit business, advertising or other selling activities in support of a private business enterprise, or any other use that would reflect adversely on DOD or which are incompatible with public service (*e.g.*, threatening or harassing phone calls and transferring pornography or other sexually explicit communications).**

H. ***In addition to e-mail, the internet provides a tremendous resource of information interchange and other communications through such vehicles as mail list servers, databases, files, and web sites. Subject to the restrictions in sections V.A.3. and V.A.4., above:***

1. **You have permission to use your computers to access these internet resources for professional development purposes, subject to ensuring that your primary duties and mission are accomplished.**

2. **You also have permission to use your computer to access these internet resources for any other personal reason; but you may do this only before and after work hours, or during your lunch period or other authorized break during the work day.**

I. ***Supervisors must monitor employee use of federal communication systems and resources to ensure that the above guidance is followed. Any requests that are not covered under the blanket authorization will be handled by supervisors. Supervisors will follow the above guidance in acting upon such requests.***

FACT SHEET

ATZR-JA
CPT Phillips/ 2-2388
7 December 1998

SUBJECT: Purchase and Mailing of Greeting Cards

PURPOSE: To inform Commanders of Restrictions on the Purchase and Mailing of Greeting Cards/Christmas Cards

FACTS:

1. The use of government funds to purchase greeting cards (including Christmas cards) is not authorized.

a. Army Regulation 37-47 prohibits the use of official representation funds for the purchase and mailing of greeting cards;

b. AR 215-1 prohibits the use of non-appropriated funds for the purchase of greeting cards;

c. The Comptroller General has stated that the cost of greeting cards is "a personal expense to be borne by the officer who ordered and sent them, and may not be charged to public funds." This also includes greetings in the form of a letter, rather than a card.

d. The Comptroller General has also held that it is immaterial that the card is sent by an organization, and not by an individual; the expenditure is still improper.

2. In accordance with the above-stated restrictions, all purchases must be made with personal funds, with no reimbursement by the government. Additionally, under the Joint Ethics Regulation, government resources may not be used to deliver personal mail.

3. As the Office of the General Counsel for the Government Accounting Office stated, "While sending greetings may be a nice gesture, it is not the sort of thing that should be charged to the taxpayers."

December 7, 1998

MEMORANDUM FOR STANDARDS OF CONDUCT OFFICE, DEPARTMENT OF THE ARMY

SUBJECT: Christmas Cards

You asked whether appropriated funds could be used to purchase holiday greeting cards. Your question has arisen in response to a recent Comptroller General opinion that overturned a series of prior Comptroller General opinions, and found that obtaining business cards for government employees who regularly deal with the public could be a "necessary expense" for purposes of using government operations and maintenance appropriations. B-280759 (November 5, 1998). Several commanders have asked your office whether this opinion could be read to permit the purchase of holiday greeting cards. The answer to your question is that appropriated funds may not be used to purchase holiday greeting cards.

The recent Comptroller General opinion, and the Office of Legal Counsel opinion on which it is based, rest upon the recognition that business cards are used in the modern world to provide telephone numbers, office addresses, e-mail addresses, and other information useful in maintaining business communications. Business cards are no longer used primarily as calling cards, a personal social formality. The Comptroller General has repeatedly refused to permit the use of appropriated funds for holiday greeting cards, based on the premise that holiday greeting cards are primarily individual good will gestures and not part of a general effort to improve the work environment or accomplish agency business. B-2475634 (December 11, 1996); 67 Comp.Gen 87 (November 17, 1987); 64 Comp.Gen 382 (March 20, 1985). We are aware of no social changes that would cause us to believe that Comptroller General might change his position on holiday greeting cards.

/s/

Matt Reres
Deputy General Counsel
(Ethics & Fiscal)

Ford, Fred K., MAJ, TJAGSA

From: MIKE WENTINK [mwentink@alexandria-emh1.army.mil]
Sent: Tuesday, February 09, 1999 2:19 PM
To: ethicscounselors; CRAIG HODGE
Cc: DEMMON CANNER; ALEX BAILEY; STAN CITRON; LISA SIMON; ED BEAUCHAMP
Subject: Use of Government Resources

The GAO has written an opinion that discusses 5 CFR Sec. 2635.704 (Use of Government property) and 5 CFR Sec. 2635.705 (Use of Government time). It is a letter addressed to the GC of OPM and dated 4 Jan 99. It deals specifically with the issue of members of the Reserve Component using their time while on their Federal civilian job and agency office equipment to engage in incidental functions related to his or her Guard or Reserve organization.

The GAO concludes that agencies may permit their employees to use a limited amount of official time and agency resources to support the Guard and Reserves. The starting point is the purpose statute, 31 USC Sec. 1301(a). But, not each and every Government employee or agency activity has to be specficially listed by statute. The agency has a permissible range of discretion, although it probably would want to regulate how it is used. [See chapter 3, DoD Joint Ethics Regulation, e.g., JER 3-211].

Here is the link to the GAO letter:

- [Letter], B-277678, January 4, 1999
http://www.gao.gov/decisions/appro/277678.htm

Mike Wentink

Use of Government E-Mail Accounts &
Internet Access

by

Michael J. Wentink
Army Standards of Conduct Office
Office of The Judge Advocate General

(U)

I. Introduction.

Most Army personnel have access to Army computers and most Army computers are capable of sending electronic mail (e-mail) and otherwise accessing the internet through Army provided gateways. As a result, commanders and supervisors are increasingly dealing with issues of permissible use of e-mail and other access to the internet using government resources.

There have already been cases of misuse. Most are minor requiring "on-the-spot" type corrections. Others have been more serious. Such misuse will likely increase as the availability of these resources grows and they become even easier to use than they are now. This article explains the ethical parameters and gives specifics examples of what is permissible and what is not when dealing with the use of government communications resources.

II. What is the "Internet"?

The internet is a worldwide network that consists of thousands of smaller networks. Military, government, commercial and organizational networks, and each person when he or she connects to the internet, are all part of this global network. The internet is a gargantuan (the only word for it) resource of information. There are tens of thousands of "sites" on the net where information is provided. Some examples of site subjects are:

- the White House;
- a family (pictures, statistics, heritage);
- a military installation (command organization, history of the installation and units, available services, hospital hours, community events);
- a company's products and services and how to order them;
- lists of, and links to, other sites related to a particular subject such as a stamp collecting, mutual fund investments, legal topics, engineering, travel, *etc.*;
- search engines (used to find specific sites, or to find names, addresses and phone numbers, maps, *etc.*)
- pending legislation; and
- Department of Defense (DOD) Directives.

These sites are called "web sites" because of the web of information that they link to at many other sites throughout the internet. With the click of the mouse at an installation's web

site, for example, the user is transported to the Army's site, and from there to the DOD site, and from there to the White House, *ad infinitum*.

In addition, list servers exist for just about any topic of interest. Those who subscribe to the list server (usually for free) engage in a dialogue with other subscribers concerning a particular topic. Each message in the dialogue goes to all members of the "list" as e-mail. Newsgroups also exist for just about any topic. Newsgroups are like the list servers, but the messages are not sent via e-mail. Rather the messages are posted to, and downloaded from, the group's "bulletin board" for any interested person to read.

Finally, the most ubiquitous use of the internet is for the transmission of e-mail. E-mail uses software programs like CC Mail, Groupwise and Eudora where the user enters a computer-type address to send a message electronically to someone within the same office on the local area network, or to someone in another office that is connected with his or her office (wide area network), or to anyone else anywhere in the world through the internet. The cost of sending the message is the same for the message to go to someone in the next office as it is to a friend on the other side of the globe -- nothing! The overhead of the computers and access to the internet exists whether or not e-mail is transmitted. There are no additional postage, toll or long distance charges for sending e-mail.

There is a tremendous amount of information on the internet. Access and use by Army personnel in the performance of their official duties is a tremendous benefit to the Army.

However, the internet can also be a quick, reliable and cheap source for “personal” information and communications.

III. Ethical Parameters for the Internet.

The DOD *Joint Ethics Regulation* (JER), DOD 5500.7-R, directs that communications resources shall be for “official use” and “authorized purposes” only.

“Official use” is easy to determine in most circumstances.

“Authorized purpose” is a concept that recognizes the reality of the workplace and the needs of employees. While at their desk, employees often have a need to access information and to communicate with family and others concerning their non-work life. In addition to using the telephone, they can now engage in this type of personal communication by using e-mail and other access to the internet.

Rules governing the use of the telephone for personal reasons were quite restrictive. Now, however, the JER provides some latitude by permitting personal communications that are reasonably made from the workplace, to include communications by e-mail and brief internet searches, when permitted by the “Agency Designee” (supervisors, directors and commanders). The criteria for such permissive communications are:

- No adverse impact on the employee's official duties;
- Reasonable duration and during personal time (*e.g.* break periods or lunch) as much as possible;
- Serves legitimate public interest (*e.g.* keeping employee at desk, enhancing employee proficiency in use of the system, or enhancing professional skills);
- No adverse reflection on DOD;
- Doesn't overburden the communications system or result in significant additional cost.

This means that you may permit employees to send e-mail to their children studying at an university, check the stock market at a website, read a news magazine at a website, send e-mail to their families at home while on TDY, make a medical appointment, authorize a financial transaction, *etc*. There are, however, some uses that should never be permitted and that will almost always be ***wrong***, such as:

- Sending electronic chain letters;
- Sending "for sale" messages to multiple addresses;
- Sending multiple e-mails promoting fundraising or other private enterprises;
- Surfing sexually oriented websites;
- Conducting private business, such as a tax preparation service.

Commanders, supervisors and directors should consider issuing a written policy so that their employees are aware of the parameters. This policy could be for an entire command, installation or office, depending on the circumstances. Although the policy must comport with minimal JER guidelines, there are many reasons for it to be more restrictive, such as security concerns or resource capacity. A sample policy statement might be as follows:

> 1. Reference: Department of Defense (DOD) 5500.7-R, *Joint Ethics Regulation* (JER), 30 August 1993 (w/ch2).
>
> 2. Use of Federal communication resources (including Government owned and leased telephones, facsimile machines, electronic mail (e-mail) and other access to the internet) "shall be for official use and authorized purposes only." (JER 2-301). "Authorized purposes" may include personal use as permitted by "Agency Designees" within specified parameters.
>
> 3. I hereby establish the following policy for personal use of Federal Government communications resources by <u>(identify office, directorate, command or organization)</u> personnel. Supervisors may issue more restrictive guidance.
>
> 4. The following personal communications are permitted:
>
> > Those communications that are most reasonably made from your normal work place, such as checking in with spouse or children, making medical, home and automobile repair and similar appointments; or making a bank or other financial transaction.
>
> 5. In order to ensure that such use does not adversely affect the performance of official duties and serves a legitimate public interest, this permission is subject to the following:
>
> a. Whenever possible, do it before or after your work hours or during lunch or other authorized breaks;

b. If made during your normal work hours, keep the communications infrequent and short;

c. You may not incur any long distance tolls or other usage fees chargeable to the Government; you must use toll-free numbers or charge the communications or access or other fees to your personal credit card;

d. This permission does not extend to personal communications to solicit business, advertise, or engage in other selling activities in support of private business enterprises; fundraising activities (other than those permitted by JER 3-210); or any other use that would reflect adversely on the Army or which is incompatible with public service (*e.g.*, chain letters, harrassing e-mail, surfing sexually oriented sites or downloading sexually oriented material).

e. You may not send group electronic mailings to offer items for sale or other personal purposes (*e.g.*, selling an automobile or renting a private residence). You may not send group electronic mailings to announce events sponsored by a non-Federal entity without the prior approval of your supervisor.

6. In addition, the internet provides a tremendous resource of information interchange and other communication through such vehicles as mail list servers, databases, files, and web sites. Subject to the restrictions in subparagraph 5c through e, above:

a. You have permission to use your computers to access and use these internet resources for professional development purposes, subject to ensuring that your primary duties and mission are accomplished;

b. You also have permission to use your computers to access and use these internet resources for any other personal reason, such as routine e-mail correspondence with your children away at college, reading a business magazine website or checking stock quotes; but you may do this only before and after work hours, or during your lunch period or other authorized break during the work day.

7. In appropriate cases, your supervisor may also authorize you to use e-mail and other internet access in support of your personal and private participation in non-Federal and not-for-profit

professional organizations (*see* JER 3-305), subject to the limitations in paragraph 5, above.

8. You should be aware that any use of Government communications resources is with the understanding that such use is generally not secure, not anonymous, and serves as consent to monitoring.

IV. CONCLUSION.

There appears to be a lot of uncertainty by Army employees concerning what is and is not permissible use of the internet, including the transmittal of e-mail. Staffing and issuing a written policy within your command or organization will help with this uncertainty.

RELATIONS WITH NON-FEDERAL ENTITIES

Prepared by Steve Epstein, Deputy Director, Standards of Conduct Office
DoD General Counsel
March 16, 1999

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A. ETHICAL PRINCIPLES COMMONLY INVOLVED:

1. Personnel shall not use Government property for other than authorized purposes.
2. Personnel shall not use public office for private gain.
3. Personnel shall not give preferential treatment to any private organization or individual.
4. Personnel shall not hold financial interests that conflict with their conscientious performance of duty.

B. APPLICATION OF ETHICAL PRINCIPLES:

1. **Misuse of Government Resources (fiscal law):** Government property (appropriated funds) may be used only for authorized purposes.

   References:

   5 C.F.R. 2635.704: Improper use of Government property
   5 C.F.R. 2635.705: Improper use of official time
   5 C.F.R. 2635.808: Fundraising
   41 C.F.R. 101-20.4: Occasional use of public buildings
   DoD 5500.7-R, Joint Ethics Regulation (JER)
   - 2-301: Generally restricts use of property to authorized purposes.
   - 3-305: Prohibits use of Federal personnel for unofficial purposes.

   Principles of Federal Appropriations Law (GAO Redbook)
   Comptroller General Opinions
   Office of Legal Counsel (DOJ) opinions

2. **Preferential Treatment**: Federal personnel may not provide support to some organizations that they do no make available to other similar groups.

   References:

   5 C.F.R. 2635.702(b): Appearance of sanction
   5 C.F.R. 2635.702(c): Endorsement

5 C.F.R. 2635.808: Fundraising
DoD 5500.7-R, Joint Ethics Regulation (JER)
3-209: Endorsement
3-211(5): Support for events

3. **Conflicts of Interest:** Federal personnel may not hold interests in non-Federal entities that conflict with their official duties.

References:

18 U.S.C. 205: Representing parties before the Government
18 U.S.C. 209: Accepting outside payment for performance of official duties
18 U.S.C. 208: Conflicting financial interests
18 U.S.C. 1913: Lobbying Congress
5 C.F.R. 2635.402: Conflicting financial interests
5 C.F.R. 2635.502: Conflicting personal interests
5 C.F.R. 2635.802: Conflicting outside activities
JER: 3-202: Management of private organizations
JER: 3-203: Impartiality of agency designee
JER: 3-204: Impartiality of employee
JER: 3-205: May not receive unofficial pay for performing official duties

C: TYPES OF INTERACTION: OFFICIAL SUPPORT:

1. **RULE: May not use Government resources, time, or equipment for unauthorized purposes.** (5 C.F.R. 2635.704 & 705, 31 U.S.C. 1301, 62 Comp. Gen 323 (1983))

Performance of services by Government personnel for private entities constitutes an improper use of appropriated funds, even if the Government is compensated therefor or reimbursed in kind. See 34 Comp. Gen 599 (1955)

APPLICATION OF THE RULE, WITH EXCEPTIONS:

a. Many non-Federal entities have **statutory authorization** for <u>particular</u> support. Most are listed in JER 3-212, but also see Patriotic Societies (36 U.S.C. 1) and mutual aid fire protection agreements (42 U.S.C. 2543a).

b. See also OPNAVINST 5350.6A, Navy Community Service Program; and AR 210-1, Private Organizations

c. **Support via Training (Innovative Readiness Training - IRT)** DoD Directive 1100.20 (January 30, 1997) implements 10 U.S.C. 2012 by permitting SecDef to authorize support to non-Federal entities if such support is incidental to military training and authorized by statute.

(1) Must fulfill valid training requirement
(2) May not compete with commercial sources
(3) Limited to US, territories and possessions
(4) Examples: Rebuild roads, repair buildings, transport materials and personnel, and provide medical and dental services in underserved areas.

d. **Official Communications:** JER 3-208 permits use of official channels to notify DoD personnel of events of common interest sponsored by non-Federal entities.

c. **Official Speakers:** JER 3-207 permits DoD personnel to speak in their official capacities at conferences of non-Federal entities in accordance with public affairs regulations (DoD Directive 5410.18). (See DoD General Counsel memo dated August 18, 1997, "Guidance on Analyzing Invitations to DoD Officials to Participate in Fundraising Activities and...")

d. **Logistical Support:** JER 3-211 permits heads of DoD organizations and commands to render logistical support and DoD speakers to non-Federal entity events if the support:
(1) Does not interfere with official duties
(2) Serves official interests
(3) Is appropriate for DoD involvement
(4) Is of benefit to DoD or community
(5) Does not offer preferential treatment
(6) Admission fee may not exceed cost of event, or DoD support is incidental to the event
(7) Does not violate statute or regulation

(N.B. May also support **fundraisers** (with logistical support only) if they meet the above criteria, but do not target Federal workers or solicit in the workplace.)

(N.B. Be vigilant for programs that feature DoD speakers and charge excessive registration fees (often to DoD personnel). Consult agency SOCO if you encounter this.)

e. **Attend Meetings:** JER 3-200 permits agency designees to authorize employees to attend meetings, etc., in their official capacity at Government expense and time if the meetings serve a legitimate official purpose. (See 31 U.S.C. 1345)
See 5 C.F.R. Part 251 regarding agency relationships with organizations representing Federal personnel and other organizations. The Office of Personnel Management (OPM) requires consultation with associations of management officials and/or supervisors, and permits support to other organizations representing Federal personnel. Such support includes: use of agency equipment to prepare papers, payment of travel to attend professional meetings (for employee development or when directly related to agency functions), liberal leave to attend meetings, and use of Government information systems to inform employees of meetings).

f. **Co-sponsorship:** JER 3-206 permits agency to **co-sponsor** an event if:
(1) Topic is relevant to DoD mission
(2) Purpose is to stimulate interest in professional issues
(3) Non-Federal entity is a recognized organization, approved by component DAEO
(4) Written agreement exists
(5) Admission fees for event costs only

g. **Fundraising by DoD Personnel:** JER 3-300(a) allows heads of organizations and commands to permit DoD personnel or dependents to raise funds in designated areas. (However, 41 C.F.R. 101-20.308 bars fundraising in GSA controlled property.)

h. **Community Support Activities:** JER 3-300(c) allows Agency Designees to excuse absences for volunteers to work on civic projects.

i. **Charitable or Civic Activities:** "We have viewed certain charitable or civic activities involving limited use of agency resources and employee time as "official." 71 Comp. Gen 469 (B-243862, July 28, 1992) In that opinion the Comptroller General determined that DOE could use appropriated funds to publish yearbooks for an Adopt-a-School program and transport school students in an agency vehicle.

j. **Professional Associations:** JER 3-300(b) allows Agency Designees to grant excused absences for participation of personnel in professional associations, and to provide support services (including personnel) for papers to be published in professional journals if participation relates to official duties, gives a benefit to the agency, and does not interfere with performance of duties.

k. **GSA Buildings:** See 41 C.F.R. 101-20.4 for General Service Administration (GSA) regulations on occasional use of buildings owned or leased by GSA. Section 101-20.401 permits use of public areas for soliciting funds for religious or tax-exempt organizations. All groups may use GSA buildings for "cultural, educational, and recreational activities". (Public Buildings Cooperative Use Act of 1976, 40 U.S.C. 490(a)(16)).

2. **RULE: May not endorse or sanction organization.**
(5 C.F.R. 2635.702, JER 3-209)
   a. Even if you co-sponsor an event with the organization, you may not endorse the organization.
   b. May not encourage (or suggest) subordinates to join particular organizations.

3. **RULE: May not use official position or title to support organization.** (5 C.F.R. 2635.702(a)) A tactic of some non-Federal entities is to ask senior officials to visibly participate at fundraising events. This includes receiving an award, giving a speech, presenting an award, or serving in an honorary position. Senior officials thus become the "star attraction" for the fundraiser. Such participation in their official capacity is prohibited except for "mere attendance" or delivering an official speech in accordance with the public affairs directives. (5 C.F.R. 2635.808(a), DoD General Counsel memo dated August 18, 1997, "Guidance on Analyzing Invitations...")

4. **ADDITIONAL GUIDANCE:** (Refer also to military service regulations that implement DoD guidance.)

   a. Community Relations: DoD 5410.18
   b. Private Organizations on DoD Installations: DoD 1000.15
   c. Armed Forces Community Relations: DoD 5410.19
   d. Professional U.S. Scouting Organization Operations at U.S. Military Installations Located Overseas: DoD 1015.19
   e. Support and Services For Eligible Organizations and Activities Outside the Department of Defense: DoD 1100.20
   f. Fund-Raising Within the Department of Defense: DoD 5035.01

D: TYPES OF INTERACTION: OFFICIAL MANAGEMENT:

1. To avoid conflicts of interest, JER 3-202 permits DoD personnel to participate **in their official capacities** in the management of non-Federal entities <u>only</u> with the approval of DoD General Counsel.

   a. Duty to agency v. fiduciary duty to organization as part of management.

      "An employee appointed to a position with an organization such as the Society may have a fiduciary duty to act in the best interest of the Society in accordance with state law; to the extent he also has a duty to act in the Government's best interest, these conflicting obligations may present problems for the Government employee.
      --OGE letter to Barbara S. Fredericks, Dept of Commerce, November 18, 1992

   b. Statutory Authorization required: FY 98 DoD Appropriations bill (Publ. L 105-113) permits Service Secretaries (with the concurrence of DoD General Counsel) to authorize official participation in management of four military welfare societies, entities that regulate international athletic competition, entities that regulate and support athletic programs of the service academies, entities that accredit service academies and other schools of the armed forces, and entities that regulate military health care. (Change 4 to JER, paragraph 3-202)

E. TYPES OF INTERACTION: OFFICIAL LIAISON:

1. JER 3-201 allows official DoD liaisons with non-Federal entities where there is a significant and continuing DoD interest in such participation.
   a. 5 U.S.C. 5946 prohibits use of appropriated funds for individual memberships.
   b. Fiscal laws apply: must satisfy an authorized agency purpose.
2. Personnel may not participate in management, but may serve on advisory committees.
3. No conflict of interest because personnel represent only their agency.
4. Personnel act in official capacity, therefore may use Government time, resources, and personnel to perform function.
5. Since personnel act within scope of office, their personal liability is limited.

F. TYPES OF INTERACTION: PERSONAL PARTICIPATION:

1. JER 3-301 permits management of non-Federal entities in a personal capacity. **However, except for JER 3-210 organizations, DoD personnel may <u>not</u> serve in their personal capacities if the non-Federal entity position was offered because of the employee's official position.**

   a. For an extensive discussion of application of 18 U.S.C. 205 & 208 in these situations, see January 27, 1994, memo from Stuart Frish, Acting General Counsel, Justice Management Division of DOJ, "Application of Federal Conflict-of-Interest Statutes to Federal Employees Working With or For Non-Federal Entities That Do Business with the United States."

   b. Flag and General Officers may not accept compensation for serving as officers or members of boards of non-Federal entities, in their personal capacities. Exceptions permitted with Secretarial approval for professional associations and family-held entities. (DepSecDef memo of July 23, 1996)

2. Personnel may not take official action on particular matters involving their organization. (18 U.S.C. 208, 5 C.F.R. 2635.502)
   a. May obtain waiver if interests are not so substantial as to affect employee's integrity. (18 U.S.C. 208(b)(1))

b. May obtain authorization from agency designee. (5 C.F.R. 2635.502)

c. Common problem: Approving requests from subordinates to attend meetings or prepare papers for a professional organization in which employee is an active participant or official. (See JER 3-300d).

3. May not represent organization before Government. (18 U.S.C. 203 and 205)
   a. However, 18 U.S.C. 205(d)(1)(B) permits Federal personnel to represent non-profit professional, recreational, or similar groups if the majority of the organizations's members are Federal personnel or their dependents. (Limitations set out in 205(d)(2)).

4. May not use Government resources, personnel, or official time for unauthorized purposes. (5 C.F.R. 2635.704 & 705) However, JER (section 3-305) allows agency designees to permit limited use of official resources (except personnel) if the use:
   (a) Does not adversely affect mission
   (b) Is reasonable in duration and frequency
   (c) Serves legitimate public interest
   (d) Does not reflect adversely on DoD
   (e) Creates no significant additional costs

5. May not solicit funds from subordinates or prohibited sources. (5 C.F.R. 2635.808) However, JER 3-300a(2) allows DoD organization heads to authorize fundraising by DoD personnel and dependents at designated areas on installation.

6. May not give his or her organization preferential treatment.

7. Employee has no official protection from liability.

8. May not use official title or position in any endorsement, or on organization's letterhead. (5 C.F.R. 2635.702(c), JER 3-300a(1))

9. May not divulge nonpublic information. (5 C.F.R. 2635.703)

10. Filers of financial disclosure reports (SF-278 or OGE Form 450) must report positions in outside organizations.

DEPARTMENT OF DEFENSE
SECRETARY OF DEFENSE

29 April 1997

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH & ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST & EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION & MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: DoD Support of the USO

The United Service Organizations (USO) was created by President Franklin Roosevelt and subsequently chartered by the Congress. For more than 56 years, the USO has supported the morale and welfare of the men and women of the Armed Forces and their families. Virtually all who have served during the past half century have benefited from USO programs and services, currently offered in over 160 locations worldwide, as international beacons that are ever ready to provide a Atouch of home≅ to our uniformed men and women and their families. Many have also enjoyed USO celebrity entertainment programs in the best traditions of Bob Hope.

DoD personnelXincluding military members on active dutyXmay voluntarily serve in their personal capacities during off-duty time on local USO councils and committees and assist with USO fundraising away from any Federal workplace, provided there is no conflict with the performance of their official duties. The Standards of Ethical Conduct for the Executive Branch, 5 C.F.R. э 2635, and the Department of Defense regulation, 5500.7-R, AJoint Ethics Regulation,≅ furnish guidance to DoD commanders regarding DoD support for non-Federal events, including fundraising activities. While DoD cannot officially endorse non-Federal organizations, such as the USO, official DoD support, within the limits of the regulations, may include providing DoD personnel to speak or otherwise participate in

their official capacities at USO-sponsored non-fundraising events. DoD support may also include permitting the USO to use facilities and equipment, including the services of DoD personnel necessary for proper use of the equipment.

The USO is a civilian nonprofit charity that must perpetually raise funds from corporate and individual donors in order to continue its mission to assist and improve the quality of life for members of our Armed Forces and their families. Such hands-on support and affection for military members by its civilian populace is unparalleled in other countries.

I join the hundreds of thousands of past beneficiaries in thanking the USO for representing America=s commitment to those who serve in our Armed Forces. We look forward to a continuing relationship with the USO that will benefit those who serve our country.

s/s

William S. Cohen

Carl E. Mundy, Jr.
General, U.S. Marine Corps (Ret)
United Service Organizations
World Headquarters
Washington Navy Yard, Bldg. 198
901 M St., S.E.
Washington, DC 20374-5096

Dear General Mundy:

You requested that I reissue guidance regarding the standards of conduct regulations as they may be applied to practical situations concerning the United Service Organizations (USO) and the Department of Defense (DoD). My previous guidance was issued on October 24, 1994. Since that time, the DoD regulation, 5500.7-R, AJoint Ethics Regulation (JER),≅ which governs DoD support that may be provided to events sponsored by non-Federal organizations, such as the USO, has been amended twice.

It remains the case that Secretary Cohen may not endorse the USO. Nonetheless, he issued a letter April 29, 1997 acknowledging the support that the USO has given to the members of our Armed Forces and their families and providing guidance to Department Components. The purpose of this letter is to amplify the guidance provided in the Secretary=s letter. As most, if not all, USO-sponsored events are fundraisers, this letter primarily discusses the logistical and personnel support that DoD may provide to those types of events.

Logistical Support

Under section 3-211(b) of the JER, the head of a DoD Component command or organization may provide Aon a limited basis, the use of DoD facilities and equipment (and the services of DoD employees necessary to make proper use of the equipment)≅ to support a USO-sponsored fundraising event if he determines that all the requirements of subsections 1 through 6 of section 3-211a. have been met. Additionally, as the USO is affiliated with the Combined Federal Campaign, the event may not be held on the Federal Government workplace, which includes the entire DoD installation.

Under subsection (1), the support may not interfere with the performance of official duties or detract from readiness. There should be no cost to the government other than the regular pay of personnel, and the support should normally not exceed 3 days. Under subsection (2), DoD community relations or other legitimate DoD public affairs interests must be served by the support. The event must be of interest to the general public and benefit a broad representational community. DoD interests include increasing understanding of U.S. defense posture and capabilities, fostering and sustaining good

relations with elements of the public, increasing public awareness and understanding of the Military Services, and supporting the personnel recruiting of the Services.

Under subsection (3), the event must be appropriate for association with DoD. Under subsection (4), the event must be of interest and benefit to the local civilian community, and the DoD Component command or organization providing the support, or any other DoD entity. Nonpartisan events open to the public are usually of common interest and benefit to the general public. Non-fundraising events sponsored by the USO would also usually be considered beneficial. Events attended only by invitation, however, may be considered only where a cross section of the USO=s representational community attends.

Under subsection (5), the deciding official must also be able and willing to provide the same support to comparable events sponsored by similar organizations. It is DoD policy that ceremonial support may not be provided to social events, such as dinners, or fundraising events, sponsored by non-Federal organizations, which include the USO. Finally, under subsection (6), the support must not otherwise be restricted by statute or regulation.

Personnel Support - Official Capacity

Under section 3-201 of the JER, DoD employees may serve in their official capacities as liaisons for DoD on USO councils and committees when the head of a DoD Component command or organization determines that there is a significant and continuing DoD interest to be served by such representation. Because official liaisons must serve only DoD interests, they may not be involved in the internal management or administration of the USO or USO events. Liaisons may be identified on USO letterhead, or otherwise in connection with the USO, by name and as the liaison of the DoD Component command or organization that they represent.

Under the Standards of Ethical Conduct for the Executive Branch, 5 C.F.R. ϶ 2635.808, a DoD employee, unless otherwise authorized, may not Aparticipate in fundraising in an official capacity.≅ There is no such authorization with respect to fundraising for the USO. Fundraising includes Aactive and visible participation in the promotion, production, or presentation of≅ an event at which any portion of the cost may be taken as a charitable tax deduction. Participation includes serving as an honorary chairperson, sitting at a head table, or standing in a reception line. In accordance with Section 3-210 of the JER, a DoD employee may not Aofficially endorse or appear to endorse≅ fundraising for the USO. Under Section 3-209 of the JER, DoD employees may not officially state or imply, or use their titles or positions to suggest, an official endorsement or preferential treatment of the USO or any USO-sponsored event, including a fundraising event. Senior DoD officials may not permit the use of their names, titles, or grades where that use would likely be perceived as an official endorsement.

There are only two exceptions under which a DoD employee may be associated with a USO-sponsored fundraising event in his or her official capacity. First, under 5 C.F.R. ϶ 2635.808(a)(2), an

employee may merely attend a fundraising event as long as the USO does not use the fact of attendance to promote the event.

Second, under 5 C.F.R. ϶ 2635.808(a)(2) & (3), an employee may deliver an official speech, which is one given in an official capacity on a subject matter that relates to his or her official duties. This may include the employee=s own official duties; the responsibilities, programs, or operations of the agency; or matters of Administration policy on which the employee is authorized to speak. The employee may not request donations or any other support for the USO. Further, the employee=s agency must first determine that the event provides an appropriate forum for the dissemination of the information.

The JER authorizes the heads of DoD Component commands or organizations to make that determination. Section 3-211a. and c. of the JER and DoD Directive 5410.18 set out the conditions under which they may make that determination. In addition to the 6 requirements of section 3-211a., discussed above, subsection 3-211a.(7) must also be satisfied before DoD may provide a speaker to make an official speech. It is DoD policy that official speeches at fundraisers are generally disfavored, but may be given if a more appropriate forum is not available and the DoD information needs to be disseminated within a certain time period. The emphasis is whether DoD needs to meet certain public affairs goals and whether the forum in question is the most appropriate to accomplish those goals.

Regarding subsection (7), DoD support must be incidental to the event, in accordance with public affairs guidance. For example, if the event is an annual dinner, which is going to be held with or without a DoD speaker, then DoD support is probably incidental to the event. DoD participation must be carefully evaluated on a case-by-case basis.

Whenever the DoD deciding official determines that a fundraising event is an appropriate forum, certain precautions must be taken to prevent the appearance that an employee=s participation is an endorsement of the fundraising event. First, the employee may not request donations or other support for the USO. Second, his attendance may not be used to promote the event. Therefore, the USO may include in its invitation package the fact that the DoD employee will make an official speech, but must be careful not to use that fact to promote attendance or to cause the official to appear to endorse the USO or its fundraising activities. DoD Public Affairs offices, in consultation with Ethics Counselors, should be consulted on appropriate language.

Personnel Support - Personal Capacity

DoD personnel may volunteer to serve in their personal capacities during off-duty time on local USO councils and committees and assist with USO fundraising away from the Federal workplace, provided there is no conflict with the performance of their official duties. DoD employees are also free to make positive statements of personal opinion about the value of the USO and its programs and services, as long as it is clear that they do so in their personal capacities and not on behalf of DoD.

Under section 2-301 of the JER, a DoD employee, acting in his personal capacity and with authorization from his supervisor who is either a commissioned military officer or a GS/GM-12 employee, may make limited use of DoD resources when certain conditions are met. These conditions include: 1) the use does not adversely affect the performance of official duties by the employee or his office; 2) the employee uses only personal time that is of reasonable duration and frequency; 3) the use serves a public interest and does not reflect adversely on DoD; and 4) the use does not create significant additional cost to DoD. Under section 3-305b. of the JER, however, DoD personnel may not be used. Furthermore, if the employee is delivering a speech in his personal capacity, it may not be an official expression of DoD policy.

If DoD employees do support the USO in their personal capacities, certain restrictions must be observed. Under the standards at 5 C.F.R. ϶ 2635.808(c), a DoD employee may not personally solicit from subordinates. He also may not personally solicit from a prohibited source, which includes, at a minimum, every contractor listed on the DoD Contractors List for the most recent fiscal year. Personal solicitation includes using, or letting the USO use, his name in correspondence. It does not include mass-produced correspondence addressed to a group of many persons, as long as the solicitation is not targeted at subordinates or prohibited sources. Within these limits, DoD does not prohibit personal fundraising outside the Federal Government workplace. See section 3-300a. of the JER.

Under section 3-300a. of the JER, DoD employees may not use, or permit the USO to use, their official titles, positions, or organization names to assist fundraising. For example, DoD employees may be identified on USO letterhead, or otherwise in connection with the USO, by name only, without using any official title or position. However, terms of address, such as AThe Honorable≅ may be used. Military members may also use their military grade and service. Finally, they must avoid the appearance of an official endorsement.

If you have any questions, or if other situations arise that concern support from DoD for the USO that are not addressed in this letter, please feel free to contact David W. Ream or Gail D. Mason of the DoD Standards of Conduct Office. They may be reached at (703) 695-3272 and (703) 697-5305, respectively.

Sincerely,

s/s

Judith A. Miller

INFORMATION PAPER

DAJA-SC
13 August 1998

SUBJECT: **Private Organizations**

1. PURPOSE: To provide information on relationships with non-Federal entities (NFE)

2. FACTS:

a. **Personal Participation - Permitted Activities**

(1) DoD employees, acting in their personal capacity, may join and participate in NFE activities.

(2) DoD employees may become officers and directors of private organizations provided that the positions are not offered solely because of their Federal position and that they act exclusively outside of their official position. If the employee files an SF 278 or an OGE 450 financial disclosure report, the position as a NFE officer must be reported.

(3) DoD employees may engage in fundraising on behalf of NFEs provided that no DoD endorsement is implied, and as long as they do not personally solicit prohibited sources or their subordinates.

(4) DoD employees may make presentations and publish papers as part of NFE activities. If the presentation or paper deals with DoD operations or policies, there must be a disclaimer that the views presented are personal and do not represent DoD.

(5) Subject to supervisory approval, DoD employees may use official time and material to prepare presentations and papers for non-profit associations and learned societies.

(6) DoD employees may represent a NFE which is composed of DoD employees and their dependents in discussions with the Government except when the matter involves an administrative or judicial proceeding or the disbursement of funds.

b. **Personal Participation - Prohibited Activities**

(1) Subordinates may not be coerced to join or participate in NFE activities.

(2) An employee's official position may not be used to state or imply official

endorsement of a NFE, its activities or fundraising efforts.

(3) DoD employees who are officers or directors of NFEs in their personal capacity may not participate in official Federal actions which affect the interests of the NFE.

(4) DoD employees may not represent ordinary NFEs (as opposed to NFEs composed of DoD members) in discussions with the Government.

(5) As a matter of personnel policy, the Deputy Secretary of Defense has directed that General Officers may not receive compensation for serving as NFE officers or directors.

c. **Official Relationships - Permitted Activities**

(1) Attendance. Consistent with sound fiscal principles governing training expenses, DoD employees may attend meetings, conferences, seminars and similar events sponsored by NFEs, and may participate as panelists and speakers. DoD employees may not attend such events at government expense solely to acquire or maintain professional credentials that are minimum requirements to hold a DoD position.

(2) Liaison. DoD employees may serve as liaisons to NFEs when appointed by the appropriate commander. Liaisons may represent DoD in discussions, but cannot bind their DoD organization to any action. A liaison may not participate in the management of the NFE.

(3) Information Distribution. In accordance with public affairs regulations, official channels may be used to inform DoD employees of professional development events; scientific and technical events; and morale, welfare, and recreation events sponsored by NFEs.

(4) Logistic Support to NFE Events. On a limited basis, DoD facilities and equipment (and the personnel necessary for proper use of the equipment) may be provided when the head of the DoD command or organization determines:

(a) The support does not interfere with the performance of official duties and does not detract from readiness;

(b) The support promotes legitimate DoD community relations, public relations or recruiting interests, or military training objectives can be met by providing the support;

(c) The event is appropriate for DoD support;

(d) The command is able and willing to provide the same support to comparable events sponsored by similar organizations;

(e) No admission fee beyond the reasonable cost of the event itself will be charged, or no fee will be charged for that portion of the event supported by DoD; and

(f) The support is not restricted by other statutes.

(5) Co-Sponsorship. DoD may co-sponsor a scientific, technical, or professional event with a NFE when there is a *bona fide* DoD interest.

(6) Support to Fundraising. DoD may provide limited support to a charitable fundraising event, if the NFE is not affiliated with the Combined Federal Campaign (CFC), and the six factors in c.(4), above, are met.

d. **Official Relationships - Prohibited Activities**

(1) Management. Unless authorized by statute, DoD employees acting in their official capacity may not participate in management of NFEs.

(2) Fundraising/Membership Drives. Except for certain authorized organizations, including organizations composed primarily of DoD employees or their dependents when fund raising within the DoD community or, if a National Guard Member, charitable, community, and civic organizations identified in 32 U.S.C. 508 or DoD Directive 1100.20, a DoD employee may not officially endorse a NFE's fundraising or membership drive.

(3) Endorsement. In dealing with NFEs, DoD employees shall not engage in preferential treatment. This includes no official endorsement of a NFE, or any event, product, service or enterprise of a NFE. (Offering group life insurance programs sponsored by the State Military Department, similar to the Servicemen's Group Life insurance Program, is not a prohibited endorsement.)

(4) Support. DoD will not provide support to NFE activities unless there is a valid agency interest. There must be some benefit to the agency before extending even minimal support, such as providing a liaison.

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INFORMATION PAPER

DAJA-SC
13 August 1996

SUBJECT: Army Relations with Boy Scout Organizations

1. PURPOSE: To provide information on official Army relations with, and support to the Boy Scouts.

2. FACTS:

a. Prohibited Activities.

(1) **Fundraising and Membership Drives**. No official endorsement or participation in Boy Scout fundraising or membership drives is allowed. (*Joint Ethics Regulation* (JER), DOD 5500.7-R, para. 3-210)

(2) **Endorsement or Sanction**. Official endorsement or sanction may be neither stated nor implied, and Army officials may not give preferential treatment to the Boy Scouts. (JER, para. 3-209). However, as noted below, there are statutes authorizing specific support to overseas scouting, and to Jamborees. Commanders may also support other Boy Scout events where there are legitimate community relations, morale and welfare, or other DOD interests.

(3) **Official Participation in Management**. Army personnel may not participate in management of the Boy Scouts in their official capacities. However, they may be appointed as official liaisons when there is a continuing Army interest in discussion of matters of mutual interest. (JER, para. 3-201; 3-202)

(4) **Conflicts of Interest**. Army personnel may not take official actions that affect the financial interests of the Boy Scouts if they are an officer, director, or employee of the organization. (18 U.S.C. § 208) Even if Army personnel are not officers in the Boy Scouts, if they are "active participants" in scouting, they should refrain from taking official actions which affect the Boy Scouts interests in order to avoid the appearance of favoritism. (5 C.F.R. § 2635.502) An "active participant" is someone, such as a Scoutmaster, who does not necessarily have input to organization policy, but has a visible and significant role with the Scouts.

(5) **Gratuitous Membership**. Army personnel may not accept an office, directorship or similar leadership position in the Boy Scouts offered because of their official duty position. (JER, para. 3-201)

b. National and International Jamborees. The Army may provide the following services to national and world Jamborees. Prior to these types of support being provided, the Boy Scouts must provide a bond to cover the items and the risk of loss or damage costs associated with transportation. (10 U.S.C.

§ 2544)

(1) Loan of cots, blankets, commissary equipment, flags, refrigerators, and other equipment;

(2) Services and expendable medical supplies, as available, without reimbursement;

(3) Transportation, as available, without expense to the U.S. Government, and which does not interfere with military operations.

(4) In the case of a Jamboree held on a military installation, DoD may provide personnel and logistic support at the military installation, in addition to the areas of support listed in the three paragraphs above. (10 U.S.C. § 2544(g)).

c. Overseas Scouting. Subject to various levels of delegation and authorization, the Army may provide overseas scouting organizations transportation, office space, recreational space, warehousing, utilities, and communications without seeking reimbursement. (10 U.S.C. § 2606). DOD Instruction 1015.9 should be consulted before deciding what support to provide for overseas scouting activities.

d. Use of DOD Property.

(1) On a limited basis, commanders may authorize the use of DOD equipment (and manpower to operate the equipment) in support of Boy Scout activities which are legitimate community relations events or provide genuine benefit to the morale and welfare of the military community. (JER, para. 3-211; *see also*, 10 U.S.C. § 2012) Commanders must determine that:

(a) there is no interference with unit readiness and mission accomplishment;

(b) support serves a legitimate Army interest, such as community relations; (*Community Relations*, AR 360-61, Chap. 3)

(c) the event is of interest and benefit to the local civilian or military community as a whole;

(d) the command is willing and able to provide support to other similar events and organizations (such as Girl Scouts);

(e) no admission fee beyond reasonable cost is charged either for the whole event or for that part supported by DOD, or that the DOD support is incidental to the event.

(2) Installation commanders may authorize use of space for Boy Scout meetings and storage of equipment.

(3) Government equipment may be loaned or rented if there is no interference with mission

accomplishment. However, the Boy Scouts may not use installation auditing, data processing, financial management, legal, or purchasing services. (*Special Authorization and Procedures for Issues, Sales, and Loans*, AR 725-1, Chap. 6)

(4) Army personnel who volunteer to participate may be given uncharged leave (a "permissive TDY") to support Boy Scout events that otherwise meet the requirements of a community relations event. *Leaves and Passes*, AR 600-8-10, para. 5-32k.

Mr. Novotne/DSN 227-0921

INFORMATION PAPER

DAJA-SC
14 August 1998

SUBJECT: Change 4 to the *Joint Ethics Regulation(JER)*, DOD 5500.7-R

1. PURPOSE: To summarize Change 4 to the *JER*

2. FACTS:

a. On 6 August 1998, Change 4 to the *JER* was signed. The Change involves two subjects: designation of public areas for fundraising and management of private organizations.

b. The Change clarifies that post and facility commanders have authority to designate areas of the post that are open to the public for fundraising purposes. When an area, such as the entrance to a building, has been so designated, it is not governed by the OPM/CFC restrictions on fundraising in the federal workplace.

c. Official Management of Private Organizations. Congress recently passed 10 U.S.C. § 1033, authorizing DoD employees, in the course of their official duties, to participate in management of "designated" non-Federal entities. The statute requires implementing regulations. Change 4 is that regulation

(1) To participate in management of a "designated" organization, individuals must be approved by the Secretary of the Army on a case-by-case basis. Secretarial authorization must be in writing, identify the individual employee, the entity in which the employee will participate, and specify the capacity in which the employee will participate.

(2) Limitations.

(a) Employees are not allowed to participate in internal management or day-to-day operations.

(b) Employees may not receive compensation from the organization.

(c) Appropriated funds will not be used to pay for the employee's participation in the organization, to include travel expenses.

(d) Employees will not be assigned as a primary duty to work full-time on the non-Federal entity's business.

(e) The net effect of the limitations is that Army employees may only participate in management of questions that have relevance to Army operations.

(4) "Designated" Organizations. Under the statute, the DoD General Counsel designates eligible organizations. Change 4 designates *Army Emergency Relief, Aid Force Aid Society, Navy-Marine Corps Relief Society,* and *Coast Guard Mutual Assistance* as eligible organizations. The DoD General Counsel may also designate:

(a) Entities that regulate and support the athletic programs of the service academies (including athletic conferences);

(b) Entities that regulate international athletic competitions (such as the U.S. Olympic Committee);

(c) Entities that accredit service academies and other DoD schools; and,

(d) Entities that regulate the performance, standards and policies of military health care (including health care associations and professional societies).

(e) Requests for designation must be submitted in writing to the General Counsel. Designations, and the individuals authorized for participation, will be published in the Federal Register.

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SUBJECT: MEETINGS OF NATIONAL SERVICE-RELATED ORGANIZATIONS
A. AR 1-211 (ATTENDANCE OF MILITARY AND CIVILIAN PERSONNEL AT PRIVATE ORGANIZATION MEETINGS).
B. AR 360-61 (COMMUNITY RELATIONS).
C. AR 210-1 (PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS AND OFFICIAL PARTICIPATION IN PRIVATE ORGANIZATIONS).
D. AR 690-400 (EMPLOYEE PERFORMANCE AND UTILIZATION).
E. JFTR (JOINT FEDERAL TRAVEL REGULATIONS, VOL 1; UNIFORMED SERVICE MEMBERS).
F. JTR (JOINT TRAVEL REGULATIONS, VOL 2; DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL).
G. DOD 5500.7-R (JOINT ETHICS REGULATION) (JER).

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H. PRIVATE ORGANIZATIONS REFERENCE GUIDE (HQDA, DIRECTOR OF MANAGEMENT).
1. REQUEST WIDEST POSSIBLE DISTRIBUTION OF THE FOLLOWING GUIDANCE WITHIN YOUR COMMAND/ACTIVITY/AGENCY.
2. THIS MESSAGE PROVIDES GUIDANCE FOR ATTENDING, AT GOVERNMENT EXPENSE, MEETINGS OF SERVICE-RELATED PROFESSIONAL ORGANIZATIONS. SUCH EVENTS INCLUDE, BUT ARE NOT LIMITED TO, THE 1999 ANNUAL MEETINGS OF THE ASSN OF THE UNITED STATES ARMY IN WASHINGTON, D.C., 11-13 OCT; THE RESERVE OFFICERS ASSN IN ANAHEIM, CA, 23-26 JUN; THE RETIRED OFFICERS ASSN IN JACKSONVILLE, FL, 23 OCT; THE AMERICAN LEGION IN ANAHEIM, CA, 3-9 SEP; THE VETERANS OF FOREIGN WARS IN KANSAS CITY, MO, 14-20 AUG; THE NONCOMMISSIONED OFFICERS ASSOCIATION IN LAS VEGAS, NV, 8-11 JUL; ARMY AVIATION ASSN OF AMERICA IN NASHVILLE, TN, 9-12 MAY; U.S. ARMY WARRANT OFFICERS ASSN IN GARMISH, GERMANY,25-29 OCT; AND OTHERS.
3. AR 1-211 AND AR 210-1 REMAIN THE PRIMARY REGULATIONS GOVERNING SUCH ATTENDANCE (SEE AR-360-61, CHAP 4, FOR SPEAKING ENGAGEMENTS). THE FOLLOWING SHOULD BE CONSIDERED:
A. ATTENDANCE AT GOVERNMENT EXPENSE IS AUTHORIZED ONLY WHEN INFORMATION GAINED WILL SUBSTANTIALLY BENEFIT THE APPROVING

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AUTHORITY'S MISSION ACCOMPLISHMENT. IT SHOULD RELATE DIRECTLY TO THE MEMBER'S PROFESSIONAL BACKGROUND OR PRIMARY DUTIES, REPRESENT A VALUABLE TRAINING OPPORTUNITY, AND IMPROVE THE ATTENDEE'S VALUE TO THE ARMY. ATTENDANCE SHOULD NOT PROVIDE SELECTIVE BENEFIT OR FAVOR ANY INDIVIDUAL, POLITICAL ORGANIZATION, CORPORATION, OR COMMERCIAL VENTURE. SEE JER, CHAP 3.
B. GOVERNMENT EXPENSE SHOULD BE MINIMIZED BY DESIGNATING THE MINIMUM NUMBER OF PARTICIPANTS (QUALIFIED TO ACCOMPLISH THE PURPOSE OF THE MEETING AND LOCATED NEAREST TO THE MEETING SITE) NECESSARY TO ACQUIRE AND RELATE INFORMATION FROM THE MEETING TO OTHER MEMBERS OF THE ORGANIZATION.
C. WHEN ATTENDANCE IS AUTHORIZED AT GOVERNMENT EXPENSE AND THE MEETING IS AUTHORIZED SPECIFICALLY IN THE TRAVEL ORDER, AUTHORIZED REIMBURSABLE EXPENSES MAY INCLUDE TRANSPORTATION, PER DIEM, MISCELLANEOUS EXPENSES, AND REGISTRATION FEES IAW JFTR OR JTR.
4. IF YOU HAVE ANY QUESTIONS ABOUT PARTICIPATION IN PRIVATE ORGANIZATION EVENTS, CONSULT THE ETHICS COUNSELOR ASSIGNED TO YOUR ORGANIZATION OR HQDA STANDARDS OF CONDUCT AT OFFICE AT DSN 425-6707/COMM (703) 588-6707.
5. HQDA POC IS SAPA-CROD, MAURA MEEHAN, DSN 225-2992/COMM (703)

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FUNDRAISING

Prepared by Steve Epstein, Deputy Director, Standards of Conduct Office
DoD General Counsel
March 21, 1999

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I. REFERENCES

A. General Services Administration building regulations: 41 C.F.R. subparts 101-20.3 and 101-20.4

B. Pentagon Reservation regulations: 32 C.F.R. Part 234

C. Office of Government Ethics fundraising regulation: 5 C.F.R. 2635.808.

D. Combined Federal Campaign (Government-wide): 5 C.F.R. Part 905

E. Combined Federal Campaign in DoD: DoD 5035.1 of August 28, 1990

F. DoD Combined Federal Campaign Overseas: DoD 5035.5

G. Joint Ethics Regulation (JER): DoD 5500.7-R of August 30, 1993

H. Charitable Fund-Raising: E.O. 12404 of February 10, 1983

I. Charitable Fund-Raising: E.O. 12353 of March 23, 1882

J. Fundraising Activities: Office of Government Ethics memo dated August 25, 1993

K. Guidance on Analyzing Invitations to DoD Officials to Participate in Fundraising Activities and to Accept Gifts Related to Events: DoD General Counsel memo dated August 18, 1997

L. Conduct of CFC in DoD: SOCO Advisory, 98-8 (October 22, 1998)

M. Guidance Regarding Military Ball Fundraisers and Similar Events: SOCO memo dated March 14, 1996

N. Fundraising Activities (nonmonetary items): Office of Goverrment Ethics memo dated March 22, 1994

II. ETHICS PRINCIPLES COMMONLY INVOLVED

(5 C.F.R. 2635.101(b))

A. Personnel shall not use Government property for other than authorized purposes.
B. Personnel shall not use public office for private gain.
C. Personnel shall not give preferential treatment to any private organization or individual.
D. Personnel shall not hold financial interests that conflict with their conscientious performance of duty.
E. Personnel shall put forth an honest effort in the performance of their duties.

III. REGULATORY BACKGROUND

A.. Fundraising is complicated because no comprehensive fundraising regulation exists. Instead, it is governed by independent, overlapping, and unrelated regulations including:

1. Site Regulations:
   (1) GSA Buildings: 41 C.F.R. Subparts 101-20.3 and 20.4
   (2) Pentagon: 32 C.F.R. Part 234
2. Government-wide fundraising regulations:
   (1) OGE fundraising regulation 5 C.F.R. 2635.808
   (2) CFC campaign: 5 C.F.R. Part 950
3. Agency regulations:
   (1) JER: 3-210, 3-211, 3-300
   (2) CFC campaign in DoD: DoD 5035.1
   (3) CFC overseas campaign: DoD 5035.5
4. Assorted guidance:
   (1) OGE DAEOGRAM DO-93-024, August 25, 1993
   (2) DoD General Counsel memo, Aug, 18, 1997, Guidance on Analyzing Invitations to DoD Officials to Participate in Fundraising
   (3) JER 2-302: gambling

IV. FUNDRAISING IN AN OFFICIAL CAPACITY

A. "Fundraising in an official capacity" requires authorization pursuant to statute, Executive Order, regulation, or other authority making such activity part of an employee's official duties.

1. DoD Official Fundraising (JER 3-212)

   a. Combined Federal Campaign (CFC)
   b. Army Emergency Relief
   c. Navy-Marine Corps Relief Society
   d. Air Force Assistance Fund
   e. Emergency and disaster appeals approved by the Office of Personnel Management
   f. Organizations composed primarily of DoD personnel or their dependents when fundraising among their own members or their dependents when approved by head of command or organization.
   g. National Guard exception.

2. Site regulations: **If on GSA controlled property:** Fundraising a - f, above, permitted by 41 C.F.R. 101-20.308(a).

3. Combined Federal Campaign:

   a. Sources of Guidance:

      (1) 5 C.F.R. 2635.808 (OGE regulation)
      (2) 5 C.F.R. Part 905 (CFC)
      (3) DoD 5035.1 (CFC in DoD)
      (4) DoD 5035.5 (CFC in DoD overseas)
      (5) JER 3-210, 2-302

   b. Fundraising events such as car washes, raffles, bake sales and races are encouraged.

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   c. Lotteries encouraged, when in compliance with gambling regulations. (See Section VI, below.)

d. Limited use of appropriated funds authorized: kick-off events, awards. Overseas program may receive administrative and logistical support and "space available " transportation. (DoD 5035.5, SOCO Advisory 98-8 of October 22, 1998)

(1) What about tours of warships, rounds of golf with agency head, helicopter rides, etc?

e. Contributions must be truly voluntary. Directive guarantees freedom of choice to give or not give, and guarantees confidentiality of donation decision. Be alert for undue command pressure to contribute.

f. May <u>officially</u> support and endorse CFC. (Including use of your title and position.)

g. Beware: Official support does not include official solicitation from individuals or entities that are not Federal employees.

4. Military relief societies and local fundraising among employees and their dependents for the benefit of employees and their dependents.

a. Sources of Guidance

(1) JER 3-210
(2) Military Department directives
(3) 5 C.F.R. Part 905

b. Authority for such fundraising is in 5 C.F.R. 950.102(d) and JER 3-210, which permit "solicitations conducted by organizations composed of civilian employees or members of the uniformed services among their own members for organizational support or for the benefit of welfare funds for their members."

c. Use of appropriated funds established by Military Departments.

d. Gambling may be authorized by Military Departments (and usually tightly controlled).

e. May officially endorse and support fundraising.

5. Toys for Tots (Marine Corps Reserve)

V. FUNDRAISING IN A PERSONAL CAPACITY

1. **General Rule**: No personal fundraising because it disrupts the workplace, competes with CFC for donations, and invites an abuse of power by superiors or an attempt to curry favor by subordinates.

2. Site regulations: **If on GSA controlled property:** may not solicit alms, solicit business, sell, or display advertising. (41 C.F.R. Subparts 101-20.3 and 101-20.4)

   a: "Alms" include non-monetary items. However, OPM advises that this regulation does not prohibit employees from placing collection boxes in public parts of building to collect food or clothing for charity. (OGE DAEOGRAM, August 25, 1993, OGE DAEOGRAM, March 22, 1994).

   b: 41 C.F.R. 101-20.308(d) exempts religious or tax-exempt organizations that lease public areas of the building for cultural, educational, and recreational activities. Organizations must obtain permit and may not disrupt official business.

3. Government-wide regulations.

   a. **May not fundraise in Federal workplace.** (5 C.F.R. 950.102 (a).

      (1) Exceptions:

         (a) Collections of gifts-in-kind (5 C.F.R. 950.102(b))

         (b) Solicitations among agency members for benefit of agency members (5 C.F.R. 950.102(d))

(2) "Federal workplace" is defined by Agency Head consistent with GSA and other regulations. (5 C.F.R. 950.102(b))

c. **May not solicit from subordinate or prohibited source.** 5 C.F.R. 2635.808(c)

(1) Prohibition of personal solicitation applies to person-to-person communications and use of name on correspondence. Solicitations through media or mass mailings are permitted (unless targeted at subordinates or prohibited sources).

4. DoD Regulations:

a. May provide logistical support (not speakers) to fundraisers for non-Federal entities: JER 3-211

(1) May not interfere with readiness
(2) Must serve community relations
(3) Must be appropriate for DoD
(4) Must benefit DoD or local community
(5) No preferential treatment
(6) May not violate statutes or regulations
(7) If fundraising takes place in Federal workplace, it may not be for an organization that is supported by the CFC.

b. Use of position or title constitutes official support. Problem area: organizations ask senior officials to visibly participate at fundraising events. (Receive an award, give a speech, present an award, accept position as "Honorary Chairperson".) Senior officials thus become the "star attraction" for the fundraiser. Prohibited except for "mere attendance" or delivering an official speech in accordance with public affairs directives. (DoD Directive 5410.18) For extensive guidance, see DoD General Counsel memo dated August 18, 1997.

c. Organization heads may permit personnel to solicit in their personal capacity in designated areas on Federal installations. (non-workplace) (JER 3-300(2))

d. May use official channels to notify DoD personnel of events of interest sponsored by non-Federal entities. (JER 3-208)

e. DoD employees may voluntarily participate in fundraising for non-Federal entities provided they act exclusively outside the scope of their official positions. (JER 3-300(a))

VI. RELATED ISSUES

1. **Gambling**

a. JER 2-302 prohibits gambling on Government property or while on official duty.

b. Gambling Defined: Gambling is generally considered to have 3 elements: (State statutes or case law may pertain, but see Brooklyn Daily Eagle v. Voorhies, C.C.N.Y 1910, 181 F. 579.)

(1) Consideration (betting something of value, usually money),
(2) A game of chance, and
(3) An offering of a prize

Events that do not include all of these elements are not considered to be gambling. For example, a drawing using a CFC pledge card, <u>when it is clear that the pledge card may include no contribution at all</u>, is not gambling because the participants in the drawing are not required to furnish consideration to enter the drawing.

March 14, 1996

MEMORANDUM FOR DESIGNATED AGENCY ETHICS OFFICIALS
DEPUTY DESIGNATED AGENCY ETHICS OFFICIALS

SUBJECT: Guidance Regarding Military Ball Fundraisers and Similar Events

It has come to our attention that there is a need for uniform guidance regarding attendance and/or participation at "military balls" and similar fundraising events. The following general rules are offered to help you advise your clients:

1) When a fundraising event will be donating **ALL** of the contributed funds to organizations listed in section 3-210.a.(1) through (5) of DoD 5500.7, Joint Ethics Regulation, (Combined Federal Campaign, OPM approved emergency and disaster relief efforts, Army Emergency Relief, Navy-Marine Corps Relief Society, Air Force Assistance Fund), a DoD employee:

a) **may** officially endorse and attend the event in an official capacity,

b) **may** provide official logistical support **only if** all the criteria of section 3-211 of the Joint Ethics Regulation are met (these criteria would be met easily for events by organizations listed in section 3-210 of the Joint Ethics Regulation),

c) **may** accept unsolicited free attendance and travel benefits on behalf of the DoD Component, if accepted in accordance with 31 USC 1353,

d) **may** accept unsolicited free attendance and travel benefits for accompanying spouse on behalf of the DoD Component, if accepted in accordance with 31 USC 1353,

e) **may** use appropriated travel funds for travel needs not covered by benefits accepted uner 31 USC 1353.

2) When a fundraising event will be donating **ANY PART** of the contributed funds to charitable organizations that are not listed in section 3-210 of the Joint Ethics Regulation, a DoD employee:

a) **may** attend the event in an ***official capacity*** **only if** the DoD employee is performing official duties (e.g., by receiving an award for meritorious public service or by giving a speech when there has been a determination in accordance with public affairs guidlines that the event is an appropriate forum for the expression of

an official DoD position), and

i) **may** accept unsolicited free attendance and travel benefits on behalf of the DoD Component, if accepted in accordance with 31 USC 1353,

ii) **may** accept unsolicited free attendance and travel benefits for accompanying spouse on behalf of the DoD Component, in accordance with 31 USC 1353,

iii) **may** use appropriated travel funds for travel needs not covered by benefits accepted under 31 USC 1353.

b) **may** attend the event in a ***personal capacity***, and accept unsolicited free attendance (including any meal integral to the event) under a gift acceptance exception, **only if** the criteria of 5 CFR 2635.204(g)(2), widely attended gathering, are met.

c) **may** provide official logistical support to the event **only if** the criteria of section 3-211 of the Joint Ethics Regulation are met.

d) **may not** accept travel benefits from any source for attendance in a personal capacity (acceptance of travel benefits under 31 USC 1353, 10 USC 2601, or 5 USC 4111 would be improper in these circumstances).

I hope this information is helpful to you. If you have questions regarding this matter, you may contact Randi Elizabeth DuFresne at (703) 697-5305 or dufresnr@osdgc.osd.mil.

David W. Ream
Deputy Designated Agency Ethics Official
Standards of Conduct Office

18 August 1997

MEMORANDUM FOR GENERAL COUNSELS OF THE MILITARY DEPARTMENTS
JUDGE ADVOCATES GENERAL OF THE MILITARY DEPARTMENTS
GENERAL COUNSELS OF THE DEFENSE AGENCIES
COUNSEL FOR THE COMMANDANT OF THE MARINE CORPS
STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS
LEGAL COUNSEL TO THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Guidance on Analyzing Invitations to DoD Officials To Participate in Fundraising Activities and to Accept Gifts Related to Events

DoD officials often receive invitations from various organizations requesting their participation in certain events, such as serving as chairs or honorary chairs, attending, or making speeches. These invitations are further complicated when the events are designed to raise funds on behalf of the organization or to benefit a charitable entity. This memorandum provides guidance on analyzing those invitations under the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the Joint Ethics Regulation (JER), DoD 5500.7-R. It also discusses the rules governing the acceptance of free attendance at events for which there are normally charges.

Official Capacity

Under 5 C.F.R. ϶ 2635.808, a DoD official, unless authorized, may not Aparticipate in fundraising in an official capacity.≅ Fundraising includes Aactive and visible participation in the promotion, production, or presentation of≅ an event at which any portion of the cost may be taken as a charitable tax deduction. Participation includes serving as an honorary chairperson, sitting at a head table, or standing in a reception line. In accordance with Section 3-210 of the JER, a DoD official may not Aofficially endorse or appear to endorse≅ fundraising for any non-Federal organization, with certain specified exceptions. Under Section 3-209 of the JER, DoD officials may not officially state or imply, or use their titles or positions to suggest, an official endorsement or preferential treatment of any non-Federal organization or event, with the exception of those in section 3-210: Combined Federal Campaign; emergency and disaster appeals approved by the Office of Personnel Management; Army Emergency Relief; Navy-Marine Corps Relief Society; Air Force Assistance Fund; and Aother organizations composed primarily of DoD employees or their dependents when fundraising among their own members for the benefit of welfare funds for their own members of their dependents when approved by the head of the DoD Component command or organization.≅

Under these regulations, a DoD official should decline an invitation to serve, in his official capacity, as the chairperson or honorary chairperson of a fundraising event for an organization that is not authorized under Section 3-210 of the JER. Serving in such a position clearly constitutes fundraising, which is not allowed under the regulations. These invitations seek the visibility of the DoD official and his name to help solicit attendance and money for the event. Participating under these circumstances would also constitute an unauthorized endorsement of the organization=s fundraising.

There are only two exceptions under which a DoD employee could be associated with a fundraising event in her official capacity. First, under 5 C.F.R. э 2635.808(a)(2), an employee may merely attend a fundraising event as long as the organization does not use the fact of her attendance to promote the event.

Second, under 5 C.F.R. э 2635.808(a)(2) & (3), an employee may deliver an official speech, which is one given in an official capacity on a subject matter that relates to her official duties. This may include the employee=s own official duties; the responsibilities, programs, or operations of the agency; or matters of Administration policy on which the employee is authorized to speak. The employee may not request donations or any other support for the organization. Further, the employee=s agency must first determine that the event provides an appropriate forum for the dissemination of the information.

DoD allows the heads of DoD Component commands or organizations to make that determination. Section 3-211 of the JER and DoD Directive 5410.18 set out the conditions under which they may make that determination. All of the conditions of section 3-211 must be met before DoD may provide a speaker. It is DoD policy that official speeches at fundraisers are generally disfavored, but may be given if a more appropriate forum is not available and the DoD information needs to be disseminated within a certain time period. The emphasis is whether DoD needs to meet certain public affairs goals and whether the forum in question is the most appropriate to accomplish those goals. A review of the conditions follows.

The speech and its preparation may not interfere with the performance of official duties or detract from readiness. DoD community relations or other legitimate DoD public affairs interests must be served by the speech. These include increasing understanding of U.S. defense posture and capabilities, fostering and sustaining good relations with elements of the public, increasing public awareness and understanding of the Military Services, and supporting the personnel recruiting of the Services. The event must also be of interest and benefit to the local civilian community as well as DoD.

The organization and the event must be appropriate for association with DoD and the speech. For example, nonpartisan events open to the public are usually of common interest and benefit to the general public. Events attended only by invitation, however, may be considered only where a broad cross section of the community is represented, such as an annual convention of an association, or where the organization is particularly connected with the DoD. If organizations have a narrow membership base or interest, the DoD support must benefit the community, not the sponsoring organization.

The deciding official must also be able and willing to provide the same support to comparable events sponsored by similar organizations. For example, if the Secretary of a Military Department determines that a fundraising annual dinner of a public policy organization with a conservative approach is appropriate for him to make an official speech, then he must be willing to make an official speech at a fundraising annual dinner of a public policy organization with a liberal approach. The same support is not provided if a lower-level official makes a speech at the second event. There are many civic, social, and fraternal organizations, including thirteen organizations that are listed at 32 U.S.C. э 508, that may be considered similar organizations.

DoD should not provide a speaker at an event that charges a fee in excess of the reasonable costs of sponsoring the event. This limitation applies to commercial activities making a profit and fundraising activities. The only exception to speaking at a profit-making or fundraising event is if DoD support is incidental to the event, in accordance with public affairs guidance. For example, if the event is an annual dinner, which is going to be held with or without a DoD speaker, then DoD support is probably incidental to the event. DoD participation must be carefully evaluated on a case-by-case basis.

Whenever the head of a DoD Component command or organization determines that a fundraising event is an appropriate forum, certain precautions must be taken to prevent the appearance that an official=s participation is an endorsement of the fundraising event. First, the official may not request donations or other support for the sponsoring organization. Second, his attendance may not be used for promotion of the event. Therefore, any sponsoring organization should be advised that the official may not appear to endorse the organization or its fundraising activities. The organization may certainly include in its invitation package the fact that the DoD official will make an official speech, but must be careful not to use that fact to promote attendance. DoD Public Affairs offices, in consultation with Ethics Counselors, should try to advise on appropriate language and request the opportunity to review and comment on the wording.

As an example of applying the analysis discussed above, to accept an invitation to speak at the Mom, Apple Pie, and DoD Supporter (MAPADS) annual dinner fundraiser, the head of a DoD Component command or organization must make the following determinations. First, she must determine that there are specific DoD community relations interests that may be satisfied by a speech to the MAPADS. Second, because the event is attended by invitation, she must determine whether the MAPADS attendance represents a sufficiently broad cross section of its representative interest group. Alternatively, she may determine that the MAPADS is particularly connected with a message that DoD needs to convey. DoD must also determine that other appropriate fora, which do not involve fundraising, are not available at the time. Third, she must determine that she is willing and able to address the annual dinner fundraiser of a similar organization that does not actively support DoD. The point here is that DoD may not give or appear to give preferential treatment to any particular type of group. Finally, she must determine that the presence of DoD, or the presence of a specific DoD speaker, is not one of the primary attractions of the event. In other words, should DoD presence, or

the presence of a specific speaker, be canceled, the event will continue. If this determination is made, then any speech by a DoD official would be incidental to the event. If all these determinations are made, the precautions discussed on page 3 must be observed.

Personal Capacity

There is also a question of whether very senior officials may endorse, fundraise for, or assist an organization in their personal capacities. These officials are the Secretary of Defense, the Deputy Secretary of Defense, the Secretaries of the Military Departments, and the Chairman and members of the Joint Chiefs of Staff. In 1992, the Standards of Ethical Conduct for Employees of the Executive Branch were published. It was the Office of Government Ethics= (OGE=s) determination that it is theoretically possible for senior officials to have a personal capacity. It is DoD=s position that, for these officials, the capacity is minimal, especially in the area of fundraising, and should be used only on rare occasions.

The determination of personal capacity would depend on the specific circumstances, including the office of the employee, how much the public identifies the employee with his office, the notoriety of the employee, and past history of association between the employee in his personal capacity and the organization. If the official previously supported something in his personal capacity, it would probably be permissible to continue the personal support. For example, if he had supported his local animal shelter in his personal capacity for the past 10 years, he could probably continue to offer the same type of support in his personal capacity. However, if he now receives for the first time a request from a national humane society for his support, he does not have the kind of historical relationship that could support a personal capacity. Thus, fundraising in a personal capacity would be precluded.

Accordingly, attempting to serve as Honorary Chairperson of the annual fundraising dinner of a national humane society in a personal capacity would be impermissible. Under circumstances where there is no history of a strong association in a personal capacity and where a public organization is requesting support at a highly visible forum, it is virtually impossible to avoid the appearance or implication of an official endorsement. Therefore, we recommend that a DoD official not accept such an offer in his personal capacity.

If he were to do so, however, there are other restrictions that must be observed. Under the OGE standards, at 5 C.F.R. э 2635.808(c), the DoD official may not personally solicit from subordinates. He may also not personally solicit from a prohibited source, which includes, at a minimum, every contractor listed on the DoD Contractors List for the most recent fiscal year. Personal solicitation includes using, or letting others use, his name in correspondence. It does not include mass-produced correspondence addressed to a group of many persons, as long as the solicitation is not targeted at subordinates or prohibited sources.

If the service requires a speech, the official could not give a speech expressing official DoD policy; however, he could use DoD speechwriters if the organization could be considered a non-profit

professional association or learned society. Under section 3-300b. of the JER, administrative support services may be used in a limited manner to prepare speeches for presentation at such organizations when related to DoD Afunctions, management or mission,≅ DoD can derive a benefit, such as improved public confidence from the recognition, and the use does not interfere with performance of official DoD duties. If the organization is not such an association or society, DoD personnel may not be used to assist the official.

A DoD official may not use, or permit others to use, his official title or position to assist the fundraising. Terms of address, such as AThe Honorable≅ or AGeneral≅ may be used, although this use weakens the attempt to divorce the speech from the employee=s official capacity. Finally, he must do everything possible to eliminate the appearance of an official endorsement.

Gifts

Another issue that may arise is whether a DoD official may accept gifts of an invitation to an event, which may include lodging, meals, and entertainment, and of any related transportation in either his official or personal capacity. Under section 3-200 of the JER, a DoD official may attend a Ameeting, conference, seminar or similar event≅ in his official DoD capacity if his Agency Designee determines that there is a legitimate Federal Government purpose in accordance with training or gathering information of value to DoD. If that determination is made, the Federal Government may pay all related expenses. Under 31 U.S.C. ϶ 1353, DoD may then accept travel, subsistence, and related expenses from a non-Federal source for attendance of the official at a meeting or similar function relating to his official duties. Therefore, if the official makes the determination, he may accept both gifts in his official capacity. If the gift of travel exceeds $250, it must be reported to the Director of OGE through the DoD Component=s ethics office.

Under 5 C.F.R. Part 2635, employees may not accept in their personal capacities gifts from a prohibited source or offered because of the employee=s official position, unless an exception applies. Determining whether a donor is a prohibited source should be fairly easy. Determining whether the official is being offered the gifts due to his official position may be more difficult.

In a situation where the potential donor is not a prohibited source, the ethics official needs to examine closely the circumstances of the offered gift. If the official were invited for several years prior to his current official position, it would not appear likely that the invitation this year was offered because of his official position. If the official were not invited in the past, however, the gift is more likely based on his current official position. Two exceptions may apply. Under 5 C.F.R. ϶ 2635.204(h), the official may accept food and entertainment from a non-prohibited source if no fee is charged to any person in attendance. Under 5 C.F.R. ϶ 2635.204(b), the official may also accept a gift if it is clear that the motivation is a personal friendship rather than his position. Factors to consider are the history of the relationship and whether the friend personally pays for the gift. Where a gift is paid by an organization, however, rather than a personal friend, OGE considers that it is a business relationship, not a personal friendship, that is the primary motivation.

If you have any questions about application of this guidance to a particular situation, please contact the DoD Standards of Conduct Office at (703) 695-3422 or 697-5305.

s/s

Judith A. Miller

August 25, 1993
DO-93-024

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts
Director

SUBJECT: Fundraising Activities

This memorandum addresses some recurring questions that have been raised concerning the "Fundraising activities" section of the Standards of Ethical Conduct, at 5 C.F.R. § 2635.808.

Section 2635.808 of the Standards describes the circumstances under which an employee may engage in fundraising in either an official or a personal capacity. In accordance with this section of the Standards, an employee may participate in fundraising in an official capacity if there is authority for the employee to do so as part of his official duties. An employee may engage in fund-raising activities in a personal capacity if the employee does not use his official title, position, or authority to further that effort or personally solicit funds or other support from subordinates or from anyone known to him to be a prohibited source for purposes of the gift restrictions in subpart B of the Standards. A special Government employee, however, may solicit charitable contributions from a prohibited source as long as that person does not have interests affected by the performance or nonperformance of his official duties.

Authority For An Employee To Engage In Fundraising As Part Of His Official Duties

Section 2635.808(b) of the Standards provides, "An employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties." [underscoring supplied.] The phrase, "or otherwise as determined by the agency," was included in this provision because several agencies who commented on the proposed Standards of Ethical Conduct suggested that authority for an employee to engage in fundraising as part of his official duties may be found, for example, in statutes more general in character than those specifically providing for agency personnel to engage in fundraising. The phrase recognizes that agencies may have authority to permit official fundraising notwithstanding that such authority is not expressly set forth in a statute, Executive order, or regulation.

As noted in the Federal Register notice for the Standards, at 57 Fed. Reg. 35040 (Aug. 7, 1992), a recommendation that section 2635.808(b) be

changed "to allow official fundraising that is consistent with the agency's mission or otherwise furthers agency programs" was not adopted in the final rule. An agency would have to have some authority for official fundraising to be permissible under section 2635.808(b); it would not be enough for the fundraising simply to be consistent with an agency's mission or for the fundraising simply to further the agency's programs.

The Standards of Ethical Conduct and the Combined Federal Campaign

The Combined Federal Campaign (CFC) is the program that governs charitable fundraising among Federal employees at the Federal workplace. The CFC allows charities to solicit contributions during an annual fundraising drive that is intended to be fair, trustworthy, and nondisruptive. Federal employees are officially assigned to distribute a brochure containing information about all of the charities participating locally in the CFC, to collect contributions, and to be involved otherwise in the administration of the CFC. The CFC is authorized by Executive Order 12353, as amended, and is conducted under regulations issued by the Office of Personnel Management (OPM), in 5 C.F.R. part 950.

Employees' fundraising activities at the Federal workplace must comply with the CFC regulations, as well as the Standards of Ethical Conduct. The reference to the CFC regulations, in the introductory paragraph of section 2635.808, is intended to establish that the Standards do not supersede the CFC regulations.

Section 4 of Executive Order 12353 provides that there shall be "only one annual solicitation except in cases of emergency or disaster appeals for which specific provision shall be made by the Director [of OPM]." In accordance with this directive, the CFC regulations provide: "The CFC is the only authorized charitable fund-raising drive in the Federal workplace . . . . No other fundraising drive may be conducted in the Federal workplace without the express written permission of the Director." 5 C.F.R. § 950.102(a).

Thus, section 2635.808(b) of the Standards, regarding "Fundraising in an official capacity," does not eliminate the need for an agency to request permission from the Director of OPM for employees of the agency to engage in fundraising at the Federal workplace if the fundraising is outside the confines of the CFC. On the other hand, when a fundraising drive outside the confines of the CFC has been approved by the Director of OPM, an employee would be “authorized to engage in the fundraising activity as part of his official duties” at his federal workplace in accordance with Section 2635.808(b) of the Standards of Ethical Conduct.

Information as to whether a fundraising drive has been approved by the Director of OPM may be obtained from OPM’s Office of CFC Operations. The telephone number of that office is 202-606-2564.

Collection of Nonmonetary Items

Neither the CFC Executive order nor the CFC regulations indicates whether the collection of nonmonetary items such as food and clothing at the Federal workplace is a solicitation of charitable contributions covered by the CFC. OGE is asking the Director of OPM for guidance on that question. Until the Director of OPM responds to OGE, OGE recommends that agencies resolve questions about Federal employees' nonmonetary charity drives at the Federal workplace by referring to the provisions of the Standards of Ethical Conduct, particularly the provisions in subpart G regarding "misuse of Position." Note, however, that the collection of nonmonetary items by employees at the Federal workplace would not be covered by section 2635.808 of the Standards of Ethical Conduct because that activity is not included in the definition of "fundraising" in section 2635.808(a).

The Federal Property Management Regulations issued by the General Services Administration (GSA), at 41 C.F.R. § 101-20.308, restrict the solicitation of "alms" o GSA-controlled property. While the term "alms" does mean money or goods given in charity, we understand that the restriction in GSA's regulations is directed primarily at members of the public who enter Government property. It has not been applied by GSA to prevent employees of an agency from setting up a box in a public part of the building to collect food or clothing for charity.

"Targeted" Solicitations

Section 2635.808c of the Standards of Ethical Conduct provides that an employee may engage in fundraising in a personal capacity provided that the employee does not, inter alia, personally solicit funds or other support from any person known to the employee to be a "prohibited source" of gifts within the meaning of section 2635.203(d) of the Standards, i.e., any person, including any organization more than half of whose members are persons, who are seeking official action by the employee's agency; doing or seeking to do business with the employee's agency; regulated by the employee's agency; or substantially affected by the performance of the employee's duties. Under section 2635.808(a)(4) of the Standards, the term "personally solicit" includes requesting or otherwise encouraging donations or other support "through the use of one's name or identity in correspondence or by permitting its use by others." However, "[i]t does not include solicitation of funds through . . . the contemporaneous dispatch of like items of mass-produced correspondence," if the correspondence is "addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted . . . at persons who are prohibited sources within the meaning of _ 2635.203(d)." [underscoring supplied.]

Whether a contemporaneous dispatch of like items of mass-produced correspondence is a "targeted" solicitation, and therefore an impermissible personal fundraising activity under the Standards, depends upon the circumstances. Among the factors to be considered in this regard are the extent to which the persons or organizations being solicited, as a group, have homogeneous interests in that each of them is seeking official action by the employee's agency, are doing business or seeking to do business with the employee's agency, are conducting activities regulated by the employee's agency, or have interests that may be substantially affected by the

performance or nonperformance of the employee's official duties; the criteria for selecting persons to whom the correspondence will be sent; and whether the employee's name is being used by itself or with the names of others.

Use of Official Title

An employee engaged in fundraising in an official capacity may use or permit the use of his official title, position, or authority in connection with the fundraising effort. However, under section 2635.808(c)(2) of the Standards of Ethical Conduct, an employee engaged in fundraising in a personal capacity may not use his official title, position, or any authority associated with his public office to further the fundraising effort.

An employee engaged in fundraising in a personal capacity may use or permit the use of a general term (such as "The Honorable") or a rank with his name. Moreover, unless a solicitation is "targeted" at prohibited sources (see above), an employee engaged in fundraising in a personal capacity may use or allow the use of his name without his title or position to further the fundraising effort even if the employee is so well known that use of his name alone is tantamount to invoking his title or position.

Free Attendance at a Fundraising Event

Section 2635.808(a)(2) of the Standards of Ethical Conduct defines the phrase "participation in the conduct of an event" and provides that waiver of a fee for attendance at an event by a participant in the conduct of that event is not a gift under the Standards. This means that an employee participating in the conduct of a fundraising event, in either an official or a personal capacity, may attend the event without having to pay the fee that others attending the event are being charged if the fee is being waived by the sponsor of the event. Free attendance accepted under these circumstances is treated as if it were an additional exclusion to the definition of gift for purposes of applying the prohibitions in subpart B of the Standards on gifts given by prohibited sources or because of official position.

It is not a "waiver" under section 2635.808(a)(2) if a third party pays the sponsor of the event the fee for an employee to attend the event, even though the employee is a participant in the conduct of the event. In such a case, the payment of the attendance fee would be a gift to the employee from the party that paid the fee on the employee's behalf, and could be subject to the gift restrictions in the Standards.

Likewise, if an employee is not a participant in the conduct of a fundraising event, but would only be attending the event, the event sponsor's waiver of the fee for the employee to attend the event could be subject to the gift restrictions in the Standards. In accordance with section 2635.203(c) of the Standards, the posted fee or ticket price to attend the event would be the market value of attending the event.

INFORMATION PAPER

DAJA-SC
2 June 1998

SUBJECT: Support to Private Organization Fund-Raising

1. PURPOSE: To provide information on a Post Commander's ability to have fund-raising activities in support of a non-Federal entity (NFE).

2. FACTS:

a. A Post Commander may provide logistical support to NFE fundraising activities on his installation only if he has obtained permission, in advance, from the Office of Personnel Management (OPM). The reason for this rule is that most NFEs are affiliated with the Combined Federal Campaign (CFC). As such, all fund-raising by the organization should be within the context of the CFC. This rule would also apply to a local chapters which are affiliated with the CFC. [**NOTE:** OPM has indicated that, generally, it will not approve exceptions for fund-raising outside of the CFC.]

Example: *The local Amvets chapter, a CFC affiliate, wants to host a fund-raising 10K race on post and asks for logistical support. Without OPM approval, the Post Commander cannot approve either the race or the support.*

b. The exception to this general rule is when the NFE fund-raising event is in direct response to an OPM approved emergency or disaster relief appeal.

Example: *A branch of the local river has flooded in a nearby community. The President has designated the area eligible for Federal disaster relief, and OPM has announced that Federal agencies may allow employees to collect food, blankets and funds to assist victims of the flood. The Post Commander may authorize soldiers and employees to use official time and resources to collect donations to be given to the Red Cross for relief in this disaster.*

c. OPM permission is not required if the event raises gifts-in-kind such as food, clothing or toys, rather than funds.

Example: *The United Way sponsors a Food Bank for needy families. They have asked for access to the post housing area to conduct the collection. The Post Commander can approve the request.*

d. OPM approval is not required if the fund-raising does not occur in the Federal workplace. The Federal workplace includes, by definition, the entire DoD installation. The installation commander may, however, designate limited areas as public places on the

installation where similarly situated groups may solicit funds.

Example: *The Red Cross has asked whether it can set up a card table and a "Cross Your Heart" display soliciting donations outside of the PX on Valentine's Day weekend. In the past the Post Commander designated this area as a public area. He has authorized both the Girl Scouts to sell cookies and the Disabled American Veterans to sell poppies in this area. The Commander has the authority to authorize the Red Cross appeal in the same place because it is a designated public area, and similar organizations have been granted access in the past.*

e. After obtaining OPM approval for an on-post an NFE fund-raising event, a commander may provide logistical support**.** On a limited basis, DoD facilities and equipment (and the personnel necessary for proper use of the equipment) may be provided when the head of the DoD command determines:

(1) The support does not interfere with the performance of official duties and does not detract from readiness.

(2) The support promotes legitimate DoD community relations, public relations or recruiting interests, or military training objectives can be met by providing the support.

(3) The event is appropriate for DoD support.

(4) The command is able and willing to provide the same support to comparable events sponsored by similar organizations.

(5) No admission fee beyond the reasonable cost of the event itself will be charged, or no fee will be charged for **that portion** of the event supported by DoD. (That is, DoD support to an event must be incidental to the fund-raising purpose, and cannot be the basis of the fund-raising.)

(6) The support is not restricted by other statutes.

Example: *The USO has obtained OPM approval to conduct a fund-raising concert in conjunction with the CFC. Local celebrities and entertainers have offered their services. The USO has asked if the post theater may be used for the concert. Use of the post theater can be authorized. (This scenario is a good example of how DoD may support a fund-raising event without directly contributing assets to the fund-raising itself.)*

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1999 ETHICS COUNSELORS WORKSHOP

USE OF GOVERNMENT TRANSPORTATION

MAJ Michael J. Coughlin
Office of The Judge Advocate General, Army
(Administrative Law Division)

Outline of Instruction

I. REFERENCES

A. Government Vehicles

1. 31 U.S.C. § 1344, Passenger motor vehicle and aircraft use.

2. 31 U.S.C. § 1349, Adverse personnel actions [for fiscal impropriety or misuse of government transportation].

3. 10 U.S.C. § 2637, Transportation in certain areas outside the U.S.

4. P.L. 101-194, § 503, Ethics Reform Act of 1989.

5. 41 C.F.R. § 101-6.4, Home-to-Work Transportation.

6. DoD 4500.36-R, Management, Acquisition, and Use of Motor Vehicles, 29 March 1994.

7. AR 58-1, Management, Acquisition, and Use of Administrative Use Motor Vehicles (C1, 1 March 1981)(under revision).

8. AFI 24-301, Vehicle Operations (1 October 1998).

9. AFPD 24-3, Operation, Maintenance, and Use of Transportation Vehicles and Equipment.

10. Secretary of the Army Memorandum, Policy for Travel by Department of the Army Officials, December 8, 1995 (under revision).

B. Government Aircraft

1. 31 U.S.C. § 1344.

2. Office of Management and Budget (OMB) Circular A-126, "Improving the Management and Use of Government Aircraft," 22 May 1992.

3. DoD Directive 4500.56, DoD Policy on the Use of Government Aircraft and Air Travel, 2 March 1997.

4. DoD 4515.13-R, Air Transportation Eligibility, November 1994.

5. AR 95-1, Flight Regulations (1 September 1997) (supersedes and incorporates AR 95-3).

6. AFPD 24-1, Personnel Movement (1 September 1995).

7. AFI 24-101, Passenger Movement (1 October 1995).

8. Secretary of the Army Memorandum, Policy for Travel by Department of the Army Officials, December 8, 1995 (under revision).

9. Chairman, JCS Memorandum, subject: Travel on Military Aircraft (7 Aug 1996).

C. Bus Transportation

1. 10 U.S.C. § 2632, Transportation to and from certain places of employment and on military installations.

2. DoD 4500.36-R, Management, Acquisition, and Use of Motor Vehicles, 29 March 1994.

3. AR 58-1, Management, Acquisition, and Use of Administrative Use Motor Vehicles (C1, 1 March 1981)(under revision).

D. Other

1. AR 600-8-105, Military Orders (28 October 1994) (authority to issue travel orders).

2. AR 360-5, Public Information, Ch. 5, Use of Military Transportation (UPDATE).

3. AR 360-61, Community Relations, Ch. 13 Travel and Transportation (15 January 1987).

4. DoD and Service messages.

II. NON-TACTICAL GOVERNMENT VEHICLES

A. 31 U.S.C. § 1344

B. DoD 4500.36-R, Management, Acquisition, and Use of Motor Vehicles.

1. Implements DoD Directive 4500.36.

2. All DoD-owned or –controlled motor vehicles, <u>except</u> "those used in direct connection with or in support of combat or tactical operations."

3. Shall be used for official purposes only.

C. Official Use

1. <u>Rule</u>: The use of Government owned or leased motor vehicles is restricted to official purposes only. DoD 4500.36-R, para. 2-5.

2. "Uses that would further the mission of the agency. Providing a government vehicle solely or even principally to enhance the comfort or convenience of a government officer or employee is not permissible." H.R. Rep. No. 451, 99th Cong., 2d Sess. 6 (1986).

3. Each federal agency shall ensure that Government passenger carriers operated by its employees are used for official purposes only; i.e. *to further the mission of the agency.* 41 CFR § 101-6.402(a) (1995).

4. Whether a use is for an official purpose is a matter of administrative discretion. Commanders or their designated representatives will determine the official use of motor vehicles. All factors will be considered including whether the transportation is:

   a. essential for successful completion of an DoD function, action, or operation, and

   b. consistent with the purpose for which the vehicle was acquired. DoD 4500.36-R, para. 2-5a.

5. Government vehicles may not be used for transportation to, from, or between any location for the purpose of conducting personal

business or other personal activities by military or civilian personnel, their family members, or others. DoD 4500.36-R, para. 2-5c.

6. Transportation of certain groups when it is determined that failure to provide transportation will have an adverse effect on morale. DoD 4500.36-R, para. 2-5e.

7. Transportation provided to those "officially participating in public ceremonies, military field demonstrations, and parades directly related to official activities." DoD 4500.36-R, para. 2-5f.

8. Transportation "shall not be provided" based solely on rank, position, prestige, or personal convenience. DoD 4500.36-R, para. 2-5j.

9. "Incidental use" may be authorized IAW Service regulations for non-official business only when such use is clearly in the interest of DoD (e.g., to obtain a commercial driver's license required for employment). DoD 4500.36-R, para. 2-11.

10. Once use of a Government vehicle is determined to be essential to the performance of official business, the following modes of transportation shall be considered in the following order, to the extent it is available and capable of meeting mission requirements (DoD 4500.36-R, para. 2-8):

    a. Scheduled DoD bus service;
    b. Scheduled public transportation;
    c. DoD motor vehicles;
    d. Voluntary use of POV (reimbursable);
    e. Taxi (reimbursable).

11. Sec Army guidance -- official use does NOT include

    a. transportation to unofficial private social functions;
    b. personal errands;
    c. attendance at official ceremonies in personal capacity.
    d. transportation to official after-hours functions will be treated as an exception to policy for which prior approval is required. All transportation to after hours functions will begin and end at the duty station.

12. Transportation of Army personnel and family members on emergency leave to nearest commercial transportation terminal to ensure arrival at an embarkation point prior to departure of first available flight, bus, or train, if commercial transportation is not adequate.

D. Home-to-Work Transportation.

1. Rule: Using Government vehicles to transport individuals between their residences and places of work is not transportation for an official purpose and is prohibited. 31 U.S.C. § 1344(a)(1) (see also, DoD 4500.36-R, Chapter 4).

Prohibition includes any part of route between home and place of employment except as otherwise authorized. DoD 4500.36-R, para. 2-5b; AR 58-1, para. 2-6a.

2. Exceptions: 31 U.S.C. § 1344 defines home-to-work transportation as an official purpose in the following situations:

a. When an employee is engaged in field work -- official work performed by employees whose jobs requires their presence at various locations that are at a distance from their place of employment (itinerant-type travel with multiple stops in the local commuting area, or use outside that area) or at a remote location that is accessible only by Government-provided transportation. This authorization is not applicable when:

(1) the individual's workday begins at an official duty station;

(2) the individual normally commuted to a fixed location, however far removed from the official duty station. 41 CFR §§ 101-6.401(g), 101-6.405.

b. When the transportation is essential for the safe and efficient performance of intelligence, counterintelligence, protective services, or criminal law enforcement duties.

c. Designated positions -- includes Secretaries of the Military Departments, Chief of Staff, Army, Chief of Staff, Air Force, Chief of Naval Operations, and Commandant of the Marine Corps.

3. 31 U.S.C. § 1344 also provides that Service Secretaries may authorize home-to-work transportation when they make a determination in writing, on a nondelegable basis, that one of the following situations exist:

a. Clear and Present Danger -- highly unusual circumstances present a threat to the physical safety of an employee's person or property and public/private transportation cannot be used. DoD 4500.36-R, para. 4-2e. The danger must be real and immediate and the government vehicle able to provide protection not otherwise available. 41 CFR § 101-6.401(h).

b. Emergency -- an immediate, unforeseeable, temporary need to provide home-to-work transportation for employees who are necessary to the uninterrupted performance of the agency's mission. 41 CFR § 101-6.401(i).

c. Compelling Operational Considerations -- circumstances in which the provision of home-to-work transportation is essential to the conduct of official business or would substantially increase the agency's efficiency and economy. Transportation may be justifiable if other available alternatives involve substantial additional costs to the Government or expenditures of employee time. These circumstances need not be limited to emergency life or death situations. 41 CFR § 101-6.401(j).

d. Determination must be in writing and include traveler's name, title, reason for exception, and expected duration. Approval extends for 15 calendar days and may be extended in 90 calendar day increments. Notification must also be submitted to Congress.

4. "Official non-DoD visitors invited to participate in DoD activities may be provided fare-free transportation between commercial transportation terminals or residence and visitation point." DoD 4500.36-R, para. 4-2f.

5. Personnel authorized home-to-work transportation may share the vehicle with others on a space-available basis provided the vehicle does not travel additional distances as a result. DoD 4500.36-R, para. 4-2g.

E. Spouses may accompany their sponsors on official business in a Government vehicle on a space-available basis only when:

1. The use of the vehicle has already been authorized to accomplish official business; there is sufficient space available in the vehicle without requiring a vehicle larger than that required for the performance of the official business; and the transportation creates no additional cost for the Government. DoD 4500.36-R, para. 2-5g; *see also* 68 Comp. Gen. 186 (1989).

2. Spouses of personnel who are authorized home-to-work transportation, or (for other spouses) when such transportation is required for security reasons, may travel in a Government vehicle independently "to or from an official function when the spouse's presence at the function is in the best interest of the government and circumstances have made it impractical or impossible for the [sponsor] to accompany the spouse en route." DoD 4500.36-R, para. 2-5g(2)(3).

F. Exceptions to Official Use Requirement.

1. 10 U.S.C. ? 2637 - Secretary of Defense may authorize the commander of a unified combatant command to use Government transportation for military members, civilian employees, and their dependents in areas outside the United States, if the commander determines that public or private transportation is unsafe or not available.

2. "Incidental Use" - Ethics Reform Act of 1989, Section 503 (P.L. 101-194)

a. Agency heads (e.g., Secretary of Defense) may prescribe appropriate conditions for the incidental use, for other than official business, of vehicles owned or leased by the Government.

b. Within DoD, it is generally authorized only on a very limited, case-by-case basis. Approved by Deputy Under Secretary of Defense (Logistics) or designee.

c. It has authorized use of government vehicles for obtaining a commercial driver's license required for government employment. DoD 4500.36-R, para. 9-5.

G. Penalties.

1. 31 U.S.C. § 1349(b)

a. Officer/employee who willfully uses or authorizes use of a government vehicle/ aircraft, for other than an official purpose,

(1) Standard: Did official know use was unofficial or have "reckless disregard" for whether official? *See, e.g.*, Felton V. EEOC, 820 F. 2d 391 (Fed. Cir. 1987).

(2) Exception: If government vehicle was used primarily to further agency business, a charge of willful use may not be sustained for "minor personal use." *See, e.g.,* Madrid v. Dept. of Interior, 37 M.S.P.R. 418 (1988).

b. Or, violates any other provision of 31 U.S.C. ? 1344 ("willful" violation not required),

c. Shall be suspended without pay for at least one month by the head of the agency, and

d. When circumstances warrant, may be summarily removed from office.

2. Military personnel who willfully use or authorize the use of a government vehicle for other than an official purpose, or otherwise violate 31 U.S.C. § 1344, can be disciplined under provisions of the UCMJ or other administrative procedures deemed appropriate. (DoD 4500.36-R, § 1-3(b)). For example:

a. Article 92 - Failure to obey order or regulation.

b. Manual for Courts Martial, Part IV, § 46c.(2)(b), states as an example of wrongful appropriation under Article 121, "while driving a government vehicle on a mission to deliver supplies, withholding the vehicle from government service by deviating from the assigned route without authority, to visit a friend in a nearby town and later restore the vehicle to its lawful use."

H. Examples of Violations of Official Use Prohibition

1. Mattos v. Department of Army, No. 93-3203 (Fed. Cir. Oct. 8, 1993). 30-day suspension for using government vehicle to stop at McDonalds when

returning from meeting when employee knew such use was unauthorized.

2. Devine v. Nutt, 718 F.2d 1048 (Fed. Cir. 1983). 30-day suspension for using government vehicle while on patrol to drive by residence to pick up beer and deliver to command center.

3. Madrid v. Dept. of Interior, 37 M.S.P.R. 418 (1988). 30-day suspension for giving employee's loan officer a ride to lawyer's residence to sign loan papers. Deviation was only several blocks off employee's normal route, but he transported unauthorized individual for personal business.

I. Examples of No Violation of Official Use Prohibition.

1. Kimm v. Department of Treasury, 61 F.3d 888 (Fed. Cir. 1995). An ATF agent on 24-hour call who was authorized to use government vehicle for home-to-work travel transported his child to day care on his way to work for one week period while his wife was bedridden. Circuit court overturned suspension finding that it was reasonable for agent to assume the use was essential to completion of the mission.

2. Felton v. EEOC, 820 F.2d 391 (Fed. Cir. 1987). Overturned 30-day suspension of supervisor who authorized office's only typist to take a government vehicle to secure her POV which had broken down on the way to work. Circuit court found no evidence of willful element since supervisor reasonably determined that the use would promote the successful operation of the agency.

III. USE OF GOVERNMENT VEHICLES WHILE ON TDY

A. Limited to Official Purposes.

1. Use of Government vehicles shall always be predicated on need, distance, and other conditions that justify their use. When an adequate DoD or commercial bus system is available, the use of any individual motor vehicle or commercial rental car is prohibited. DoD 4500.36-R, para. 2-5d(1).

2. Official use while on TDY includes transportation between places where the member's presence is required for official business and between such places and temporary lodging. When public transportation is unavailable or its use is impractical, travel to restaurants, drugstores, place of worship, barber shops, cleaning establishments, and similar places required for the

subsistence, comfort or health of the member is authorized. JFTR, para. U3200 A; JTR, para. C2050; DoD 4500.36-R, para. 2-5d(2).

3. Using a DoD-owned or leased vehicle for transportation to or from entertainment or recreational facilities is prohibited. DoD 4500.36-R, para. 2-5d(2). *But see*, Comp. Gen. B-254296 (1993) (authorizing limited exception).

B. Rental Vehicles.

1. Vehicles rented by government employees using their government charge cards are not "government leased" vehicles and therefore are not subject to the sanctions of 31 USC 1349(b). Chufo v. Department of Interior, 45 F.3d 419 (Fed. Cir. 1995).

2. Employees and service members may only be reimbursed for costs associated with the official use of rental vehicles. Any additional expenses for nonofficial use of a rental vehicle must be borne by the employee or service member. Expenses include gas, mileage charges, rental fees in excess of that chargeable to the government for official use, and liability. *See* Comp. Gen. B-156536 (1965).

IV. GOVERNMENT AIRCRAFT

A. 31 USC § 1344, official use requirement applies.

B. DoDD 4500.56 implements OMB Circular A-126 and establishes categories of travel authorized official use of government aircraft.

C. Required Use -- Designated travelers who are required to use military aircraft because of their continuous requirement for secure communications and security.

1. The DoD directive designates the Secretaries of the Military Departments, the Vice Chairman and Joint Chiefs of Staff, the Commanders of the Unified and Specified Commands, and four-star general/flag officers.

2. Within the Army, required use is further restricted to only the Secretary of the Army and the Chief of Staff, Army.

D. Other Official Travel.

1. Normally accomplished using commercial transportation.

2. May include travel for matters such as giving speeches, attending conferences or meetings, and making routine site visits to facilities.

3. Use of government aircraft is authorized only if:

a. The actual cost of using government aircraft is not more than the cost of using commercial air service, or

b. Commercial air service is <u>not</u> reasonably available because:

(1) it is unable to meet the traveler's departure and/or arrival requirements within a 24-hour period, or

(2) highly unusual circumstances present a clear and present danger, an emergency exists, or other compelling operational considerations make commercial transportation unacceptable.

E. Unofficial Travel.

1. Travel by family member, non-DoD civilian, or non-Federal traveler.

2. Accompanying a senior DoD/Federal official who is traveling on MilAir on official business.

3. NOT Space-A travel (see, DoD 4515.13-R, Ch. 6).

4. MilAir is already scheduled; doesn’t require larger aircraft; official travelers are not displaced; negligible cost to Government; reimbursable by traveler at full coach fare rate.

F. Authorizing Officials.

1. Normal travel order approving authority.

2. SECDEF or designee.

3. Service Secretaries and Chiefs of Staff, or designees.

4. DoD 4515.13-R.

V. SPOUSE TRAVEL

A. Transportation: Spouses may accompany their sponsors at government expense as an exception to policy only:

1. to attend an unquestionably official function in which the spouse is actually to participate in an official capacity; or

2. if such travel is deemed in the national interest because of diplomatic or public relations benefit to the United States. (DoDD 4500.56, Encl 2, para. E1, JTR, para. C6000(15), JFTR, para. U7700).

3. Actual participation connotes participation beyond merely attending a meeting, conference, or function, even if hosted by DOD on a matter related to DOD official business.

B. Transportation and Per Diem: Spouses may only receive per diem in the following very narrow circumstances (JFTR, para. U7700, JTR, para. C6000):

1. The authorizing official determines that spouse's travel is "essential to accomplishing the mission and there is a benefit for DOD beyond fulfilling a representational role."

2. Spouse confers with DOD officials on DOD matters as a "subject matter expert." Status as spouse is incident to status as expert.

3. Attendance at a service-endorsed training course after which the spouse will provide voluntary service incident to such training. Limited for training to protect family members when stationed abroad. *See* 71 Comp. Gen. 6 (1991).

C. Spousal Air Travel Approval Authorities (requests routed through command channels)

a. Service Chiefs or designees for requests from members and employees within their Services. May be delegated in writing, but not below Major Command Chief of Staff or equivalent for travel requests from senior officials.

b. Code 2 civilians, four-star general/flag officers and three-star general/flag officers specified in Appx. B, DOD 4515.13-R may approve transportation, per diem, and/or other expense allowances for their spouses on a case-by-case basis.

c. Army further limits to:

(1) Secretary of the Army for all requests for commercial travel and all requests by Secretariat officials.

(2) Chief of Staff, Army or Director of the Army Staff for all other requests for travel by military means, except four-star general officers, and the three star commander of USARPAC who can approve own.

D. Unofficial Travel/Non-interference Travel on MilAir

(See, para. IV E, above)

VI. BUS TRANSPORTATION (10 U.S.C. § 2632, DOD 4500.36-R, Chap. 5)

A. Shuttle Bus Service - 10 U.S.C. § 2632(a)(2)(A)

1. Used to transport groups of individuals on official business between offices on installations or between nearby installations.

2. In determining whether to provide the service the Secretary concerned shall consider the potential for saving energy and reducing air pollution.

3. No fare may be charged members of the Armed Forces if the service is used incident to the performance of duty.

B. Group Transportation - 10 U.S.C. § 2632(a)(2)(B)

1. Whenever the Secretary of a Military Department determines that the effective conduct of the affairs of the Department requires assured and adequate transportation, he or she may provide transportation service by motor vehicle (having a seating capacity of 12 or more people) to and from places of employment for individuals attached to that Department.

2. To authorize the establishment of such systems, the Secretary must determine that:

a. other transportation options are inadequate and cannot be made adequate;

b. a reasonable, but unsuccessful, effort has been made to induce operators of private companies to provide the necessary transportation; and

c. the services to be furnished will make proper use of and provide the most efficient transportation.

3. A reasonable fare shall be charged.

C. Mass Transit Services - 10 U.S.C. § 2632(a)(2)(C)

1. Transportation of military members, employees, and dependents to and from a military installation that the Secretary concerned determines is in an area not adequately served by regularly scheduled, and timely, commercial or municipal mass transit services.

2. To authorize the establishment of such systems, the Secretary must determine that:

a. other transportation options are inadequate and cannot be made adequate;

b. a reasonable, but unsuccessful, effort has been made to induce operators of private companies to provide the necessary transportation; and

c. the services to be furnished will make proper use of and provide the most efficient transportation.

3. Service will be provided at a reasonable rate of fare unless waived by the Secretary concerned.

D. Watercraft.

1. “Barges and Gigs”

(a) Official purposes only (31 U.S.C. § 1301(a); recreational purposes not allowed (OPNAVINST 4780.6C).

(b) Proper uses may include visits to ships not accessible by pier facilities; conduct facility inspections; hosting VIPs in "afloat settings" or other events qualifying for use of Official Representation Funds (SECNAVINST 7042.7H; boat handling; and training.

(c) Support of social functions and hail and farewell parties not allowed.

(d) Alcohol use on barges and gigs limited by Navy Regulations and SECNAVINST 1700.11c.

VII. PUBLIC AFFAIRS TRAVEL

A. DoD 4515.13-R, Chapter 3.

1. "[A]ny travel or transportation of individuals, groups, or materiel undertaken as a result of a request to or an invitation from, and authorized by, an approving authority in the interest of adding to the public understanding of DoD activities."

(a) Shall not compete with U.S. flag commercial PAX carriers;
(b) Primarily in DoD's interest;
(c) Travel designed to improve relations, good will, or serve humanitarian purposes is not PA travel.

2. Types of Travel.

(a) Local Travel;
(b) Nonlocal Travel;
(c) Point-to-Point Travel;
(d) Public Affairs Orientation Travel;
(e) Representatives of the News Media.

3. Approval Authority.

(a) Assistant SECDEF for Public Affairs.
(b) Commanders and Service OPA.

4. Eligible Categories of Travelers.

VII. CONCLUSION

CHARMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20318-9999

CN-1373-96
7 August 1996

MEMORANDUM FOR: Commander In Chief, US Atlantic Command
Commander In Chief, US Central Command
US Commander In Chief, Europe
Commander In Chief, US Pacific Command
Commander in Chief, US Southern Command
Commander in Chief, US Space Command
Commander in Chief, US Special Operations Command
Commander in Chief, US Strategic Command
Commander In Chief. US Transportation Command

Subject: Travel on Military Aircraft

1. The Secretary of Defense has directed that the enclosed guidance, based on current directives Issued by the Secretary of Defense, the Deputy Secretary of Defense, and the Office of Management and Budget, be provided regarding travel on military aircraft (MilAir). As senior leaders, it is important to understand DOD travel policies and procedures applicable to official and unofficial air travel.

2. Please ensure that MilAir is used only for authorized purposes, and make every effort to avoid the perception of inappropriate use. Your continued support is greatly appreciated.

JOHN M. SHALIKASHVILI
Chairman
of the Joint Chiefs of Staff

Enclosure

Copy to: Commander in Chief
US Forces Korea

ENCLOSURE

MilAir Travel by Unified Commanders and Their Spouses

1. The Secretary of Defense designated commanders of Unified Commands as "Required Use" travelers for official duty travel. This means Commanders in Chief (CINCS) must use MilAir for official air travel. Except as noted in paragraph 2, CINCs cannot use MilAir for unofficial travel (e.g., personal business or leave). CINCs may conduct personal business while on official travel using MilAir as long as the primary purpose of each travel segment is for official DOD business. Engaging in personal business, however, may affect entitlement to per diem during the unofficial portion of travel.

2. The Secretary of Defense designated USCINCEUR and CINCUSACOM as "Required Use" travelers for both official and unofficial air travel when carrying out their duties as SACEUR and SACLANT, respectively. They must reimburse the US government at the full coach class commercial rate as defined by OMB Circular A-126 for all unofficial MilAir travel, and they may not receive per them for such travel. Government employees required to support unofficial travel (e.g., communications operators) are in an official travel status. The number of such support personnel must be kept to the minimum required.

3. As a general rule, a family member may not accompany a DOD sponsor traveling on MilAir for official business. A family member may be approved for such travel when there is an unquestionably official function in which the family member is actually to participate in an official capacity, or such travel is deemed in the national interest because of a diplomatic or public relations benefit to the United States. Such travel is normally limited to spouses and is representational in nature. Furthermore, the travel must be on a "mission noninterference basis only," supported by invitational travel orders, and normally authorized only for transportation costs, not per diem.

4. A spouse is eligible for per them only when the spouse's participation is essential for the conduct of official government business (not just representational) and would justify the spouse traveling on official government orders (via space-required on previously scheduled MilAir or commercial air) under the JTR/JFTR without the DOD sponsor. Under these circumstances, "spouse status" is irrelevant to the authority for the official travel.

5. CINCs have been delegated authority by the Secretary of Defense to approve the travel of their spouses to accompany them on required use MilAir travel by applying the preceding criteria. In applying the criteria, the CINC must consider spouse travel on a case-by-case basis in advance and use sound judgment as to whether the travel is

appropriate under the circumstances. The CINC must personally sign the invitational travel order designating the travel. A CINC may approve spouse travel for a broad range of official activities based upon his unique role as one of nine world wide combatant commanders. This is especially true for the geographic CINCS, who are tasked by the President in the Unified Command Plan to provide US military representation to international and US national agencies and to provide the single military point of contact for the US government within the theater. The "functional" CINCS also have a wide range of political-military responsibilities, both with respect to overseas activities and in the United States and its territories. In carrying out these responsibilities, a CINC may determine that on a particular occasion it is important for the spouse to assist in representing the United States and the National Command Authorities (especially if counterparts or other dignitaries are accompanied by spouses), and to help facilitate meetings with subordinate units by having the spouse discuss issues such as quality of life, morale, and welfare with other spouses (with a view toward advising on problem areas and recommending possible solutions) . This latter role does not necessarily have to be in the context of a formal meeting with a "scripted" itinerary for the spouse, although that is highly desirable.

6. Under very limited circumstances and incident to authorized official spouse travel when accompanying the CINC, a CINC may authorize his spouse to travel without the CINC on previously scheduled MilAir. Such travel may only be authorized if there is no additional cost to the government for using MilAir and such travel is a reasonable and necessary means of accomplishing or completing the spouse's travel with the CINC. In unusual circumstances, the spouse's travel with the CINC may be interrupted due to an emergency, equipment failure, or NCA direction. For example, a CINC's spouse may accompany the CINC on a four-country itinerary but, for reasons of national security, the CINC is ordered immediately to Washington. The spouse is left to return to home station without the sponsor. In this unique situation, the CINC may approve the spouse's return to the point of origin via previously scheduled MilAir or commercial air, if less expensive to the government.

7. The spouse of a CINC may also travel by MilAir in an unofficial status on personal business when the CINC is traveling on official business. This category of travel differs from the space available privilege authorized in chapter 6 of DOD 4515.13R in that the spouse must be in the company of the CINC and must reimburse the government at the full commercial coach class fare by personal check to the Treasurer of the United States. The servicing travel office must annotate the applicable fare on the CINC's travel voucher. Such unofficial travel by the CINC's spouse on MilAir is not permitted unless the aircraft is already scheduled for an official purpose, the travel does not interfere with the official travel or require a larger aircraft, official travelers are not displaced, and any additional cost to the government is negligible.

SECRETARY OF THE ARMY
WASHINGTON DC

December 8, 1995

MEMORANDUM FOR PRINCIPAL OFFICIALS OF HEADQUARTERS, DEPARTMENT OF THE ARMY

SUBJECT: Policy for Travel by Department of the Army Officials

The enclosure to this memorandum reaffirms the Army's dedication to sound travel policies and implementing procedures. I urge that you and your staff become thoroughly familiar with the provisions of this memorandum and with the regulations that it supplements.

We should be particularly alert to the use of military aircraft by other than required users, to destinations outside the continental United States and to major hub cities where the use of commercial air generally results in only minimal delays and is usually more economical. We must eliminate 'last minute" submission of travel requests regardless of the method of transportation. Such late submissions provide the approval authority little time to properly explore alternatives. Individuals should not purchase tickets or make plans that generate financial commitments until the trip has been approved by the appropriate authority. Consequently, I expect these submissions to become more timely in the future.

All officials of the Department of the Army are expected to fully comply with the provisions and the intent of these policies. Reimbursement from the individual will be required for transportation not authorized under these policies. l will review our joint efforts on a continuing basis to reduce the number of persons traveling and the costs of travel performed.

Enclosure

POLICY FOR TRAVEL BY DEPARTMENT OF THE ARMY OFFICIALS

It is the policy of the Department of Defense and the Department of the Army that transportation resources are to be vigorously managed to prevent both the misuse and the perception of misuse. Travel must be directly and clearly related to mission achievement.

This document supersedes the Secretary of the Army memorandum subject: Policy for Travel by Department of the Army Officials, dated 11 July 1995, and prior Secretary of the Army delegations of authority for approval of spouse travel. It implements specified policies and procedures provided by the Deputy Secretary of Defense memorandum, dated I October 1995, subject: DoD Policy on the Use of Government Aircraft and Air Travel. It also serves to reduce the cost of travel, and prevent the inappropriate an perceive inappropriate use of Army travel resources by the implementation of these policies and procedures

1. GENERAL POLICY

A. Within the Department of the Army, only the Secretary of the Army and the Chief of Staff are required to use military aircraft for all travel when in a duty status.

B. The Secretary of the Army is the approval authority for all travel by the following Secretariat officials: Under Secretary, the Assistant Secretaries, the General Counsel, the Administrative Assistant ' the Chief of Legislative Liaison, the Chief of Public Affairs, the Director of Information Systems for Command, Control, Communications, and Computers; The Inspector General; the Auditor General, the Deputy Under Secretaries, the Director, Small and Disadvantaged Business Utilization, and the Chairman, Army Reserve Forces Policy Committee.

(1) Requests for the above officials will be submitted through the Administrative Assistant who will coordinate travel requests to assure e that sufficient key personnel are e in the National Capital Region to conduct Departmental business Dual absences of the above listed officials and their principal deputies, when authorized, must be approved by the Secretary of the Army,

(2) The Administrative Assistant is responsible for developing, for approval by the Secretary, detailed policies and procedures relating to travel of members of the Army Secretariat and its field operating agencies.

C. The Chief of Staff of the Army is responsible for establishing implementing Procedures to properly control travel within the Army-my Staff and for Army commanders as outlined in this document

(1) The Chief of Staff will ensure that a sufficient number of key Army my Staff members are in the National Capital Region to conduct Departmental business.

(2) Simultaneous travel by the Chief of Staff and the Vice Chief of Staff will be coordinated with the Secretary of the Army.

D. Special emphasis is to be given to controlling and monitoring administrative travel and all overseas travel (including overseas travel by students of service schools) reducing the number of personnel traveling to the same site, andreducing the number of days of travel per trip.

E. Control of travel will continue to be an item of special interest during all Inspector General and Army Audit Agency inspections, audits, and reviews.

F. It is Army policy that Air Mobility Command (AMC) or AMC-contracted airlift will be used for overseas travel when it is available, and meets the mission requirements for PCS or TDY travel.

G. Current "Required Use" joint or "dual hatted" Army commanders of Unified & Specified Commands being reassigned to positions within the Department of the Army must document a mission necessity to use military aircraft for permanent change of station travel and must obtain prior authorization from the Secretary of the Army.

2. CONFERENCE TRAVEL

A. Travel to conferences, and nonessential but job-related training, can produce benefits, but is also costly, The Chief of Staff and the Administrative Assistant will periodically conduct special reviews of all Army-sponsored conferences and workshops, and will eliminate all but the most essential events.

B. Travel with only marginal return should be deferred or canceled, and alternate means utilized to accomplish the mission. To assure adequacy of controls on travel to Department of the Army sponsored conferences, the need for meetings of this nature (for which the total amount for facility's costs, travel, and per them estimates exceed $7,500, per DA Memo I- 1 7, HQDA Conferences, Symposia, Seminars, and Meetings) shall be certified by the Administrative Assistant for Secretariat personnel, and by the Chief of Staff for Army Staff personnel. The Chief of Staff certification authority may be delegated by the Chief of Staff to appropriate levels.

C. A viable alternate to conference travel is the use of video
teleconferencing.
'This can effectively and efficiently extend managerial and oversight responsibilities while significantly reducing travel requirements Video teleconferencing can provide videotaped records of the conferences for later use by those unable to attend, serving as a permanent record of the proceedings, and provide real-time, face-to-face conferences without the requirement for travel.

3. FOREIGN TRAVEL

A. Foreign travel by key members of the Secretariat and the Army Staff should be undertaken only when the need is absolutely clear, and then only by the smallest groups possible, consistent with mission requirements. Back-to-back trips by different officials to the same location(s) are strongly discouraged. Trips should be actively coordinated to prevent this situation.

B. All foreign travel in which the traveler will meet with officials of foreign governments must be coordinated with the Department of State through the Office of the Secretary of the Army in accordance with DOD guidance and appropriate implementing Army guidance. All requests for foreign travel should be submitted prior to discussing travel plans with the foreign government concerned,

C. Requests for foreign travel by Secretariat principal officials will be submitted through the Administrative Assistant for approval by the Secretary. The Chief of Staff is delegated the authority to act on the foreign travel of Army Staff officials, and may delegate this authority to an appropriate level. All foreign travel requests for officials referred to in A and B above that meet the conditions in those paragraphs will then be submitted to the Secretary of Defense through the Administrative Assistant

4. COMMERCIAL AIR TRAVEL

A. Inasmuch as domestic flights are relatively short, all commercial air travel will be coach-class unless exceptional circumstances dictate otherwise. Such circumstances primarily involve travel that must be per-formed at a specific time, and/or there are no other seating accommodations available.

(1) When traveling overseas on official TAD/TDY business the Under Secretary, the Assistant Secretaries, the General Counsel, and three-star and four-star general officers are authorized to use premium-class (less than first-class). This authorization extends to the principal only.

(2) Requests for OCONUS air travel at premium-class (less than first-class) for officials in the Secretariat and the Army Staff, other than those listed in (1), must include full written justification of the unique requirements for premium-class (less than first-class) travel. Requests will be submitted through the Administrative Assistant to the Secretary of the Army for approval.

(3) Requests for CONUS air travel at premium-class (less than first-class) for all officials in the Secretariat and the Army Staff must include full justification of the unique requirements for premium-class (less than first-class) travel. Requests will be submitted through the Administrative Assistant to the Secretary of the Army for approval.

B. Routine premium-class (less than first-class) travel up-grade on commercial flights in excess of 14 hours (including stopover) is prohibited for all others not listed in paragraphs A(l) through A(3). Travelers are responsible for determining travel requirements and scheduling coach-class accommodations in sufficient time to allow authorized

rest stops in route or at destination. When returning from TDY, premium-class (less than first-class) travel will not be authorized simply because the total flight time (including stopover) is in excess of 14 hours, Order approving officials may authorize fully justified requests for premium-class (less than first-class) travel for officials other than those in A(l) through A(3) under the appropriate provisions of the JTR and FFTR.

C. The Secretary of the Army retains the authority to approve
the use of all first-class travel. All requests for exception to policy for the use of first-class travel must be fully justified under the appropriate provision of the JTR/JFTR. This first-class travel prohibition includes transportation costs paid for by a non-Federal source, and is applicable to both the principal and accompanying spouse

D. Frequent flyer mileage and related promotional mileage credits may be accrued for official travel by DOD personnel who desire to participate in frequent flyer programs on a voluntary basis. Under no circumstances may credits earned during official travel be used for personal travel. Credits earned during official travel are a result of government expenditures ' therefore, the first consideration should be given to redeeming credits to defray official travel costs. Credits may also be used for accommodation upgrades to premium (less than first-class) while on official travel, but may not be used for upgrades to first-class air travel.

5. GENERAL MILITARY AIR TRAVEL

A. Travel by military aircraft will require complete documentation signed by the senior traveler. More detailed guidance on the use of Special Air Mission and Operational Support Airlift aircraft is contained in later paragraphs Within the Department of the Army, the Secretary of the Army and the Chief of Staff are required to use military aircraft for all travel when in a duty status All others will justify the use of military aircraft , both fixed and rotary wing, for official travel based on one or more of the following criteria

(1) The air travel used must be the most economical mode of transportation consistent with the accomplishment of the military mission,

(2) The particular aircraft to be used must be the least costly one capable of satisfying the transportation requirements Larger aircraft will be used only for reasons of safety, security, or economic feasibility.

(3) An emergency situation exists whereby the military mission could not be completed without the use of military aircraft, or

(4) The use of commercial aircraft causes significant scheduling delays over several legs of a multi-stop mission.

B. Aircraft will not be scheduled for training missions where
the principal purpose would be to accommodate the travel of senior Army officials, either military or civilian When scheduling military aircraft, every effort will be made to avoid

(1) Trips between major US cities,

(2) Trips where the purpose is to deliver "speeches", especially when the aircraft appears to be filled with personal staff members to make the trip cost effective.

(3) Trips requested to accommodate competing requirements, especially when the event(s) are of a social nature. Therefore, maximum advance planning is emphasized so that scheduling conflicts do not dictate the use of military aircraft.

C. The OCONUS use of CONUS based military aircraft must be approved by the Secretary of the Army for all Secretariat officials, and by the Chief of Staff for all members of the Army Staff and MACOM commanders. MACOM commanders are delegated approval authority for individuals under their supervision. CONUS based military aircraft may be used for OCONUS travel only under the most unusual circumstances such as

(1) when it can be clearly shown that the use of commercial aircraft is more costly than using military aircraft,

(2) When there are significant security concerns; or

(3) When the use of commercial aircraft adds more than 24 hours to both the outbound and inbound trips, or the mission

is an essential or emergency mission. This prohibition does not apply to required use travelers.

D. The use of commercial airlift to OCONUS destinations does
not preclude the use of military airlift in an OCONUS theater of operation when

(1) It is reasonably available and does not require long deadhead flights to begin or end the mission

(2) The U.S. carriers are not available, or

(3) There are significant security concerns in the use of foreign flag carriers or
facilities.

E. Military aircraft shall not be used if commercial airline,
including charier, service is reasonably available (i.e., commercial airline service is available to effectively fulfill the mission requirement), and is able to meet the traveler's departure and arrival requirements within a 24-hour period unless: highly unusual circumstances present a clear and present danger; an emergency exists; the cost of using the military aircraft is less than the cost of commercial transportation; or the aircraft to perform a bona fide training mission, if the minimum mission requirements have not been exceeded, and there is no additional cost to the government.

F. Cost analysis for use of military aircraft will be based on the formula used by the Operational Support Airlift Command (OSAC) system. (Please note the 24-hour scheduling window makes it extremely difficult to justify the use of military aircraft for all but required users along high density routes such as Washington, D.C. to New York, Atlanta, or Chicago.)

6. SPECIAL AIR MISSION (SAM) AIRCRAFT

A. Special Air Mission (SAM) aircraft may be authorized in the following instances: travel is plainly in the national interest for official purposes, commercial transportation is clearly incapable of meeting the requirement for security, or other significant reasons as approved by the appropriate authority. The hourly costs associated with the limited inventory of aircraft assigned to the United States Air Force

89th Military Airlift wing range from approximately $600 to nearly $17,000 depending on the type of aircraft, thereby necessitating judicious use of this limited resource. Requests for SAM support require a cost analysis as a part of the justification. (For example, the use of SAM flights from Washington, D.C. to New York could seldom, if ever, be justified.)

(1) Requirements for both domestic and foreign SAM flights for personnel in the Secretariat will be submitted through the Administrative Assistant to the Secretary

(2) The Chief of Staff will establish procedures for controlling all SAM travel requests for individuals in the Army Staff and MACOM Commanders. This also includes foreign counterpart visits.

(3) All non-DOD requests for SAM aircraft, exclusive of Congressional travel, will be submitted through the Administrative Assistant for processing to OSD

(4) Congressional use will be coordinated by tire Chief of Legislative Liaison in accordance with established procedures. The use of SAM aircraft is especially appropriate for Army sponsored trips by members of Congress or DOD officials when the trip has significant DOD interest.

B. Within the Department of the Army, only the following officials are eligible to use SAM aircraft. Additionally, it is required that one of these senior officials must be aboard, or a SAM aircraft cannot be used for the mission

Secretary of the Army
Chief of Staff
Under Secretary of the Army
Vice Chief of Staff
Assistant Secretaries of the Army
General Counsel
General Officers (four-star)

C. The SAM Airlift validator in the Office of the Chief of Staff, @ Force, provides periodic reports on utilization of SAM aircraft through the Administrative Assistant for review by the Secretary and the Chief of Staff, Army.

7. OPERATIONAL SUPPORT AIRLIFT (OSA)

A. The use of Operational Support Airlift (OSA), both fixed and rotary wing, assigned to the Army should be restricted to flights where commercial transportation is inconsistent with security or other significant mission requirements. Requests for use of OSA will be processed in accordance with current directives and procedures.

(1) Every effort will be made to pool these requirements for maximum aircraft utilization. Minor differences of only a few hours in travel schedules seldom warrant the use of separate aircraft. (Flexibility in scheduling and passenger loads to accommodate the pooling of missions is encouraged.) All requests should include a comparison of the costs of travel by military air and commercial modes of transportation.

(2) The United States Army Priority Air Transport Detachment can support longer missions, but its use must be fully justified through OSAC policies and procedures.

B The Commander, Operational Support Airlift Command, will provide a monthly report of the use of Operational Support Airlift by senior Army officials through the Director of the Army Staff and the Administrative Assistant for review prior to submission to the Secretary.

C. All MACOM commanders will ensure that they are kept informed of their command's OSA usage.

8 HELICOPTER TRAVEL

A. Rotary wing military aircraft may be used only when it is
cost favorable as compared to ground transportation, or when the use of ground transportation would have a significant adverse impact on the ability of the senior official to effectively accomplish the purpose of the travel. This policy does not apply to "operational mission" use of rotary wing aircraft as defined in AR 95-3, Aviation: General Provisions, Training, Standardization and Resource Management.

B. It is the policy of the Department of the Army that helicopter assets shall not be used for transportation between installations within the National Capital Region (NCR) except in unusual circumstances, The existence of unusual circumstances shall be determined by the Secretary of

the Army for members of the Secretariat, and by the Chief of Staff, Army for cases involving travel by Army staff members.

C. The following guidance applies to the use of the Pentagon
Helipad.

(1) Eligibility for use of the Pentagon Helipad is restricted to Code 6 civilians, Brigadier Generals, and above-

(2) The Pentagon helipad is normally available Monday through Friday from 0730 to 1730 hours. The Chief of Staff, or his designee, may grant exception for weekend and/or alternate travel times for Code 2 and 3 civilians and General Officers (four-star), Exceptions may be granted only under the most extraordinary circumstances for travel originating within the NCR

D. Within the NCR, all approved requests for helicopter support are forwarded from the respective organizational airlift validator to the Operational Support Airlift Command Normally, the use of this mode of transportation will be limited to those NCR intra-city trips that are within a 125 Nautical Mile (NM) radius and/or more than a 90 minute motor vehicle trip from the Pentagon. A chart providing comparison mileage and time is included for reference.

(1) Intra-city travel is travel that departs from and arrives at any location within the Greater Washington-Baltimore Metropolitan area.

(2) Intra-city travel is limited to Code 1, 2, & 3 civilians and Code 2 & 3 General Officers.

(3) Requests for exception must be approved by the Administrative Assistant for Secretariat officials, and by the Chief of Staff or his designee for Army officials not assigned to the Secretariat. Requests for exceptions to use of U S. Army assets by officials other than Army officials will be coordinated with the Executive Secretary of the Department of Defense.

9. ACCOMPANYING SPOUSE TRAVEL

A. Within the Department of the Army, accompanying Spouse travel eligibility will normally be limited to the spouses of the following officials:

Secretary of the Army
Chief of Staff
Under Secretary of the Army
Vice Chief of Staff
Assistant Secretaries of the Army
General Counsel
General Officers (four-stars and the three-star commander of USARPAC as specified in DOD Directive)

B. As a general rule, spouses or other dependents may not accompany Army personnel, either military or civilian, on official business at government expense. Accompanying spouse travel will be accomplished as an exception to policy whether by commercial or military aircraft. No exceptions can be granted for accompanying dependents other than spouses traveling at government expense. (See section I 1, Non-Interference (Reimbursable) Travel.)

C. Accompanying spouses will travel with their sponsors on military or commercial aircraft, at government expense, when there is an unquestionably official function in which the spouse is in an official capacity, or it is deemed in the national interest as desirable because of diplomatic or public relations benefit to the country. Requests for travel meeting these criteria will be considered Non-Interference (Non-Reimbursable) Travel.

(1) When funding is required to support spouse travel under these circumstances, it will be for transportation only. Per diem is not authorized except in limited cases.

(2) Each event of spouse travel is to be approved on a case-by-case basis therefore, blanket travel orders for spouses are not appropriate. The request for spouse travel will be reviewed by the principal's legal counsel prior to submission for approval through the normal chain of command. Additionally, when the requesting official is not assigned to HQDA, the request for approval for spouse travel will also be reviewed by the requesting official's Chief of Staff, or equivalent official prior to submission.

D. The Secretary of the Army is the approval authority for all accompanying spouse travel at government expense, via military or commercial means, for spouses of Secretariat officials, and by commercial means for uses of all other military and civilian officials of' the Department of the Army.

(1) All requests for spouse travel that are to be approved by the Secretary of the Army will be forwarded to the Administrative Assistant for processing.

(2) Requests should be submitted at least ten working days prior to the travel.

E. Except as delegated in paragraph F below, the Chief of Staff is delegated the approval authority for all travel of spouses of military officials (not assigned to the Secretariat) by military means. This authority may be redelegated to the Director of the Army Staff without further delegation

F. All four-star general officers and the three-star commander of USARPAC are delegated the authority to approve accompanying travel of their own spouses on military aircraft.

(1) This authority does not extend to travel by spouses of others assigned to the commands of those general officers and commanders.

(2) Each occurrence will be approved and documented by a Memorandum for Record on a case-by-case basis by the principal concerned and will include a concurrence of legal counsel and will bear his or her principal's signature. Blanket travel orders for these spouses are not appropriate. In all cases, the spouse travel will be reviewed prior to the travel by the principal's legal counsel.

G. Joint or "dual hatted" Army commanders of Unified & Specified Commands follow their joint command approval process concerning accompanying spouse travel when they are traveling on behalf of their joint command. When traveling on Department of the Army- business, the provisions of this policy memorandum will be followed (example: Army Four-Star Commanders Conference).

H. The Chief, National Guard Bureau is delegated, without further delegation, the authority to approve the travel of

accompanying spouses of the 54 State and Territory Adjutants General by military aircraft when they are traveling for purposes of National Guard Bureau business (example: NGAUS Conference). However, when the State and Territory Adjutants General are traveling on state or territory business, the state or territory guidance governing accompanying spouse travel will be used. In either case, the tests of unquestionable official need, actual participation, and/or significant diplomatic or public relations benefits must be met

1. Spouses are permitted to travel at full government expense, including per diem, when they are participating in a service-endorsed training course. The spouse will then provide voluntary service incident to such training where the Army receives a primary and direct benefit from the spouse's participation (example anti-terrorist driving training).

J. Spouses, either individually or part of a group, are permitted to travel at full government expense, including per diem, when performing a direct service to the Department such as providing advice or guidance as a "subject matter expert" in his/her own right when converting with Department of Defense officials on Department of Defense matters. In this case, being a spouse is incidental to the individual being a subject matter expert, and the circumstances of travel are not to be confused with accompanying spouse travel.

K. Spouses merely attending a meeting or conference, even if it is hosted by the Department of Defense component concerned on a matter related to the component's official business, are not authorized travel at government expense. Approval of spouse travel under this criteria will be considered Non-Interference (Reimbursable) Travel

10 REQUIRED REPORTING FOR SPOUSE TRAVEL

A. A report will be submitted by the Director of the Army Staff to the Administrative Assistant for review prior to submission to the Secretary of the Army listing spouse travel trips via military aircraft for the spouses of the officials listed below.

(1) Four-Star General Officers and the Three-Star Commander of USARPAC,

(2) Joint or "Dual Hatted" commanders when travel was on behalf of the Department of the Army and

(3) State and Territory Adjutants General of the National Guard when travel was on National Guard Bureau business

B. The report will list each spouse travel trip and will

include:

(1) Name of sponsor and spouse,

(2) Justification,

(3) Destination,
(4) Duration, and

(5) Any per diem or incidental expenses allowed to the spouse.

C. This report is due to the Administrative Assistant NLT 31
October for each prior fiscal year's travel. However, documentation of each trip will be maintained for at least cars from the date of the travel to comply with audit and/or inspection requirements.

11. NON-INTERFERENCE (REIMBURSABLE) TRAVEL

A. Non-interference (reimbursable) travel is travel by a spouse, dependent, or other non-Federal traveler not on official business in the company of a senior DOD official (normally Code 1, 2 and 3 civilians, and Code 2 and 3 General Officers) who is traveling on official business official on a military aircraft This is NOT SPACE AVAILABLE TRAVEL. The travel cost for the spouse, dependent, or other non-Federal traveler is REIMBURSABLE by the traveler to the Government at the full commercial coach class fare rate or equivalent. Non-interference travel is not authorized on military aircraft unless all of the following are met:

(1) The military aircraft is already scheduled for an Official Purpose,

(2) The non-interference use does not require a larger aircraft than is needed for the official purpose,

(3) Official travelers are not displaced,

(4) The travel results in negligible additional cost to the government, and

(5) The government is reimbursed at the full commercial coach class fare rate or equivalent.

' C. This type of travel will be approved in advance and in writing. Each case will be reviewed by the senior traveler's legal counsel prior to submission for approval. The senior DOD official will attach to his/her travel voucher a personal check made payable to the Treasurer of the United States and include a travel office printout that reflects the full commercial fare.

D. Approval will be through the senior traveler's normal approval chain.

12. MOTOR VEHICLE TRANSPORTATION

A. Section 1344 of Title 31 of the United States Code specifies those officials who are authorized home-to-work transportation Within the Department of the Army, only the Secretary and the Chief of Staff are authorized home-to-work transportation

(I) With certain limited exceptions prescribed by statute, home-to-work transportation is not transportation for an official purpose, and is prohibited. Normally, such transportation is a personal responsibility Section 1344 establishes criteria for exceptions to this policy, and for reporting those exceptions to Congress however, within the Department of the Army only the Secretary of the Army can approve those exceptions.

(2) Individuals who are authorized home-to-work transportation
may incur personal tax liability in connection with this government furnished service regardless of the circumstances. The law provides that an individual who willfully violates Section 1344 may be suspended without pay for a minimum of 30 days, and when circumstances warrant, for a longer period, or may be summarily removed from office .

B Transportation to official after-hours functions will be treated as exception to policy for which prior approval is

required. All transportation to after-hours functions will begin and end at the individual's normal place of duty.

C. Official motor vehicle transportation requirements do not include: transportation to private social functions ' personal errands or side trips for unofficial purposes I transportation of dependents or visitors without an accompanying official, or in support of Non-DoD activities unless specifically approved under the provisions of Army Regulation(s)

D. The use of Army motor vehicles is restricted to official purpose only

(1) Military and civilian personnel of the Department of the Army may use Army motor vehicles when attending official ceremonies (e.g., changes of command, parades, promotions, retirements, unit activations/deactivations, field demonstrations, funerals, or other similar events) when attendance is in their official capacity .

(2) Army motor vehicle transportation is not authorized for officials attending such ceremonies or events only (e.g., personal friendship, family ties, prior professional relationship with the honoree or unit, etc.).

(3) Commanders or their principal staff officers will determine whether attendance at such ceremonies or events is in an official or personal capacity. When official travel is authorized for general attendance the mode of travel provided will normally be via mass transportation rather than via individual vehicles,

D Army Regulation 58-1 governs the use of motor vehicles ' however, in the National Capital Region the provisions of DODI 45 15 7 take precedence All levels of management should become familiar with local regulations that implement DOD policies and provide guidelines and restrictions on vehicle use.

E. Transportation support to other U. S. Government agencies, or non-U.S. Government entities, may be provided only under strict guidelines. Reimbursement by the requesting activity is normally required for transportation support to non-DOD activities. Army officials shall review established guidelines and obtain required approvals prior to inviting travel or committing Army support.

UNITED STATES ARMY
THE CHIEF OF STAFF

May 28, 1996

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Policy for Travel by Department of the Army Officials

1. REFERENCES.

a. Memorandum, DEPSECDEF, 1 October l99S, subject: DoD Policy on the Use of Government Aircraft and Air Travel.

b. Memorandum, SECARMY, 8 December 1995 , subject: Policy for Travel by Department of the Army Officials.

2 . GENERAL. As the Secretary stated in reference 1. b ., "Travel of government officials is a matter of serious concern. and one that lends itself to intense public scrutiny." To that end, I encourage senior Army leaders and their key staff to become thoroughly familiar with the provisions and requirements for travel at government expense, and require senior military travelers to actively participate in the travel approval process . This policy supersedes Chief of Staff, Army Memorandum, subject: Policy for Travel by Department of the Army Officials, dated 8 August 1935. It implements specified policies and procedures provided by the Secretary of the Army in reference l.b. Significant changes are italicized

3. AUTHORIZING OFFICIALS.

a. Reference 1. a. requires Service Chiefs, or their designees, to review and approve requests for travel on military aircraft by DoD senior officials within their service. "DoD senior officials" are general or flag officers and civilian employees of the Senior Executive Service or equivalent. An "Authorizing officials must review and approve DoD senior official MilAir requests prior to travel to ensure the proper method of transportation is used.

b. Four-star General Officers, and the three-star Commander of U.S. Army Pacific (USARPAC), may act as their own Authorizinq Official for MilAir travel.

c. For Headquarters, Department of the Army (HQDA) and Field Operating Agencies (FOAs) and Staff Support Agencies (SSAs), the officials listed below are designated as Authorizing Officials for operational support airlift (QSA) requests from senior official4 within their commands or organizations. Further delegation of this authority is not authorized.

(1) Vice Chief of Staff
(2) The Deputy Chiefs of Staff
(3) The Assistant Chief of Staff for Installation Management
(4) Chief of Engineers
(5) The Surgeon General

(6) Chief, National Guard Bureau
(7) Chief, Army Reserve
(B) The Judge Advocate General
(9) Chief of Chaplains
(10) Commander, U.S. Army Military District of Washington (MDW)
(11) Heads of FOAs and SSAs (major general or equivalent and higher)

The Authorizing Official for those senior officials listed above is the Director of the Army Staff (DAS). The Vice Chief of Staff, Army may act as his own approval authority. MilAir requests will be processed through the Aviation Staff Officer, Office of the Chief of Staff, Army (ATTN: DACS-DMC-A).

d. For other headquarters, Major Army Command (MACOM) Commanders (major general or higher) are designated as Authorizing Officials for OSA requests from senior officials within their: commands. MACOM Commanders may delegate this authority in writing, without further delegation, down to the Major General level. Except for four-star generals, and the three-star Commander of USARPAC, senior officials may not approve their own MilAir travel. The DAS is the Authorizing Official for MACOM commanders who are not 4-star generals. Process MilAir requests for MACOM commanders other than 4-star generals through the Aviation Staff Officer, Office of the Chief of Staff, Army (ATTN: DACS-DMC-A).
e. The senior traveling official will personally sign all MilAir requests, unless the senior person is an invited traveler The senior official may not delegate signature authority, in which case the "requesting official" will sign regardless of rank or position.

f. MilAir requests for personnel (O-6 or equivalent and below) will be processed for approval as outlined in Chapter 3, AR 95-3, Aviation: General Provisions, Training, Standardization, and Resource Management, 27 September 1990, and the Operational Support Airlift Guide, dated 1 April 1994.

4. HELICOPTER TRAVEL. Travel (point to point) by rotary wing aircraft may be used only when it is cost favorable, as outlined by paragraph 8 of reference l.b. This policy does not apply to operational missions as defined by AR 95-3. As a general rule, using a rotary wing aircraft to support an operational requirement means that the flight is an integral part of the event causing the travel (FTX, aerial gunnery exercise, unit deployments, etc. J

5. OTHER TRAVEL).

a. The Director of the Army Staff is designated as the Authorizing Official for requests for the following types of travel from Army officials not assigned to the Secretariat. Requests from personnel assigned to the Secretariat will be approved as outlined in reference l.b. above,

(1) OCONUS travel in CONUS based military aircraft (ARSTAF and MACOM Commanders)
(2) Special Air Mission (SAM) (ARSTAF and MACOM Commanders}
(3) Helicopter travel originating in the National Capital Region (NCR), to points beyond 125 NM

{4) Helicopter travel in/about the Greater Washington Metropolitan area, which is defined as the area within a box bounded by a line from Dulles International, to Montgomery County Airport, to Loch Raven Reservoir, to Martin State Airport to Andrews AFB, to the Occoquan Bridge at I95, and back to Dulles International.

(5) Accompanying spouse travel via MilAir for active component (SecArmy retains approval authority for accompanying spouse travel via commercial means, and Chief, National Guard Bureau is delegated authority to approve the travel of accompanying spouses of the 54 State and Territory Adjutants General,)

b. Chief of Staff, Army retains authority for authorizing foreign distinguished visitors on official visits, to travel (point to point) on MilAir within CONUS; and, orientation flights (aircraft capabilities demonstration) for foreign citizens on Army aircraft.

c. Joint or dual hatted Army commanders of Unified or Specified Commands must follow Army rules when they are traveling on behalf of the Army.

6. REQUIRED REPORTS.

a. Commander, Operational Support Airlift Command (OSAC) will submit monthly reports on the use of Operational Support Airlift by senior Army officials through the Aviation Staff Officer to the Director of the Army Staff. Reports will include: name and grade/rank of the traveler and the date, duration and destination of the travel.

b. Each Army commander will submit, through the chain of command, an annual report outlining each completed accompanied spouse travel trip by MilAir for the following: four-star general officers and the three-star commander of USARPAC; Joint or "dual hatted” commanders when travel was on behalf of the Army; and State and Territory Adjutants General of the: National Guard when travel was on National Guard Bureau business. The report will include: name of sponsor and spouse, justification, destination and duration of the travel, and per diem or incidental expenses when specifically suthori2ed for the spouse. Compiled information must be submitted to HQDA, ATTN: DACS-DMC-A, 200 Army Pentagon, Washington DC 20310-0200, NLT 14 business days after the close of each Fiscal Year.

7. Headquarters Department of the Army, point of contact for this policy is the Aviation Staff Officer, Office of Chief of Staff, Army, DSN 227-2009 or COM (703) 697-2009.

DENNIS J. REIMER
General, United States Army
Chief of Staff

DISTRIBUTION:
Vice Chief of Staff, Army
Administrative Assistant to the Secretary of the Army
Director of the Army Staff

The Inspector General
Deputy Chief of Staff for Intelligence
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Deputy Chief of Staff for Operations and Plans
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Chief of Engineers
The Surgeon General
Chief, National Guard Bureau
Chief, Army Reserve
The Judge Advocate General
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U.S. Army Pacific
U.S. Army Criminal Investigation Command
U.S. Army Health Services Command
U.S. Army Military District of Washington
U.S. Army South
U.S. Military Academy
Military Traffic Management Command

CF:
Sergeant Major of the Army
CSA'S Staff: Group
General Officer Management Office
OSACOM

INFORMATION PAPER

DAJA-SC
7 July 1997

SUBJECT: Use of First-Class Airline Accommodations on Official Travel

1. PURPOSE: To provide information regarding official travel using first-class airline accommodations.

2. FACTS:

a. The JTR and the JFTR were revised effective 29 October 1993, to reflect President Clinton's directive entitled "Government Fiscal Responsibility and Reducing Perquisites."

b. It is US Government policy that Federal employees on official business who use commercial air carriers for domestic and international travel shall use coach-class accommodations, with limited exceptions.

(1) First-class accommodations may be purchased with appropriated funds, with Secretary of the Army approval, when:

(a) No other reasonably available accommodations exist. "Reasonably available" means coach-class or premium-class (other than first-class) seats are available within 24 hours of proposed departure or arrival time. However, accommodations are not "reasonably available" if the employee will arrive at the duty site after the required reporting time, or depart earlier than the scheduled duty completion time.

(b) Travel by a disabled employee whose condition necessitates first-class travel. This must be substantiated in writing by competent medical authority. An attendant, whose services are required en route, may also fly first-class.

(c) Exceptional security circumstances. These include, but are not limited to, travel by agents-in-charge of protective details, couriers accompanying controlled pouches, and employees whose use of less than first-class would endanger their lives or Government property.

(2) Premium-class (other than first-class), such as business-class, may be used when:

(a) Regularly scheduled flights along the required route only provide premium-class seats.

(b) No space is available in coach and travel is urgent and cannot be postponed.

(c) Travel involves an employee with a disability substantiated in writing by competent medical authority. An attendant may accompany him in premium-class, if necessary.

(d) Security purposes or exceptional circumstances exist.

(e) When travel on a foreign flag carrier has been approved and the sanitation or health standards in coach are inadequate.

(f) When overall savings to the Government would result, such as avoidance of additional subsistence costs, overtime, or lost productive time incurred while waiting for available coach seats.

(g) When travel costs are paid by a non-federal source and properly accepted under statutory authority. Payments from a non-federal source may not be used for first-class travel, only coach or premium-class.

(h) When travel is in excess of 14 hours; however, it is Secretary of the Army policy is that such travel will not be routine, and must be fully justified. When employees fly premium-class, they are not authorized rest periods en route or upon arrival. The former authority for three and four-star generals to routinely fly premium class on flights in excess of 14 hours is rescinded.

(i) Frequent flyer benefits earned on official travel may be used for accommodations upgrades to premium-class on future official travel, but not to first-class.

c. The rules with respect to the use of frequent traveller benefits are:

(1) The preferred use of bonus miles and other such benefits earned on official travel continues to be the reduction of future official travel costs.

(2) For accomodations other than air line seats, (such car rentals or hotels) frequent flyer points earned on official travel may be used for upgrades.

d. "On-the-spot" upgrades.

(1) Upgrades may be accepted if generally available to the public, all Federal employees, or all military members. They may not be accepted if offered because of a traveller's rank or official position.

(2) Military members should not accept upgrades to first-class while travelling in uniform because of the potential for adverse public perceptions of extravagance.

e. A person travelling on TDY may use his or her own personal travel benefits or funds to upgrade to first-class. Again, to avoid adverse public perceptions, upgrades to first-class should not be done when travelling in uniform.

Mr. Novotne/DSN 227-0921

181500Z OCT 94
AOC ZEO TO ALL USARMY REPS AND ACTIVITIES
UNCLAS ALARACT 118/94
SUBJECT: USE OF MILITARY AIRCRAFT FOR CEREMONIAL EVENTS

A. OMB CIRCULAR A-126, 22 MAY 1992, SUBJECT: IMPROVING THE MANAGEMENT AND USE OF GOVERNMENT AIRCRAFT.
B. B. SECDEF MEMO, 10 JUNE 1994, SUBJECT: DOD POLICY ON USE OF GOVERNMENT AIRCRAFT AND AIR TRAVEL.
C. C. SECARMY MEMO, 15 JULY 1994, SUBJECT: POLICY FOR TRAVEL BY DEPARTMENT OF THE ARMY OFFICIALS.
D. D. AR 95-3, 27 SEPTEMBER 1990, AVIATION: GENERAL PROVISIONS, TRAINING, STANDARDIZATION, AND RESOURCE MANAGEMENT.

2. THERE IS SOME CONFUSION CONCERNING ARMY POLICY ON THE USE OF MILITARY AIRCRAFT (MILAIR) FOR TRAVEL TO OFFICIAL CEREMONIES, SUC AS CHANGES OF COMMAND, RETIREMENT, PROMOTION, UNIT ACTIVATION/DEACTIVATION, AND REFLAGGING CEREMONIES. THE PURPOSE OF THIS MESSAGE IS TO PROVIDE ADDITIONAL GUIDANCE TO ALL TOTAL ARMY SENIOR LEADERS O THIS VERY IMPORTANT AND SENSITIVE MATTER. TRAVEL ON MILAIR IS A PREMIUM MODE OF TRAVEL INVOLVING HIGH COSTS AND LIMITED RESOURCES. BOTH MISUSE AND PERCEPTION OF MISUSE OF MILAIR ASSETS, EVEN WHERE THAT USE APPEARS SANCTIONED BY PAST PRACTICES, CAN BE EXTREMELY DETRIMENTAL. I WANT TO MAKE CLEAR AT THE OUTSET THAT THIS MESSAGE APPLIES TO USE OF MILAIR ONLY. HOWEVER, IT DOES NOT APPLY TO THOSE PERSONS SPECIFICALLY DESIGNATED BY THE SECRETARY OF THE ARMY AS “REQUIRED USE” TRAVELERS.

3. MILAIR MAY BE USED TO TRAVEL TO CEREMONIAL EVENTS BY THOSE ATTENDING SUCH EVENTS IN THEIR OFFICIAL CAPACITY. FOR PURPOSES OF THIS MESSAGE ONLY, AN INDIVIDUAL WHO IS MERELY ATTENDING AS AN INVITED GUEST IS NOT TRAVELING IN AN OFFICAL CAPACITY. PRIOR ASSOCIATION WITH A UNIT DOES NOT, IN ITSELF, JUSTIFY THE USE OF MILAIR TO ATTEND A CEREMONY CONCERNING THAT UNIT. INVITATIONS BASED ON RANK OR GRADE ALONE ARE AN INSUFFICIENT JUSTIFICATION FOR USE OF MILAIR. GREAT CARE MUST ALSO BE USED IN DISTINGUISHING ATTENDANCE AT CEREMONIES IN AN OFFICIAL CAPACITY FROM ATTENDANCE BASED ON PERSONAL RELATIONSHYIPS. USE OF MILAIR TO SUPPORT ATTENDANCE AT CEREMONIES HONORING INDIVIDUALS BASED SOLELY ON FRIENDHSIP, FAMILY TIES, OR PRIOR PROFESSIONAL RELATIONSHIPS WITH THE HONOREE ARE GENERALLY INAPPROPRIATE. FOR EXAMPLE, NORMALLY IT WOULD BE IMPROMER F0OR A GENERAL OFFICER TO USE MILAIR TO ATTEND OR PRESIDE AT A PROMOTION CEREMONY FOR A FORMER SUBORDINATE WHO IS NO LONGER IN THE GENERAL OFFICER’S CHAIN OF COMMAND. LIKEWISE, IT SI INAPPROPRIATE FOR THE FORMER

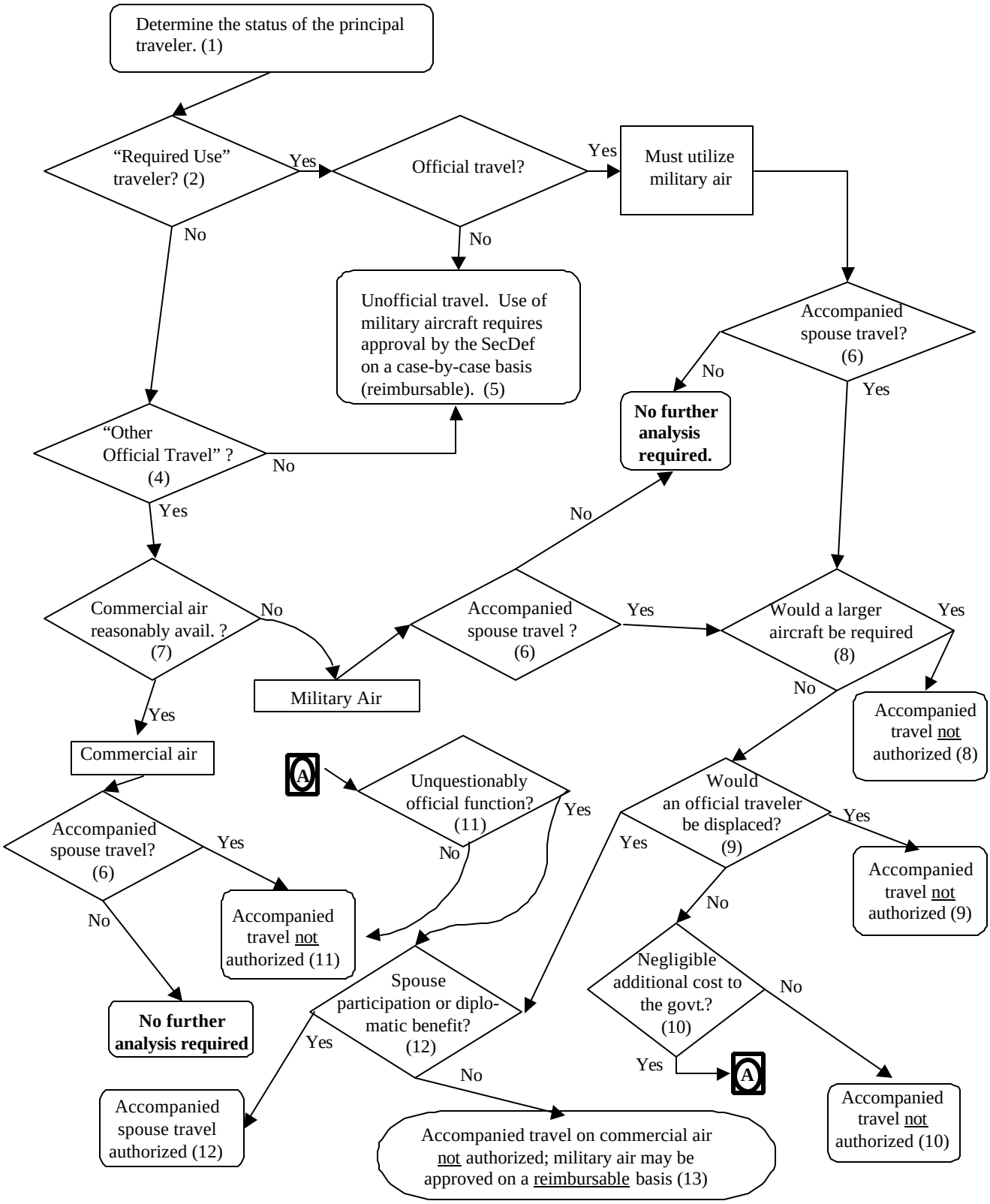
COMMANDER OF A UNIT TO USE MILAIR TO TRAVEL TO THAT UNIT'S CHANGE OF COMMAND AS AN INVITED GUEST.

4. EXAMPLES OF APPROPRIATE USES OF MILAIR INCLUDE TRAVEL BY 1) A CORPS COMMANDER WHO IS PRESIDING OVER A SUBORDINATE DIVISION CHANGE OF COMMAND CEREMONY. 2) A NATIONAL GUARD DIVISION COMMANDER ATTENDING A SUBORDINATE BATTALION CHANGE OF COMMAND AS AN INVITED GUEST AND SENIOR REPRESENTATIVE OF THE CHAIN OF COMMAND, AND 3) A SENIOR MILITARY OFFICIAL PRESIDING OVER A ROTC GRADUATION CEREMONY IN AN OFFICIAL CAPACITY WHEN INVITED BY PROPER AUTHORITY. TRAVEL BY MILAIR SHOULD BE AUTHORIZED ONLY WHEN LESS EXPENSIVE MODES OF TRANSPORTATION ARE NOT REASONABLY AVAILABLE. USE OF MILAIR WILL BE DOCUMENTED IAW REFERENCE D.

5. IT IS NOT MY INTENT THROUGH THIS MESSAGE TO DISCOURAGTE EITHER ATTENDANCE AT CEREMONIAL EVENTS OR THE APPROPRIATE USE OF MILAIR TO SUPPORT SUCH EVENTS. THESE CEREMONIES PLAY AN IMPORTANT ROLE IN REMINDING ALL SOLDIERS OF OUR ARMY'S RICH HISTORY AND TRADITIONS. I DO, HOWEVER, EXPECT ALL LEADERS TO EXERCISE COMMON SENSE AND SOUND STEWARDSHIP PRINCIPLES IN THE USE OF MILAIR FOR CEREMONIAL EVENTS.

6. EXPIRATION DATE CANNOT BE DETERMINED. BT
DA WASH DC.

AIR TRAVEL ANALYSIS



AIR TRAVEL ANALYSIS

(1) DoD Directive 4500.56, dated 2 March 1997, paragraph A.2: "The purpose of the travel is to be determined by the individual and his or her next level supervisor. DoD airlift authorizing officials shall ensure that an official, rather than personal purpose is served by the travel."

(2) DoD Directive 4500.56, dated 2 March 1997, paragraph B.1: "Required Use. Such designated travelers are required to use MilAir due to one or more of the following: their continuous requirement for secure communications; for security; or for responsive transportation to satisfy exceptional scheduling requirements dictated by frequent short-notice travel, which makes commercial transportation unacceptable."

DoD Directive 4500.56, dated 2 March 1997, paragraph B.1.c: "The Secretary of Defense has determined that the criteria of subsection B.1., above, have been met and designates as "required use" travelers for official travel only the Deputy Secretary of Defense; the Secretaries of the Military Departments; the Vice Chairman and Joint Chiefs of Staff; the Commanders of the Combatant Commands; and four-star general and/or flag officers. The Secretaries of the Military Departments may apply more stringent restrictions for general and/or flag officers assigned to positions within their respective Military Departments."

Secretary of the Army Policy Memorandum, subject: Policy for Travel by Department of the Army Officials, dated 8 December 1995, paragraph 1.A. "Within the Department of the Army, only the Secretary of the Army and the Chief of Staff are required to use military aircraft for all travel when in a duty status."

(3) DoD Directive 4500.56, dated 2 March 1997, paragraph A.2: "The purpose of the travel is to be determined by the individual and his or her next level supervisor. DoD airlift authorizing officials shall ensure that an official, rather than personal purpose is served by the travel."

(4) DoD Directive 4500.56, dated 2 March 1997, paragraph B.2: "Other Official Travel. Such travel is normally accomplished using commercial transportation and is for the conduct of DoD official business other than that discussed in subsection B.1., above. Other official travel may include travel to address matters such as giving speeches, attending conferences or meetings, making site visits to facilities, and permanent change of station."

(5) DoD Directive 4500.56, dated 2 March 1997, paragraph B.1.b: "The Secretary of Defense may designate other key DoD Officials as "required use" travelers. "Required use" unofficial travel may be performed by these officials only upon advance notification to the Secretary of Defense on a case-by-case basis. These officials and all unofficial travelers accompanying them on MilAir, including family members or other invited guests, shall reimburse the Government for any unofficial travel at the full coach fare as set forth in reference (b) [Office of Management and Budget Circular A-126, Improving the Management and Use of Government Aircraft, May 22, 1992]."

(6) DoD Directive 4500.56, dated 2 March 1997, paragraph B.3: "Unofficial Travel. Such travel is by a family member, non-DoD civilian, or non-Federal traveler only when

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accompanying a senior DoD or other Federal official who is traveling on a military aircraft on official business. Such official travel is not authorized on MilAir unless the aircraft is already scheduled for an official purpose; this noninterference use does not require a larger aircraft than needed for the official purpose; official travelers are not displaced; it results in negligible additional cost to the Government; and the Government is reimbursed at the full coach fare. "Required use" travelers shall approve all unofficial travelers who accompany them, provided that the travel is in compliance with this subsection."

(7) DoD Directive 4500.56, dated 2 March 1997, paragraph A.3: "MilAir shall not be used if commercial airline or aircraft (including charter) service is reasonably available; i.e., able to meet the traveler's departure and/or arrival requirements in a 24 hour period, unless highly unusual circumstances present a clear and present danger, an emergency exists, the use of MilAir is more cost-effective than commercial air, or other operational considerations make commercial transportation unacceptable."

DoD Directive 4500.56, dated 2 March 1997, paragraph A.5: "Rotary-wing aircraft may be used only when cost is favorable as compared to ground transportation, or when the use of ground transportation would have a significant adverse impact on the ability of the senior official to effectively accomplish the purpose of the travel."

(8) DoD Directive 4500.56, dated 2 March 1997, paragraph B.3: "Unofficial Travel. Such travel is by a family member, non-DoD civilian, or non-Federal traveler only when accompanying a senior DoD or other Federal official who is traveling on a military aircraft on official business. Such official travel is not authorized on MilAir unless the aircraft is already scheduled for an official purpose; this noninterference use does not require a larger aircraft than needed for the official purpose; official travelers are not displaced; it results in negligible additional cost to the Government; and the Government is reimbursed at the full coach fare. "Required use" travelers shall approve all unofficial travelers who accompany them, provided that the travel is in compliance with this subsection."

(9) DoD Directive 4500.56, dated 2 March 1997, paragraph B.3: "Unofficial Travel. Such travel is by a family member, non-DoD civilian, or non-Federal traveler only when accompanying a senior DoD or other Federal official who is traveling on a military aircraft on official business. Such official travel is not authorized on MilAir unless the aircraft is already scheduled for an official purpose; this noninterference use does not require a larger aircraft than needed for the official purpose; official travelers are not displaced; it results in negligible additional cost to the Government; and the Government is reimbursed at the full coach fare. "Required use" travelers shall approve all unofficial travelers who accompany them, provided that the travel is in compliance with this subsection."

(10) DoD Directive 4500.56, dated 2 March 1997, paragraph B.3: "Unofficial Travel. Such travel is by a family member, non-DoD civilian, or non-Federal traveler only when accompanying a senior DoD or other Federal official who is traveling on a military aircraft on official business. Such official travel is not authorized on MilAir unless the aircraft is already scheduled for an official purpose; this noninterference use does not

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require a larger aircraft than needed for the official purpose; official travelers are not displaced; it results in negligible additional cost to the Government; and the Government is reimbursed at the full coach fare. "Required use" travelers shall approve all unofficial travelers who accompany them, provided that the travel is in compliance with this subsection."

(11) DoD Directive 4500.56, dated 2 March 1997, paragraph E.1: "As a general rule, a family member may not accompany his or her DoD sponsor who is traveling on official business. A family member's travel may be approved (see subsections E.2. [approval authority] and E.3., below) where there is an unquestionably official function in which the family member is actually to participate in an official capacity, or such travel is in the U.S. interest because of a diplomatic or public relations benefit to the United States."

DoD Directive 4500.56, dated 2 March 1997, paragraph E.3: "Requests that seek approval for family member travel with funding for per diem and/or other expense allowances must clearly demonstrate that travel is essential to accomplishing the mission."

(12) DoD Directive 4500.56, dated 2 March 1997, paragraph E.1: "As a general rule, a family member may not accompany his or her DoD sponsor who is traveling on official business. A family member's travel may be approved (see subsections E.2. [approval authority] and E.3., below) where there is an unquestionably official function in which the family member is actually to participate in an official capacity, or such travel is in the U.S. interest because of a diplomatic or public relations benefit to the United States."

(13) Secretary of the Army Policy Memorandum, subject: Policy for Travel by Department of the Army Officials, dated 8 December 1995, paragraph 11.A. "Non-interference (reimbursable) travel is travel by a spouse, dependent, or other non-Federal traveler not on official business in the company of a senior DoD official (normally Code 1, 2 and 3 civilians and Code 2 and 3 General Officers) who is traveling on official business on a military aircraft. This is not space available travel. The travel cost for the spouse, dependent, or other non-Federal traveler is reimbursable by the traveler to the Government at the full commercial coach class fare rate or equivalent."

Ethics Aspects of Outsourcing and Privatization

I. REFERENCES

A. Statutes

1. Statutes regulating the Contracting Out Process – 10 U.S.C. 2461, 2462, 2463, 2467; Sections 8014 and 8026 (FY99 DoD Appropriations Act)

2. Statutes impacting depot maintenance – 10 U.S.C. 2460, 2464, 2466, 2469, 2469a, 2470, 2472, 2474

3. Statutes prohibiting all contracting out – 10 U.S.C. 2465; Sec. 317 of the FY87 DOD Authorization Act

4. Conflicts of Interest – 18 U.S.C. 208

5. Post-employment – 18 U.S.C. 207

6. Representation – 18 U.S.C. 203 and 205

7. Procurement Integrity – 41 U.S.C. 423

B. Regulations

1. OMB Circular A-76 with Supplemental handbook (March 1996)

2. OFPP Policy Letter 92-1, Inherently Governmental Functions

3. FAR Subpart 7.5, Inherently Governmental Functions

4. FAR Subpart 3.1, Procurement Integrity

5. DODD 4100.15, Commercial Activities Program

6. DOD 5500-7-R, Joint Ethics Regulation

7. DODI 4100.33, CA Program Procedures (under revision)

8. AR 5-20 and Army Pam 5-20, Commercial Activities Program

9. Air Force Instruction 38-203, Commercial Activities Program

10. Air Force Policy Directive 38-6, Outsourcing and Privatization

C. Other Sources

1. White Paper, Materiel Management Outsourcing and Privatization, Army, May 9, 1997

2. Outsourcing Guide for Contracting, Air Force, June 97

3. Article by Major Mary E. Harney, "The Quiet Revolution: Downsizing, Outsourcing, and Best Value," Military Law Review, Vol. 158, December 1998

4. Office of Government Ethics Letter 95 X 10, originally an article in the Government Ethics Newsgram, Summer 1995, entitled "Privatization Issues Affect Federal Employees." (Vol. 12, no. 2, pp. 1-3)

5. AFMC LO/JAF memorandum by Mr. Mark Stone, SUBJECT: Conflicts of Interest and A-76, dated 7 November 1997

II. Background

A. Definitions

1. Outsourcing – transfer of a function that had been performed by government employees to performance by contractor employees. Also called competition. OMB Circular A-76 cost comparison procedures apply unless an exception, exemption or waiver applies.

2. Privatization – process of changing a public entity to private control and ownership. It does not include determinations of whether a service should be obtained through private or public resources when the government retains full responsibility and control over the delivery of the services. See OMB Circular A-76 Supplemental Handbook, Appendix 1. Also called competitive sourcing. Example: utilities divestiture

3. Reengineering – a sufficiently encompassing restructuring of government requirements for which any reduction in the number of government employees or any increase in contractor performance is incidental. Example: Air Force restructuring of the 38th Engineering Installation Wing Plan (GAO Report GAO/NSIAD 99-73, February 1999)

4. Inherently governmental – functions so intimately related to the public interest as to mandate performance by federal employees. See OFPP Policy Letter 92-1

B. Some History

1. Contracting out is not new. OMB Circular A-76 was first published in 1966, but is based on earlier Bureau of the Budget memorandums.

2. The Department of Defense has used contracting out extensively in the 1970s and 1980s. DoD reported to Congress in March 1999 that from 1979 to 1996, the Department competed, under A-76 rules, commercial activities involving more than 90,000 full time equivalents (FTEs). It further reported that it now saves $1.5 billion either by reorganizing in-house organizations to "most efficient organizations" or by shifting the work to the public sector, savings of about 30 percent. About half of the competitions were won by government organizations. This past year, DoD initiated studies impacting 34,000 FTEs, and developed plans to compete an additional 230,000 FTEs by FY05 with a projected cumulative savings of $11.2 billion. (DoD Report to Congress, Leasing of Non-Excess Military Property, March 1999)

3. Several policy concerns are driving the increasing number of cost comparisons.

    a. The National Performance Review panel concluded in 1993 that forcing public agencies to compete for customers would create "permanent pressure to streamline programs, abandon the obsolete, and improve what's left."

    b. DoD responded in 1997 with the Quadrennial Defense Review (QDR) with announced that for DoD to maintain the "tooth," or combat readiness, it must cut the "tail," or the support functions. By reducing infrastructure, DoD would unleash money to invest in combat readiness.

    c. The QDR was followed by the Defense Reform Initiative (DRI) that expanded upon the QDR to propose more streamlining and outsourcing. Chapter three of the DRI identifies outsourcing opportunities under OMB Circular A-76, such as payroll, personnel services, surplus property disposal, and drug testing laboratories. Chapter four identifies ways that the DoD may eliminate unneeded infrastructure, such as additional base closures, privatizing family housing and privatizing utility systems.

d. DRI directives were issued to implement the DRI. DRID 20 requires a billet level inventory of all DoD manpower coded to reflect whether each position is inherently governmental, commercial but exempt from competition, or commercial and should be competed. Phase 1 inventory was sent to OSD on 30 October 1998. Phase 2 coding on spaces to study began February 1999.

e. Congress has been ambivalent on contracting out in DoD. Historically, it has acted to limit or prevent contracting out. It also recently passed the Federal Activities Inventory Reform Act of 1998 (FAIR), Public Law 105-270 (1998). FAIR requires executive agencies to prepare a list of non-inherently governmental functions performed by federal employees, submit the list to OMB and then made the list publicly available. FAIR also established an appeals process for "interested parties" within each agency and the private sector to challenge the contents of the list. Even with the FAIR, agencies must continue to rely on OMB Circular A-76 for the outsourcing process.

C. Current *Army* Outsourcing and Privatization Initiatives

1. Cost comparisons: Goal to study functions impacting 67,000 Full Time Civilian Equivalents and 6000 Full Time Military Equivalents between 1997 and 2001, at a rate of approximately 14,000 per year.

2. Housing Privatization: Goal to privatize all family housing by FY05

3. Utilities Privatization: Goal to privatize all gas and 75% of the rest by FY03. 23 systems already privatized. 166 economic analyses ongoing.

4. Other Privatization Initiatives: The Army is reviewing several proposals involving major weapon systems and a modernized logistics automation system.

D. Cost Comparison Process:

1. Commercial Activities Proposed Action Summary (CPAS)

2. Congress notified

3. Workforce notified

4. Performance Work Statement (PWS) developed

5. Most Efficient Organization (MEO) developed

6. Cost estimates developed and reviewed by audit agency or internal review

7. Bids or proposals solicited from private industry

8. Public review and appeal period

9. Decision to award contract or cancel solicitation and reorganize to MEO

10. Transition period

11. MEO or contract operational

E. Privatization Process

1. Varies widely from fairly simple transfers of utility systems to utility companies to more complex divestitures of functions, such as the creation of an Employee Stock Ownership Plan (ESOP) company to accept a contract for execution of function previously performed by government personnel.

2. Each plan needs analysis to determine ethics issues.

F. Litigation Aspects of Cost Comparisons:

1. Historically, courts and boards have limited appeals of contracting out decisions.

   a. IRS v. FLRA (1990) 494 US 922 (no bargaining over contracting out decision)

   b. NFFE v. Cheney (DC Cir 1989) 883 F.2d 1038 (employees lack standing)

   c. SAI, Inc. 91-1 CGPD P267 (no A76 review except as part of competitive solicitation)

2. But see

   a. Diebold v. US (6th Cir 1991) 947 F.2d 787 (APA permits judicial review); also NATCO v. Pena (6th Cir 1996) 1996 U.S. App LEXIS 8258

b. CC Distributors v. US (DC 1989) 883 F.2d 146 (incumbent contractor can contest decision to bring function in-house without cost comparison)

c. Pemco Aeroplex, Inc.; Aero Corporation, B-275587, 1998 U.S. Comp Gen LEXIS 250 (June 29, 1998) (Comptroller General will overturn a decision to cancel a solicitation and maintain services in-house when the contractor has lower costs, except as otherwise provided by law – core logistics in this case)

d. DZS/Baker LLC; Morrison Knudsen Corp., B-281224, 1999 U.S. Comp Gen LEXIS 16 (January 12, 1999) (Having 14 of 16 proposal evaluators subject to losing their jobs in an A-76 cost comparison created an uncorrectable conflict of interest warranting re-evaluation by a neutral panel)

e. AFGE v. Cohen, et al. (7th Cir 1999) No. 98-1504 (Union has standing to challenge alleged violations of the Arsenal Act, 10 U.S.C. 4532 – Case potentially impacts workloading decisions between the public and private sector at arsenals)

III. Ethics Aspects of Outsourcing and Privatization

A. Conflicts of Interest: DoD personnel are prohibited from participating personally and substantially…through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a …contract,…or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner, or employee, or any person or organization with whom the employee is negotiating or has any other arrangement concerning prospective employment, has a financial interest. (18 U.S.C. 208 for DoD officers and civilian employees; DoD 5500.7-R, subsection 5-301, for enlisted personnel)

1. Cost comparisons under OMB Circular A-76 are particular matters, as are other privatization acquisitions

2. Personal participation means “direct participation” or the “direct and active” supervision of a subordinate’s participation. 5 C.F.R. 2635.402(b)(4)

3. Substantial participation means that the employee's involvement is of significance. It requires more than official responsibility or knowledge or involvement on an administrative or peripheral issue. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. 5 C.F.R. 2635.402(b)(4) Caution: Do not use the definition of FAR 3.104-3 in an 18 U.S.C. 208 or 207 context. This definition implemented an older version of the Procurement Integrity Act, and is not applicable to an analysis under 18 U.S.C. 208/207. It is also being amended.

4. Impartiality: DoD employees should not work on a matter if a reasonable person who is aware of the circumstances would question their ability to be impartial in the matter. Employees should consult with their supervisors and ethics counselors to assist them in resolving any question of perceived loss of impartiality. 5 C.F.R. 2635.502.

5. Specific Issues

a. An employee's interest in their own salary and position. The Office of Government Ethics (OGE), in consultation with the Department of Justice, treats financial interests arising from Government salary and benefits as disqualifying interests under 18 U.S.C. 208(a); however, OGE also established a limited exemption. This exemption provides that:

> "[a] employee may participate in any particular matter, whether of general applicability or involving specific parties where the disqualifying interest arises from federal government salary or benefits, … except that an employee may not :
>
> (a) Make determinations that individually or specifically affect his own government salary or benefits…,or
> (b) Make determinations, requests, or recommendations that individually or specially relate to, or affect, the government salary or benefits, ... of any other person specified in section 208 [of title 18, United States Code].
> 5 C.F.R. 2640.203(d)

Example: An employee may participate in reinvention activities, including preparation of a PWS or MEO, provided that he does not make any determination that has a special or individual effect on his salary or benefits. An employee's interest in his federal employment, even if his position may be abolished, is not a disqualifying interest for participation in the PWS or MEO. 5 C.F.R. 2640.203(d), Example 7.

Example: Absent an individual waiver under section 208(b)(1), however, an employee may not participate in the implementation of an agency plan to create an ESOP that would carry out agency functions under contract to the agency because implementing the plan would result not only in the elimination of the employee's federal position, but also in the creation of a new position to which the employee would be transferred. 5 C.F.R. 2640.203(d), Example 8.

b. Right of First Refusal. FAR 7.305© requires inclusion of the clause at FAR 52.207-3, Right of First Refusal of Employment, in all solicitations which might result in a conversion from an in-house performance to a contract performance. This right is speculative in that the contractor is only required to offer employment openings to qualified former government employees. There is no guarantee of employment. It is only if the contractor wins the competition, needs to hire employees and determines a former government employee to be qualified, that there might be an offer of employment. Therefore, we believe that the contingent right to first refusal of employment with a winning contractor does not give rise to a personal financial interest within the meaning of 18 U.S.C. 208.

c. Offers of Outside Employment. An offer of employment by an organization with a financial interest in the outcome of a particular cost comparison to a government employee who is personally and substantially participating in that cost comparison must either reject the possibility of employment, notify his or her supervisor of the need to be disqualified from any further participation, or seek a written waiver under 18 U.S.C. 208(b).

B. Post Employment. DoD personnel who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government are prohibited from later "switching side" and representing any party back to the government on the same matter. 18 U.S.C. 207 The restrictions of this statute do not prohibit employment, but only certain communications and appearances with the intent to influence.

18 U.S.C. 207 contains six substantive provisions, only two of which are likely to have general applicability to employees involved in an A-76 cost comparison. Those two provisions are:

(1) 18 U.S.C. 207(a)(1) imposes a *lifetime* bar against former government employees knowingly making, with the intent to influence, any communication to or appearance before a government employee on behalf of any other person in connection with a particular government matter involving a specific party in which the former employee participated personally and substantially as a government employee and in which the United States has a direct and substantial interest; and

(2) 18 U.S.C. 207(a)(2) imposes a *two year* bar against former governmental employees knowingly making, with the intent to influence, any communication to or appearance before a government employee on behalf of any other person in connection with a particular government matter that was pending under the employee's official responsibility during the one-year period of time prior to the employee's separation from government employment. The term "official responsibility" means "the direct administration or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise to direct government action." 18 U.S.C. 207(b).

Example: Individuals working on an A-76 cost comparison are not prohibited from working for a winning contractor by 18 U.S.C. 207(a). They may be prohibited from representing their new contractor employer back to the government with regard to the contract, or a work-related issue, if they were either personally or substantially involved in the contract or issue, or if it was under their official responsibility.

One of the more difficult factual issues in this analysis is determining when there are specific parties involved in a particular government matter. The question of whether government procurements, including those conducted under A-76, involve specific parties is to be determined "realistically by the degree of interest expressed and contacts made with … private parties as contractual requirements evolve." OGE Informal Advisory Letter 80 X 4. As noted in 5 C.F.R. 2637.201(c)(2), example 2, while a contract becomes a particular matter when its request for proposal is being formulated, it would ordinarily not become one involving a specific party or parties until proposals or indications of interest therein by contractors were first received." Depending upon the degree of contractor input during the development of the PWS, there may be no 18 U.S.C. 207 post

employment restrictions at this stage of the acquisition. Those restrictions will attach when specific parties become identified.

C. Procurement Integrity The Procurement Integrity Act establishes certain prohibitions and requirements relating to (1) disclosing or obtaining procurement information, (2) reporting employment contacts, and (3) post-government employment. 41 U.S.C. 423

1. Disclosing or obtaining procurement information Present and former government officials, and persons who advised the United States regarding a procurement are prohibited from knowingly disclosing contractor bid or proposal information or source selection information before the award of the contract. All persons are prohibited, except as otherwise authorize by law from knowingly obtaining contractor bid and proposal information or source selection information before the award of the contract.

2. Reporting employment Government employees working on procurements of $100,000 or more who are contacted regarding employment opportunities by a bidder or offeror must take one of two actions: They can immediately reject the employment opportunity. They may recuse themselves from further involvement on the procurement, notifying the contracting officer, and commence employment negotiations. Even if DoD employees immediately and clearly reject the possibility of employment with a bidder or offeror, they may continue working on a procurement of $100,000, or greater, but they must still report the employment contact in writing to their supervisors and ethics counselors.

Caution: Be wary of the definition of FAR 3.104-3 to the extent that it excludes preparation of a MEO or management study from the definition of "personal and substantial participation" for purposes of employment notification and recusal. This definition implemented an older version of the Procurement Integrity Act, and is not consistent with the standard definitions of that phrase. It is also being amended, and will probably provide that merely providing information for the management study for use by others is not "personal and substantial participation," but preparation, review or approval of the final performance work statement, management study, or cost estimates is "personal and substantial participation".

3. Post employment Restrictions For a period of *one* year after a designated date, certain former government officials may not accept compensation from the concerned contractor on a DoD contract of $10 million or more if the former officials served in any of the following capacities: procuring contracting officers, source selection authorities, members of source selection boards, chiefs of financial or technical evaluation teams, program managers, deputy program managers, administrative contracting

officers and officials who made decisions concerning claims, contract modifications or task orders, or issuance of a contract payment in excess of $10 million. The designated date varies depending upon the position held, but is generally the date of selection or award for individuals involved in the source selection process and the date of last service for program managers and ACOs and the date of decision for all others.

D. Representation Restrictions Under 18 U.S.C. 205, Government employees are prohibited from personally acting as an agent or attorney for anyone else before a department, agency or court in connection with any covered matter in which the United States is a party or has a direct and substantial interest. A contract is a covered matter.

Example: An employee could not submit a proposal to the government on behalf of a group of employees who are seeking to obtain a contract to perform a privatized government function through an ESOP. The restriction would apply whether or not the employee's position would be eliminated because the function was being privatized. Employees who wish to submit such a proposal would have to retain a non-employee to represent them in the matter. OGE 95 X 10

D. Basic Fairness

1. Contracting actions, especially those potentially impacting the positions of federal employees, need to be fundamentally fair.

2. FAR 9.501 defines "organizational conflict of interest" as a situation in which because of other activities or relationships, a person is unable or potentially unable to render impartial assistance or advice to the government or the person's objectivity is or might be impaired or the person has an unfair advantage. **Example**: We do not usually permit a contractor consultant who has written a statement of work to bid on performance of that statement of work because of the risk that the statement of work may be designed to benefit the consultant's business interests rather than the interests of the government.

3. The Comptroller General has applied the principles of organizational conflicts of interest to federal employees participating in the contracting process, as well as to contractors. **Example**: DZS/Baker LLC; Morrison Knudsen Corp., B-281224, 1999 U.S. Comp Gen LEXIS 16 (January 12, 1999) (Having 14 of 16 proposal evaluators subject to losing their jobs in an A-76 cost comparison created an uncorrectable conflict of interest warranting re-evaluation by a neutral panel)

IV. Conclusion

CONTRACTOR EMPLOYEES IN THE FEDERAL WORKPLACE

I. Introduction.

A. They're Everywhere!

1. Always have been.
2. But even more so!

B. They're Different!

1. A fact;
2. Different rules for different folk;
2. But, does not mean adversity.

C. But, we need to recognize that their presence in the workplace create issues -- many of them ethical, but others are fiscal, contract, and personnel in nature:

1. Information
2. Gifts
3. Government Resources
4. Conflicts of Interest
5. Appearances of Conflicts
6. Personal Services
7. Interference with Contractor's

    a. Performance of contract
    b. Employer-employee relationship
    c. Conduct of business!

D. Problems in dealing with issues:

1. People to people relationships (nice guys).
2. Inclusiveness.
3. Family, teaming, partnering.

II. Keys to Resolving Issues.

A. Contractor employees are not Federal employees.

1. Different loyalties.
2. Different rules apply.

B. The relationship is with the contractor, not with the contractor's employees.

1. We do not supervise employees.
2. We do not approve leave, sick leave or other absences of the contractor's employees.
3. We are not responsible for the contractor's employee's training, off-site activities, performance appraisals, awards and other recognition.

C. This relationship is defined by the contract:

1. What services the contractor is supposed to provide, under what terms, how fast, where and in what format.

2. What equipment, supplies, services, training, etc. that we are supposed to provide to the contractor.

D. Avoid paying twice:

1. The contractor is supposed to recruit, establish, train and maintain a workforce (employer-employee relation).

2. The contract price includes what it includes...

III. Non-Public Information.

A. FAR Parts 3, 14, 15, and 24.

B. Section 4304, National Defense Authorization Act for FY 1996, aka "Clinger-Cohen Act" as implemented by Federal Acquisition Regulation (FAR) 3.104, 61 Fed. Reg. 226, January 2, 1997, effective January 1, 1997 (**Procurement Integrity**).

1. **RULE:** Shall not knowingly disclose procurement information before the award of the Federal agency procurement contract to which it relates.

   RULE: No one shall knowingly obtain such information before award of the Federal agency procurement to which it pertains.

   a. Applies to:

      (1) Present or former officer or employee
      (2) Anyone who acted on behalf of the US or advised the US with

respect to a Federal agency procurement, ***and***

(3) Had access to bid or proposal, or source selection information.

2. Definition -- Procurement information is:

a. Contractor bid or proposal information (used to be "proprietary information") --

(1) Cost or pricing data;
(2) Indirect costs and direct labor rates;
(3) Proprietary information;
(4) Information marked by the contractor as "contractor bid or proposal information."

b. Source selection information:

(1) Bid prices before bid opening;
(2) Proposed costs or prices;
(3) Source selection plans;
(4) Technical evaluation plans;
(5) Technical evaluations of proposals;
(6) Cost or price evaluations of proposals;
(7) Competitive range determinations;
(8) Rankings of bids, proposals, or competitors;
(9) Reports and evaluations of source selection panels, boards or advisory councils.
(10) Other information marked as "SOURCE SELECTION INFORMATION--See FAR 3.104."

3. Penalties for violation:

a. Criminal violations under Procurement Integrity:

(1) 5 Years, fines, or both;
(2) If exchanged information for anything of value or trying to get or give a competitive advantage.

b. Civil penalties under Procurement Integrity:

(1) $50,000 for each violation plus 2X amount of compensation offered or received by the agency official;

(2) $500,000 for each violation plus 2X amount of compensation offered or paid by the offeror or bidder.

c. Various contract administrative actions are also possible.

C. Disclosure of confidential information, 18 U.S.C. § 1905.

1. May not divulge information received in course of employment or official duties.

2. Information relating to: trade secrets, processes, operations, style of work, statistical data, profits, losses, sources of income of a non-Federal entity.

3. Penalties:

a. Fine and/or one year in prison;

b. **Shall be** removed from employment.

D. Use of Nonpublic Information, 5 C.F.R. § 2635.703.

1. May not engage in a financial transaction using nonpublic information

2. May not allow the use of it for employee's own private gain or someone else's

3. Whether by advice, recommendation, or other unauthorized disclosure.

E. Contract Restrictions

1. Contractor provided technical data

2. Limited rights software

F. Nonpublic Information and Employees of Support Contractors

1. Employees of support contractors are not Federal employees

2. If give contractor employees access to nonpublic information:

a. It has now been released outside the Government

b. Contractor employees are not covered by the same laws and regulations as Federal employees -- exceptions

(1) Bribery

(2) Privacy Act

3. Before give contractor employees access to nonpublic information:

a. Is purpose within scope of contract?

b. Is there a need to know or to have access?

c. Is permission required?

(1) From owner of information?

(2) From contracting officer?

d. Privacy Act information?

e. Has contractor promised not to disclose?

(1) In the contract;

(2) By separate agreement (see Enclosure)

III. Conflicts of Interest.

A. Actual Conflict of Interests: 18 U.S.C. Sec. 208; 5 C.F.R. Part 2635, Subparts D & F.

1. "***An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.***"

2. The conflict of interest rules and regulations do not apply to contractor employees even if they should participate in an official Army matter under circumstances that would be a crime for us to participate.

3. This is a consideration to take into account when tasking services under a contract.

IV. Appearances of a Conflict of Interests.

A. 5 C.F.R. Part 2635, Subpart E: Impartiality in Performance of Official Duties.

"***Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee...***".

1. Financial Interests of Members of Household:

    a. Not the Financial Interests of Spouse and Minor Children - Already Imputed to the Employee;

    b. Financial Interests of Grown Children, In-Laws, Roommates, etc. Who are Part of Household.

    c. What if Rent a Room to Someone?

2. Employees have "**Covered Relationships**"

    a. With members of their household;

    b. With relatives (close personal relationship);

    c. With persons, organizations, entities where

        (1) They have or seek some business, contractual, financial relationship;

        (2) Spouse, parent or dependent child are seeking employment or other financial relationship;

        (3) Employee served as a officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee within the last year;

        (4) Employee is an "active participant".

        (5) Other similar situations, where it looks bad.

B. Summed up in rules about misuse of official position:

Performance of official duties affecting a private interest. To ensure that the performance of his official duties does not give rise to an

appearance of use of public office for private gain or of giving preferential treatment, an employee who duties would affect the financial interests of a friend, relative or person with whom he is affiliated in a nongovernmental capacity shall comply with any applicable requirements of Sec. 2635.502.

C. Possible examples of inappropriate appearances:

1. Federal employee is a good friend with a contractor employee. (Perhaps)

2. COTR is friendly with a contractor employee who delivers services under the contract. (It depends)

3. Branch chief is a good friend with a contractor employee who delivers services under the contract? (Perhaps)

4. COTR has an intimate relationship with contractor's site manager? (Probably)

D. Resolution of an apparent conflict of interest.

1. If it looks bad, again, disqualification is not an option.

a. Employee ***is*** disqualified.

b. Written notice is advisable.

2. Other options:

(1) Authorization by Agency Designee

(2) No prior coordination with OGE required.

E. Appearance standards applicable to contractor employees.

1. None.

V. Gifts

A. From Outside Sources.

1. Contractors and their employees are outside sources.

Different set of exceptions than if employees.

2. No solicitation.

B. Between Employees.

1. In some cases, may solicit.

2. But, not from contractor employees.

VI. Other Contractor in Federal Workplace Issues.

A. Contractor employees have their own employer. Don't interfere with their employer-employee relationships.

1. Don't invite them away from their assigned workplace.

2. They are not eligible for Federal employee awards.

3. COTRs do not approve contractor employee leave or other absences.

4. COTRs do not supervise contractor employees.

5. Avoid Illegal Personal Services!

B. The contract defines the relationship between Government and contractor.

1. Government-furnished property.

2. Government furnished services.

3. Government furnished training.

4. Don't pay twice!

VII. Summary.

A. Acquisition Ethics is important outside the contracting office!

B. *Standards of Ethical Conduct* rules apply to your participation in the acquisition process:

1. Developing requirements;

2. Recommending sources;

3. Participation in negotiations and source selection;

4. Overseeing contractor performance;

5. Approving deliverables/payments;

6. Dispute resolution.

C. When dealing with contractors and their employees:

1. They are not Federal employees;

a. Release of information to them is release outside the Government;

b. Gifts from them are gifts from outside sources;

c. Be careful of interfering with the contractor's employer-employee relationship and business;

d. The relationship is Government - Contractor

a. Defined by contract;

b. An arms-length relationship.

2. They need to be identified as Contractor employees;

3. Most of the ethics rules don't apply to them.

Michael J. Wentink
Associate Counsel
U.S. Army Materiel Command
Alexandria, VA

CERTIFICATE OF NON-DISCLOSURE

I, _____, an employee and authorized representative of _____, a contractor providing support services to Headquarters, U.S. Army Materiel Command (hereinafter **HQAMC**), and likely to have access to nonpublic information (hereinafter **RECIPIENT**), agrees to and promises the following:

WHEREAS **RECIPIENT** is engaged in delivering support services to **HQAMC** under contract; and

WHEREAS It is the intention of **HQAMC** to protect and prevent access to and disclosure of nonpublic information to anyone other than employees of the United States Government who have a need to know; but

WHEREAS **HQAMC** acknowledges that **RECIPIENT** will from time to time have or require access to such nonpublic information in the course of delivering the contract services; and therefore,

WHEREAS **RECIPIENT** may be given or otherwise have access to nonpublic information while providing such services; and finally,

WHEREAS "nonpublic information" includes such information as proprietary information (*e.g*., information submitted by a contractor marked as proprietary), advanced procurement information (*e.g*., future requirements, statements of work, and acquisition strategies), source selection information (*e.g*., bids before made public, source selection plans, and rankings of proposals), trade secrets and other confidential business information (*e.g*., confidential business information submitted by a contractor), attorney work product, information protected by the Privacy Act (*e.g*., social security numbers, home addresses and telephone numbers), and other sensitive information that would not be released by HQAMC under the Freedom of Information Act (*e.g*., program, planning and budgeting system information);

NOW THEREFORE, **RECIPIENT** agrees to and promises as follows:

RECIPIENT shall not seek access to nonpublic information beyond what is required for the performance of the support services contract;

RECIPIENT will ensure that his or her status as a contractor employee is known when seeking access to and receiving such nonpublic information from Government employees;

As to any nonpublic information to which **RECIPIENT** has or is given access, **RECIPIENT** shall not use or disclose such information for any purpose other than providing the contract support services, and will not use or disclose the information for any personal or other commercial purpose; and

If **RECIPIENT** becomes aware of any improper release or disclosure of such nonpublic information, **RECIPIENT** will advise the contracting officer in writing as soon as possible.

The **RECIPIENT** agrees to return any nonpublic information given to him or her pursuant to this agreement, including any transcriptions by **RECIPIENT** of nonpublic information to which **RECIPIENT** was given access, if not already destroyed, upon **RECIPIENT** leaving the contract.

RECIPIENT understands that any unauthorized use, release or disclosure of nonpublic information in violation of this CERTIFICATE will subject the RECIPIENT to administrative, civil or criminal remedies as may be authorized by law.

RECIPIENT:
_____(signature)
PRINTED NAME: _____
TITLE: _____

EMPLOYER: _____

Ethical principles are important (from Presidential Executive Order):

1. Must not have financial interests that conflict with official duties;
2. May not use “inside information” to further any private interest;
3. No gifts from those doing or trying to do business with agency;
4. No unauthorized commitments purporting to bind Government;
5. Must act impartially;
6. No preferential treatment;
7. No job hunting with those doing or trying to do business with agency;
8. Avoid actions that create appearance of violations of above.

B. Important because:

1. Public confidence.
2. Contractor confidence in the integrity of the procurement process.
3. Avoid protests and other litigation.
4. Competition.
5. Principles are enforced by:
    a. Criminal and other statutes;
    b. Regulations.

2. What does this mean?

a. If own a stock in a company, ***disqualified*** from participating in matters that affect the company, e.g.:.

(1) COR on contract with company;

(2) Supervising CORs on same contract.

(3) Working on a contract requirement for which the company is a logical source.

b. Fact that employee does not make final decision is not relevant.

c. Degree of employee's influence is not relevant.

d. Employee's honesty is not relevant.

e. Disqualified from participating.

3. Definitions.

a. <u>Personally and Substantially.</u>

b. <u>Particular Matter</u>.

(1) Includes judicial or other proceeding, application, request for ruling, contract claim, controversy, charge, accusation, arrest or any matter that...

(2) Involves deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.

c. Direct & Predictable Effect.

(1) Close causal link between action in the official matter and any expected effect of the matter on the financial interest.

(2) Immediacy of effect is not important.

(3) Degree of effect is not important - unless fits *de minimis* rule.

(4) Don't need to know the amount of the effect.

(5) Chain of causation attenuated = no D & P

(6) Effect contingent on occurrence of events that are speculative, or independent of, and unrelated to the matter = no D & P.

d. Financial Interests.

(1) Includes current and contingent ownership, equity, or security interest in real or personal property or business; may include debts.

(2) Includes stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust and liens.

(3) Includes rights to purchase the above, such as stock option or commodity future.

(4) Does ***not*** include a future interest such as a right as a beneficiary of an estate not yet settled.

e. Imputed Financial Interests are the interests of the following:

(1) The employee's spouse an minor children;

(2) The employee's general partner;

(3) An organization or entity which the employee serves as officer, director, trustee, general partner, or employee;

(4) An organization with whom the employee is negotiating for or has an arrangement concerning prospective employment

C. If an employee has a conflict between an official matter and his or her financial interests (or someone else's financial interests that are imputed to the employee), how to resolve this conflict?

1. Disqualification is ***not*** an option! (If the relationship exists, the employee ***is*** disqualified!)

2. Written notice of disqualification is often advisable.

3. Options include:

   a. Reassignment;

   b. Change duties;

   c. Divestiture:

      (1) May defer taxes with a Certificate of Divestiture.

      (2) Employee requests from OGE thru DAEO.

   d. Individual waiver - 18 U.S.C. § 208(b)(1): Requires prior coordination with OGE

   e. Regulatory waivers - 18 U.S.C. § 208(b)(2).

E. Standards Applicable to Contractor Employees:

1. None!

2. Need to hold contractors to same high standards as Federal employees.

A. Statutes:

1. 18 U.S.C. § 201(b) - Bribery

2. 18 U.S.C. § 201(c) - Unlawful Gratuities

3. 18 U.S.C. § 209 - Unlawful Supplementation of Employee Compensation

B. FAR 3.101-2.

C. *Standards of Ethical Conduct for Employees of the Executive Branch*, 5 C.F.R. Part 2635 - May not directly or indirectly solicit or accept a gift from a prohibited source or because of employee's official position.

D. Four-Step Analysis:

1. Is it a gift?

a. Anything of Value.

b. What it is ***not*** is more important

(1) Coffee and donuts during a meeting;
(2) Discount or other benefit offered to

(a) All government employees; or
(b) All uniformed military personnel.

(3) Greeting cards and items of little intrinsic value.
(4) Anything paid for by employee
(5) Contests and raffles open to the general public.

2. Is the gift:

a. Coming from a prohibited source?

(1) Seeking official action with agency;

(2) Doing or seeking to do business;

(3) Regulated by the agency; or

(4) Substantially affected by employee's duties; or

(5) A NFE, a majority of whose members, include the above.

b. Being given because of the employee's official position?

(1) Not actual position;

(2) But, position as a Federal employee.

c. Gifts from contractor employees are gifts from outside sources and, even if the contractor employee provides the contract services on-site, their gifts will usually be considered to be:

(1) From a prohibited source; and,

(2) Because of official position.

3. If gift is "prohibited", might there be an exception?

a. $20/$50 exception.

b. Personal relationship.

c. Discounts or other benefit

(1) Reduced membership fees for all Government employees by professional organizations where the only restriction on membership relates to professional qualification;

(2) Offered by a non-prohibited source to a group or class of employees that is not based on type of job, or on higher rank or rate of pay.

d. Awards or honorary degrees.

e. Based on outside business or employment relationships.

f. Widely attended gatherings and other events:

(1) Speaking and similar engagements;

(2) Widely attended gathering

(a) Determination of Agency interest

(2) Attend off duty

(3) Free attendance does not include travel, overnight accommodations, or meals taken outside the event.

g. Social invitations

(1) Not a prohibited source

(2) No one else is paying

4. Even if there's an exception, ***should*** you accept?

No! Not if:

a. In return for being influenced;

b. The gift was solicited or coerced;

c. The number of gifts from the same or different sources are so frequent that it looks like the employee is using public office for private gain;

d. Some other law restricts - no more special Procurement Integrity rule.

e. It is never improper to refuse a gift!

VI. Gifts of Travel and Related Expenses (31 U.S.C. § 1353).

1. Law permits acceptance of gifts of travel from non-Federal sources:

a. Meetings and similar events;

b. Not for the conduct of business.

2. Requires approval of travel approval authority, to include a conflict of interest analysis:

a. Who's offering?

b. Who's the employee?
c. Relationship? Issues?
d. Location and purpose.

e. Must conclude that acceptance under the circumstances would not cause a reasonable person with knowledge of all the relevant facts to question the integrity of agency programs or operations.

3. If value exceeds $250, must report to OGE -- public inspection.

ETHICS PANEL ANSWER SHEET

Questions **Your Answers**

1. **The Phantom Briefer:** Has Mr. Icandoit violated any laws? YES or NO

2. **The Leak:** Is there anything wrong with this? YES or NO

3. **4th Annual BRAC Survivors Picnic:** Should the VICOM CG invite all contractor employees to participate in the picnic and organization day with the VICOM employees? YES or NO

4. **The Software Bandit:** Can COL Hardcharger stop the Software Bandit? YES or NO

5. **The Level Playing Field:** Does KNOWALL have an unfair competitive advantage in the upcoming re-competition? YES or NO

6. **All in the Family:** Do the conflicts of interest rules prevent Susan from providing this technical assistance to the SSEB? YES or NO

7. **Who's Guarding the Chicken Coop:** Has COL Hardcharger adequately protected the database? YES or NO

8. **Contractor Largesse:** May COL Hardcharger accept Mark's gifts? YES or NO

9. **The Oppressive PM:** Is COL Hardcharger's conduct improper? YES or NO

10. **The Dating Game:** Must LTC Megabyte stop dating Jane Data? YES or NO

How to Score:

2 or fewer correct:	Remedial training required.
3-5 correct:	At least you're awake.
6-8 correct:	Some good instincts!
9 correct	You must have never missed an ethics briefing!

All 10 correct: Congratulations! You get to teach the next session!

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UNCLASSIFIED

AMCCC-G POINT PAPER 5 November 1997

SUBJECT: Ethical Issues Created by Contractors in the Workplace

PURPOSE: Provide information about ethical issues created by contractor employees working in the Federal workplace.

FACTS:

- Contractor employees are indeed different from Federal employees, even those contractor employees who work on a daily basis in and around the Federal workplace. One major difference is that the conflicts of interest criminal laws do not apply to contractor employees (except for the bribery statute), nor does the *Standards of Ethical Conduct for Employees of the Executive Branch* or the DoD *Joint Ethics Regulation* apply to them.

- Contractor employees and their workspace should be clearly identified to ensure that Federal employees and the public know that they are not Federal employees to avoid inadvertent unethical conduct in addition to other issues, such as illegal personal services, claims for services provided beyond that required by the contract, and misunderstandings about fiduciary responsibilities.

- **GIFTS.** Contractors and their employees are "outside sources." They should not be solicited for contributions to gifts to departing or retiring Army employees. The rules governing gifts between Army employees and those offered by a contractor or its employees to an Army employee are very different. In an appropriate case, an Army employee may accept a $300 framed print from the employees in his or her organization, but could never accept that gift from the contractor employees who support his or her organization. It is permissible for employees to accept meals and entertainment in a subordinate's home; however, in many cases, this would not be appropriate if the invitation is from a contractor employee.

- **EMPLOYMENT OVERTURES.** Any discussion about future employment between an Army employee and a contractor

employee, whoever initiates it, might require special reports depending on the situation. For sure, if the Army employee initiates the inquiry or wishes to pursue it, the Army employee is automatically disqualified from participating in official matters affecting the contractor and must issue a written notice of this disqualification.

- **RELATIONSHIPS BETWEEN FEDERAL AND CONTRACTOR EMPLOYEES.** It is common for varying degree of relationships to develop between and among employees in the workplace. The relationships run the gamut from friendly acquaintances to good friends to close personal friendships to marriage. When these relationships begin to develop between Federal and contractor employees, the Federal employees and their supervisors need to be alert to issues and appearances.

  •• If the relationship is with a Federal employee who has nothing to do with the contract or the contractor employee, the only concern might be for the protection of "inside information."

  •• If the relationship is with a Federal employee who has responsibilities involving the contract or the work being performed by the contractor employee, there will be appearances of conflicts of interest that must be resolved; these appearances often disqualify the Federal employee from participating in the official matters affecting the contractor.

  •• If the relationship between the Federal and contractor employee results in marriage, the financial interests of the spouse are imputed to the Federal employee and any actual or apparent conflicts of interest that are created must be resolved.

- **PROTECTION OF INFORMATION.** Numerous statutes protect the release of procurement information, trade secrets, other confidential information and classified information. In addition, the *Standards of Ethical Conduct* prohibits using, or allowing the use of, nonpublic information for private interests. As Army employees, we must be very circumspect as to whom we release nonpublic information (*i.e.,* need to know). But, we must be particularly

vigilant when we are discussing sensitive matters with and around contractor employees.

- When any of these or other ethical issues arise, employees and their supervisors should seek the advice of the Ethics Counselor.

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UNCLASSIFIED

AMCCC-G POINT PAPER 14 October 1998

SUBJECT: Contractor Employees in the Federal Workplace -- Practical Advice

PURPOSE: Summarize the principles derived from the AMC ethics training program for CY 1998, Contractor Employees in the Federal Workplace -- Confronting the Challenges!

FACTS:

- Remember that contractor employees are ***not*** Federal employees.

- Identify contractor employees as such with distinctive security badges, by including their company's name in their e-mail address, and otherwise ensuring that our employees and members of the public understand their status.

- Respect the employer-employee relationship between contractors and their employees and do not interfere with it by inviting their employees to leave their assigned work station, pressuring the contractor to use "favorite" employees, or insisting on some personnel action.

- Be aware of intellectual property rights consequences of contractor employee work products created in the Federal workplace. Generally, the contractor will be able to commercially exploit software or inventions that it creates in the Federal workplace.

- Avoid giving incumbent contractor <u>unfair</u> competitive advantage by including its employees in meetings to discuss aspects of the re-competition, or by accidentally allowing the contractor's employees to overhear or gain access to planning information.

- Identify possible conflicts by contractor employees. If it would be a crime (conflict of interest) or violate the Standards of Ethical Conduct (appearances of partiality) for a Federal employee to participate in an official matter, we should insist that the contractor provides employees free of the same conflicts or appearances.

- Safeguard proprietary, Privacy Act, and other sensitive and nonpublic information. Release of certain types of information to contractor employees to analyze, create charts and graphs, enter into databases, etc., could violate the procurement integrity law, the trade secrets act, the Privacy Act, or other law or regulation that could subject the releaser to civil and/or criminal penalties to include mandatory removal.

- Beware of gifts from contractor employees. Even if they work in the Federal workplace, they are "outside sources" and the rules for their gifts are very different than the rules for gifts between employees. One major difference is that contractors

and their employees may not be solicited to provide or contribute to gifts where we might be able to do so from other Federal employees for a retirement gift for another Federal employee.

- Don't require "out of scope" work, personal services, or "inherently governmental functions." The services that the contractor is required to provide through its employees are set out in the contract… there are no "and other duties as assigned." When we contract, we give up control and flexibility.

- Resolve inappropriate appearances created by close relationships between Federal and contractor employees. For example, if a Federal employee develops a close personal relationship with the contractor's site manager, that Federal employee probably should not be assigned or continue as the Contracting Officer Representative (COR).

- Set the example -- as leaders, establish and maintain high ethical standards.

- Address ethical issues promptly and confer with counsel.

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The AMC Command Counsel's Ethics Panel Presents

Contractor Employees in the Federal Workplace -- Confronting the Challenges!

ETHICS PANEL

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Background

- Army Victory Command (VICOM) is re-competing its omnibus support service contract.
- IDIQ, 5 Years, > $100,000,000 per year.
- Supports virtually all VICOM functions.
- KNOWALL, Inc. is incumbent.
- WANNABE, Inc. wants the new contract.

THE PHANTOM BRIEFER

- COL Hardcharger, PM for the support contract, tasks KNOWALL's marketeer, Mr. Icandoit, to brief General Getsued Daily on a concept plan to increase VICOM's mission (which will also increase KNOWALL's support contract).
- Mr. Icandoit conducts the briefing but does not identify himself as a KNOWALL employee.
- The briefing convinces General Daily to double the size of the VICOM mission.

Has Mr. Icandoit violated any laws?

THE PHANTOM BRIEFER
The Bottom Line

NO

- **Mr. Icandoit may brief VICOM's plan to expand its mission since the IDIQ contract is broadly written to cover this activity.**
- **Mr. Icandoit did not violate any laws, BUT...**
- **COL Hardcharger should have introduced Mr. Icandoit as an KNOWALL employee to all attendees at the outset of the briefing;**
- **Mr. Icandoit may not prepare or brief the acquisition strategy for the ESS procurement since such activity will result in an OCI problem and an unfair competitive advantage.**

THE LEAK

- Mr. Gooddeal, a VICOM employee, and Mr. Wally Street, a KNOWALL employee, were <u>not</u> involved in the source selection process but overheard a conversation between two SSEB members.
- They heard that KNOWALL won the follow-on contract which will not be publicly announced until noon tomorrow.
- They immediately called their brokers and purchased 1000 shares of KNOWALL stock at $10 per share.
- After the award is announced the next day, KNOWALL's stock jumps to $20 per share giving both shrewd investors a tidy profit.

Is there anything wrong with this?

THE LEAK
The Bottom Line

YES

- The leak of sensitive information is a risk with contractors in the Federal workplace.
- Create an awareness of the need to safeguard sensitive information.
- Ensure that Government employees know who the contractor employees are.
- Keep co-location of Government and Contractor personnel to a minimum, especially in areas where sensitive information is present.

VICOM Employee Picnic and Organization Day

- **It is that time of the year for the VICOM Employee 4th Annual BRAC Survivors Picnic.**
- **The DOIM is the project office for the picnic and LTC Megabyte recommends that the VICOM CG invite all VICOM contractor employees to the picnic. After all, they are part of the VICOM family and should participate and enjoy the work-day off with the VICOM employees.**
- **Should the VICOM CG invite all contractor employees to participate in the picnic and organization day activities with the VICOM employees?**

VICOM Employee Picnic *The Bottom Line *

NO

- **VICOM should *not* invite KNOWALL's employees to participate.**
- **Although better to limit participation to VICOM employees, it is okay to permit KNOWALL's employees to attend the picnic, but:**
  - **It is up to KNOWALL as to whether they get time off and how;**
  - **We don't pay for services not provided;**
  - **We don't solicit KNOWALL employees when fundraising;**
  - **We don't subsidize KNOWALL employees.**

KNOWALL -- the Software Bandit?

- **KNOWALL was tasked to write a program to automate VICOM's Voice Mail. It's developed entirely at Gov't expense, in a Gov't facility with the assistance of Gov't employees. It's called VICOM Phone.**
- **A few months later, COL Hardcharger is browsing at the local computer superstore and sees a software package entitled VICOM Phone being marketed by KNOWALL's commercial products division.**
- **The software becomes a nation-wide best seller and KNOWALL gets rich. COL Hardcharger is outraged! He wants KNOWALL to "cease and desist" or at least share some of the profits with VICOM.**

Can COL Hardcharger stop the software bandit?

KNOWALL -- the Software Bandit? *The Bottom Line*

NO

- General rule: Contractor owns software developed under contract and can market.
- Government only acquires a license to use the software.
- Under some circumstances, Government can procure title.
- Same rule applies to tech data.

THE LEVEL PLAYING FIELD

- **Because of its incumbent status <u>and</u> because it routinely overhears <u>nonpublic</u> information from VICOM personnel, <u>only KNOWALL</u> fully understands the complex work described vaguely in the RFP.**
- **KNOWALL has five years of cost & performance reports that show trends for the future.**
- **The VICOM CDR and her staff are totally satisfied with KNOWALL's outstanding work.**
- **WANNABE wants to unseat KNOWALL, but feels that it is at a significant disadvantage.**

Does KNOWALL have an unfair competitive advantage in the upcoming re-competition?

THE LEVEL PLAYING FIELD
The Bottom Line

YES

- **KNOWALL's advantages derived from its experience, resources, or skills obtained in the performance of its current VICOM contract are <u>not</u> unfair.**
- **But advantages derived from an inequitable release of information to KNOWALL or from an ambiguous RFP are unfair, jeopardizing the viability of the award and the integrity of the Federal procurement system.**

"All in the Family"

Does Spousal Employment Matter?

- **Susan, a KNOWALL technical expert, is assigned by her employer to help SSEB members evaluate proposals on a VICOM RFP for a new hi-tech navigation system.**
- **Someone knows her husband, and says that he works for one of the offerors as their Vice-President for Government Operations.**

Do the conflicts of interest rules prevent Susan from providing this technical assistance to the SSEB?

All in the Family
* The Bottom Line *

NO

- Generally, conflict of interest laws and the Joint Ethics Regulation do not apply to contractor employees.
- Support contract should require disclosure and avoidance of potential conflicts.
- Susan may help the SSEB if no organizational conflict of interest and if she signs a non-disclosure agreement.
- But, Susan should not consult if her husband is employed by one of the offerors.

NOTICE
AUTHORIZED PERSONNEL ONLY

NOTICE
AUTHORIZED PERSONNEL ONLY

Who's Guarding the Chicken Coop?

- **KNOWALL is tasked to perform work requiring access to the proprietary technical data package (TDP) for the hi-energy navigation system (HENS).**
- **All of VICOM's TDPs are stored in an electronic database. COL Hardcharger assigns KNOWALL a password to enter the database.**
- **COL Hardcharger, recognizing that the database contains proprietary TDPs of numerous contractors, orders the KNOWALL employees to access only the HENS TDP and not reveal its contents to anyone outside the Government.**
- **Has COL Hardcharger adequately protected the database (or has he let the fox into the chicken coop)?**

Who's Guarding the Chicken Coop? *The Bottom Line*

NO

- **Government may not give support contractors access to proprietary information unless proprietary owner consents.**
- **Contractor and its employees should sign nondisclosure agreements.**
- **Access should be limited--no *carte blanche* access.**

CONTRACTOR LARGESSE

Different Rules for Different Folk

- About to retire, COL Hardcharger, PM for the support contract, invites his employees to dinner at his house and includes Mark, a KNOWALL employee who brings a $22 bottle of wine.
- Mark invites COL Hardcharger and his wife for drinks & dinner at his favorite restaurant.
- COL Hardcharger's XO solicits contributions from everyone for his retirement gift (a $250 briefcase). Mark contributes $25.

May COL Hardcharger accept Mark's gifts?

CONTRACTOR LARGESSE

* The Bottom Line *

NO

- COL Hardcharger may not accept the wine; the value exceeds $20 and no other exception applies.
- COL Hardcharger may not accept the invitation from Mark for dinner at his favorite restaurant.
- XO may not solicit gifts or contributions to gifts from outside sources, e.g., contractor employees.

THE OPPRESSIVE PM

- COL Hardcharger routinely directs KNOWALL's design engineer, Mr. Meek, to perform tasks that are beyond the scope of the contract.
- Mr. Meek is afraid to object to the contracting officer because COL Hardcharger has threatened to give KNOWALL an adverse past performance report (past performance will be a significant evaluation factor in the follow-on competition).
- COL Hardcharger required Mr. Meek to work "uncompensated" overtime on slides for his wife's "save the whales" presentation.

Is COL Hardcharger's conduct improper?

THE OPPRESSIVE PM
The Bottom Line

YES

- Don’t require performance outside the contract scope -- keep KO in the loop.
- Don’t supervise contractor employees or risk improper personal services.
- Don’t let contractor employees perform inherently Governmental functions.
- Don’t use Government contractors for personal benefit.

The Dating Game

- **LTC Megabyte is the new VICOM DOIM.**
- **He is dating Jane Data, the KNOWALL employee responsible for DOIM support.**
- **The DOIM COTR works for LTC Megabyte and is responsible for a number of KNOWALL task orders, and the DOIM part of the upcoming re-competition.**
- **Must LTC Megabyte stop dating Jane Data?**

The Dating Game
* The Bottom Line *

NO

- **No, but…**
  - **LTC Megabyte should not participate in any contract issues, including the follow-on contract.**
  - **LTC Megabyte should not rate COTR.**
  - **LTC Megabyte should issue a written notice of disqualification.**
- **Commander might want to select someone else as DOIM.**

Contractor Employees in the Federal Workplace
Practical Advice from the Panel

1. **Remember that contractor employees are NOT Federal employees.**
2. **Identify contractor employees.**
3. **Respect the employer-employee relationship between contractors and their employees.**
4. **Be aware of intellectual property rights consequences of contractor employee work products created in the Federal work place.**
5. **Avoid giving incumbent contractor <u>unfair</u> competitive advantage.**
6. **Identify possible conflicts by contractor employees.**

Contractor Employees in the Federal Workplace
Practical Advice from the Panel (Cont'd)

7. **Safeguard proprietary, Privacy Act, and other sensitive information.**
8. **Beware of gifts from contractor employees.**
9. **Don't require "out of scope" work, personal services, or "inherently governmental functions."**
10. **Resolve inappropriate appearances created by close personal relationships between Federal and contractor employees.**
11. **Set the example -- as leaders, establish and maintain high ethical standards.**
12. **Address ethical issues promptly and confer with counsel.**

Chapter O

Agency Break-Out Sessions

NOTES

POST-GOVERNMENT EMPLOYMENT

PROCUREMENT INTEGRITY ACT

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POST-GOVERNMENT EMPLOYMENT

PROCUREMENT INTEGRITY ACT

"Always do right. This will gratify some people and astonish the rest."
Mark Twain

I. INTRODUCTION. Upon completing this instruction, the student will understand:

A. Conflict of interest prohibitions of 18 U.S.C. § 208.

B. The coverage of the Procurement Integrity Act.

C. Representational prohibitions of 18 U.S.C. § 207.

II. FINANCIAL CONFLICTS OF INTEREST. 18 U.S.C. § 208; 5 C.F.R. § 2635.402(A) (1996). Prohibits an employee from participating **personally and substantially** in his or her official capacity in any **particular matter** in which he or she has a **financial interest**, if the particular matter will have a **direct and predictable effect** on that interest.

A. The financial conflict of interest prohibitions apply in three key situations.

1. An employee may not work on an assignment that will affect the employee's financial interests, or the financial interests of the employee's spouse or minor child.

2. An employee may not work on an assignment that will affect the financial interests of a partner or organization where the employee serves as an officer, director, employee, general partner, or trustee.

3. An employee may not work on an assignment that will affect the financial interest of someone with whom the employee either has an arrangement for employment or is negotiating for employment.

B. Definition of key terms.

1. **Financial Interests.** Defined as stocks, bonds, leasehold interests, mineral and property rights, deeds of trust, liens, options, or commodity futures. 5 C.F.R. § 2635.403(c)(1). The statute specifically defines negotiating for employment as a financial interest. Thus, negotiating for employment is the same as owning stock in a company.

2. **Personally.** Defined as direct participation, or direct and active supervision of a subordinate. 5 C.F.R. § 2635.402(b)(4).

3. **Substantially.** Defined as an employee's involvement that is significant to the matter. 5 C.F.R. § 2635.402(b)(4).

4. **Particular Matter.** Defined as a matter involving deliberation, decision, or action focused on the interests of specific persons, or an identifiable class of persons. However, matters of broad agency policy are not particular matters. 5 C.F.R. § 2635.402(b)(3).

5. **Direct and Predictable Effect.** Defined as a close, causal link between the official decision or action and its effect on the financial interest. 5 C.F.R. § 2635.402(b)(1).

C. The financial interest of the following persons are imputed to the employee:

1. The employee's spouse;

2. The employee's minor child;

3. The employee's general partner;

4. An organization or entity which the employee serves as officer, director, trustee, general partner or employee; and

5. A person with whom the employee is negotiating for employment. 5 C.F.R. § 2635.402(b)(2).

D. This statute does not apply to enlisted members, but the Joint Ethics Regulation (JER) subjects enlisted members to similar regulatory prohibitions. See JER, para. 5-301. Regulatory implementation of 18 U.S.C. § 208 is found in the JER, Chapter 2 and Chapter 5, and in 5 C.F.R § 2640 (1998).

E. Options for employees with conflicting financial interests.

1. Disqualification. With approval of supervisor, the employee must change duties to eliminate any contact or actions affecting that company. 5 C.F.R. 2635.402(c); 5 C.F.R. 2640.103(d).

2. Waiver. Waivers may be "individual" or "blanket."

a. Individual waivers. The rules for individual waivers are at 5 C.F.R. § 2635.402(d)(2) and 5 C.F.R. § 2640.301. An agency may grant an individual waiver on a case-by-case basis after the employee fully discloses the financial interest to the agency. The criteria is whether the employee's conflicting financial interest is not so substantial as to affect the integrity of his or her service to the agency. 5 C.F.R. § 2635.402(d)(2)(ii); 5 C.F.R. § 2640.301(a).

b. Blanket Waivers. The rules for blanket waivers are at 5 C.F.R. § 2640, and supersede those found in the JER, para 5-302a. Blanket waivers include the following:

(1) Diversified Mutual Funds. Diversified funds do not concentrate in any industry, business, or single country other than the United States. 5 C.F.R. § 2640.102(a). Owning a diversified mutual fund does not create a conflict of interest. 5 C.F.R. § 2640.201(a).

(2) Sector Funds. Sector funds are those funds that concentrate in an industry, business, or single country other than the United States. 5 C.F.R. § 2640.102(q). Owning a sector fund may create a conflict of interest, but there is a regulatory exemption if the holding that creates the conflict is not invested in the sector where the fund is concentrated. 5 C.F.R. § 2640.201(b).

(3) De Minimus. Regulations create a *de minimis* exception for ownership by the employee, spouse, or minor child in:

(a) Publicly traded securities; and

(b) The aggregate value of the holdings of the employee, spouse, or minor child does not exceed $5,000. 5 C.F.R. § 2640.202(a).

3. Divestiture. The employee may sell the conflicting financial interest to eliminate the conflict. 5 C.F.R. § 2640.103(e).

F. Negotiating for employment. The term "negotiating" is interpreted broadly. United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).

1. Any discussion, however tentative, is negotiating for employment.

2. The regulations contain additional requirements for disqualification of employees who are "seeking employment." 5 C.F.R. §§ 2635.601 - 2635.606. "Seeking employment" is a term broader than "negotiating for employment" found in 18 U.S.C. § 208.

3. An employee begins "seeking employment" if he or she has directly or indirectly:

a. Engaged in employment negotiations with any person. "Negotiations" means discussing or communicating with another person, or that person's agent, with the goal of reaching an agreement for employment. This term is not limited to discussing specific terms and conditions of employment. 5 C.F.R. § 2635.603(b)(1)(i).

b. Made an unsolicited communication to any person or that person's agent, about possible employment. 5 C.F.R. § 2635.603(b)(1)(ii).

4. An employee has not begun "seeking employment" if he or she makes an unsolicited communication for the following reasons:

a. For the sole purpose of requesting a job application. 5 C.F.R. § 2635.603(b)(1)(ii)(A).

b. For the sole purpose of submitting a résumé or employment proposal only as part of an industry or other discrete class. 5 C.F.R. § 2635.603(b)(1)(ii)(B).

5. An employee is no longer "seeking employment" under the following circumstances:

a. The employee rejects the possibility of employment and all discussions have terminated. 5 C.F.R. § 2635.603(b)(2)(i). However, a statement by the employee that merely defers discussions until the foreseeable future does not reject or close employment discussions. 5 C.F.R. § 2635.603(b)(3).

b. Two months have lapsed after the employee has submitted an unsolicited résumé or employment proposal with no response from the prospective employer. 5 C.F.R. § 2635.603(b)(2)(ii).

G. Violating 18 U.S.C. § 208 may result in imprisonment up to one year, or, if willful, five years. In addition, a fine of $50,000 to $250,000 is possible. See 18 U.S.C. § 3571.

III. THE PROCUREMENT INTEGRITY ACT (PIA) AS CHANGED BY THE CLINGER-COHEN ACT.

Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-665 (1996). Section 27, Office of Federal Procurement Policy Act (OFPPA) amendments of 1988, 41 U.S.C. § 423, has been completely rewritten by the Clinger-Cohen Act of 1996. Changes have been made to FAR, Part 3, and to the DFARS. The new statute will also necessitate changes to the JER.[1]

A. Background Information about the amended Procurement Integrity Act (PIA).

1. Effective date: 1 January 1997.

2. The basic provisions of the new statute are set forth in FAR 3.104-2.

a. Prohibitions on disclosing and obtaining procurement information apply beginning 1 January 1997 to:

(1) Every competitive Federal procurement for supplies or services,

(2) From non-Federal sources,

(3) Using appropriated funds.

b. Requirement to report employment contacts applies beginning 1 January 1997 to competitive federal procurements above the simplified acquisition threshold ($100,000).

[1] On 28 August 1998, the DOD Standards of Conduct Office (SOCO) issued guidance on how to apply the PIA and its regulations. The SOCO, which chaired the Procurement Integrity Tiger Team (PITT), attempted to resolve issues that have arisen in light of the 1997 amendments to the PIA. This guidance is available at <http://www.defenselink.mil/dodgc/defense_ethics/dod_oge/>.

c. Post-employment restrictions apply to former officials for services provided or decisions made on or after 1 January 1997.[2]

d. Former officials who left government service before 1 January 1997 are subject to the restrictions of the Procurement Integrity Act as it existed prior to its amendment. See Appendix C.

3. Interference with duties. An official who refuses to cease employment discussions is subject to administrative actions in accordance with 5 C.F.R. § 2635.604(d) (annual leave, leave without pay, or other appropriate administrative action), if the disqualification interferes substantially with the official's ability to perform his or her assigned duties. FAR 3.104-11(c). See also Smith v. Dep't of Interior, 6 M.S.P.R. 84 (1981) (employee who violated conflict of interest regulations by acting in official capacity in matters affecting his financial interests is subject to removal).

4. Coverage. Applies to "persons," "agency officials," and "former officials" as defined in the PIA.

B. Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information.

1. Restrictions on Disclosure of Information. The following persons are forbidden from knowingly disclosing contractor bid or proposal information or source selection information before the award of a contract:

a. Present or former federal officials;

b. Persons (such as contractor employees) who are currently advising the federal government with respect to a procurement;

[2] Note: Those employees who remained in federal service after 31 December 1996 have no post government employment restrictions under the Procurement Integrity Act as a result of their duties prior to 1 January 1997.

c. Persons (such as contractor employees) who have advised the federal government with respect to a procurement, but are no longer doing so; and

d. Persons who have access to such information by virtue of their office, employment, or relationship.

2. Restrictions on Obtaining Information. Persons (other than as provided by law) are forbidden from obtaining contractor bid or proposal information or source selection information.

3. Contractor Bid or Proposal Information. Defined as any of the following:

a. Cost or pricing data;

b. Indirect costs or labor rates;

c. Proprietary information marked in accordance with applicable law or regulation; and

d. Information marked by the contractor as such in accordance with applicable law or regulation. If the contracting officer disagrees, he or she must give the contractor notice and an opportunity to respond prior to release of marked information. FAR 3.104-5(d). See also Chrysler Corp. v. Brown, 441 U.S. 281 (1979); CNA Finance Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), cert. den. 485 U.S. 917 (1988).

4. Source Selection Information. Defined as any of the following:

a. Bid prices before bid opening;

b. Proposed costs or prices in negotiated procurement;

c. Source selection plans;

d. Technical evaluation plans;

e. Technical evaluations of proposals;

f. Cost or price evaluations of proposals;

g. Competitive range determinations;

h. Rankings of bids, proposals, or competitors;

i. Reports and evaluations of source selection panels, boards, or advisory councils; and

j. Other information marked as source selection information if release would jeopardize the integrity of the competition.

C. Reporting Non-Federal Employment Contacts.

1. Mandatory Reporting Requirement. An agency official who is **participating**[3] **personally and substantially** in an acquisition over the simplified acquisition threshold must report employment contacts with bidders or offerors. Reporting may be required even if contact is through an agent or intermediary. FAR 3.104-6(a).

[3] Neither the statute nor the FAR provides guidance on the duration of the participation. Neither contains a definition of bidder or offeror (which might include prospective bidders). As such, the rules can be read in such a way that they will never trigger a reporting requirement for an individual who drafted the statement of work, or prepared the solicitation. Those documents are almost always completed before the identity of actual bidders or offerors is even known. If the employee, having completed the statement of work, is contacted by a bidder or offeror, the employee arguably no longer fits within the description of someone who "is participating." Two contrary interpretations give a more reasonable meaning to these provisions. The ethics counselor should either presume that "participation" continues until award, or should read the term bidder or offeror to include prospective bidders as the definition of "competing contractor" did in the predecessor statute.

a. Report must be in writing.

b. Report must be made to supervisor and designated agency ethics official.

(1) Designated agency ethics official in accordance with 5 C.F.R. § 2638.201.

(2) Deputy agency ethics officials in accordance with 5 C.F.R. § 2638.204 if authorized to give ethics advisory opinions.

(3) Alternate designated agency ethics officials in accordance with 5 C.F.R. § 2638.202(b). See FAR 3.104-3.

c. Additional Requirements. The agency official must:

(1) Promptly reject employment; or

(2) Disqualify him/herself from the procurement until authorized to resume participation in accordance with 18 U.S.C. § 208.

(a) Disqualification notice. Employees who disqualify themselves must submit a disqualification notice to the HCA or designee, with copies to the contracting officer, source selection authority, and immediate supervisor. FAR 3.104-6(b).

(b) Note: 18 U.S.C. § 208 requires employee disqualification from participation in a particular matter if the employee has certain financial interests in addition to those which arise from employment contacts. See 61 Fed. Reg. 66,841 (Dec. 18, 1996) (regulatory guidance on exceptions to this provision).

2. Both officials and bidders who engage in prohibited employment contacts are subject to criminal penalties and administrative actions.

3. Participating personally and substantially means active and significant involvement in:

   a. Drafting, reviewing, or approving a statement of work;

   b. Preparing or developing the solicitation;

   c. Evaluating bids or proposals, or selecting a source;

   d. Negotiating price or terms and conditions of the contract; or

   e. Reviewing and approving the award of the contract.
      FAR 3.104-3.

4. The following activities are generally considered **not** to constitute personal and substantial participation:

   a. Certain agency level boards, panels, or advisory committees;

   b. General, technical, engineering, or scientific effort of broad applicability and not directly associated with a particular procurement;

   c. Clerical functions in support of a particular procurement; and

   d. For OMB Circular A-76 cost comparisons:

      (1) Participating in management studies;

      (2) Preparing in-house cost estimates;

(3) Preparing "most efficient organization" (MEO) analyses; and

(4) Furnishing data or technical support **to be used by others** in the development of performance standards, statements of work or specifications. FAR 3.104-3.

D. Post-Government Employment Restrictions.

1. A one-year ban prohibits certain persons from accepting compensation from the awardee. "Compensation" means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Indirect compensation is compensation paid to another entity specifically for services rendered by the individual. FAR 3.103-3. The ban applies to both competitively awarded and non-competitively awarded procurements. FAR 3.104-3.

2. The one year ban applies to persons who serve in any of the following seven positions on a contract **in excess of $10 million**:

a. Procuring Contracting Officer (PCO);

b. Source Selection Authority (SSA);

c. Members of the Source Selection Evaluation Board (SSEB);

d. Chief of a financial or technical evaluation team;

e. Program Manager;

f. Deputy Program Manager; and

g. Administrative Contracting Officer (ACO).

3. The one year ban also applies to anyone who "personally makes" any of the following seven types of decisions:

   a. The decision to award a contract **in excess of $10 million**;

   b. The decision to award a subcontract **in excess of $10 million**;

   c. The decision to award a modification of a contract or subcontract **in excess of $10 million**;

   d. The decision to award a task order or delivery order in **excess of $10 million**;

   e. The decision to establish overhead or other rates valued **in excess of $10 million**;

   f. The decision to approve issuing a payment <u>or payments</u> **in excess of $10 million**; and

   g. The decision to pay or settle a claim **in excess of $10 million**.

4. The Ban Period.

   a. If the former official was in a specified position (source selection type) on the date of contractor selection but not on the date of award, the ban begins on the date of selection.

   b. If the former official was in a specified position (source selection type) on the date of award, the ban begins on the date of award.

   c. If the former official was in specified position (program manager, deputy program manager, administrative contracting officer), the ban begins on the last date of service in that position.

d. If the former official personally made certain decisions (award, establish overhead rates, approve payment, settle claim), the ban begins on date of decision. FAR 3.104-8.

5. In "excess of $10 million" means:

a. The value or estimated value of the contract including options;

b. The total estimated value of all orders under an indefinite-delivery, indefinite-quantity, or a requirements contract;

c. Any multiple award schedule contract, unless the contracting officer documents a lower estimate;

d. The value of a delivery order, task order, or order under a Basic Ordering Agreement;

e. The amount paid, or to be paid, in a settlement of a claim; or

f. The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base. See FAR 3.104-3.

6. The one-year ban does not prohibit an employee from working for any division or affiliate that does not produce the same or similar product or services.

7. Ethics Advisory opinion. Agency officials and former agency officials may request an advisory opinion as to whether he or she would be precluded from accepting compensation from a particular contractor. FAR 3.104-7(a).

F. Penalties and Sanctions.

1. Criminal Penalties. Violating the prohibition on disclosing or obtaining procurement information may result in five years confinement and a fine if done in exchange for a thing of value, or to get or give a competitive advantage.

2. Civil Penalties.

   a. The Attorney General may take civil action for wrongfully disclosing or obtaining procurement information, failing to report employment contacts, or accepting prohibited employment.

   b. Civil penalty is up to $50,000 (individuals) and up to $500,000 (organizations) plus twice the amount of compensation received or offered.

3. If violations occur, the agency shall consider cancellation of the procurement, rescission of the contract, suspension or debarment, adverse personnel action, and recovery of amounts expended by the agency under the contract. A new contract clause advises contractors of the potential for cancellation or rescission of a contract, and recovery of any penalty prescribed by law and the amount expended under the contract. FAR 52.203-8. Another clause that advises the contractor the government may reduce contract payments by the amount of profit or fee for violations. FAR 52.203-10.

4. Contracting officer may disqualify a bidder from competition whose actions fall short of a statutory violation, but call into question the integrity of the contracting process. See Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd on recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435; Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992) (contracting officer has discretion to disqualify from competition a bidder who obtained proprietary information through industrial espionage not amounting to a violation of the Procurement Integrity Act). See also NKF Engineering, Inc. v. United States, 805 F.2d 372 (Fed.Cir. 1986) (contracting officer has authority to disqualify a bidder based solely on appearance of impropriety when done to protect the integrity of the contracting process).

5. Limitation on Protests. No person may file a protest, and GAO may not consider a protest, alleging a PIA violation unless the protester first reported the alleged violation to the agency within 14 days of its discovery of the possible violation. FAR 33.102(f).

6. Contracting Officer's Duty to Take Action on Possible Violations.

   a. Determine impact of violation on award or source selection.

   b. If no impact, forward information to individual designated by agency. Proceed with procurement, subject to contrary instructions.

   c. If impact on procurement, forward information to the Head of the Contracting Activity (HCA) or designee. Take further action in accordance with HCA's instructions. FAR 3.104-10.

IV. REPRESENTATIONAL PROHIBITIONS. 18 U.S.C. § 207; JER, CHAPTER 9.

A. 18 U.S.C. § 207 and its implementing regulations bar certain acts by former employees which may reasonably give the appearance of making unfair use of their prior employment and affiliations.

1. A former employee involved in a particular matter while working for the government must not "switch sides" after leaving government service to represent another person on that matter. 5 C.F.R. § 2637.101.

2. 18 U.S.C. § 207 does not bar a former employee from working for any public or private employer after government service. The regulations state that the statute is not designed to discourage government employees from moving to and from private positions. Rather, such a "flow of skills" promotes efficiency and communication between the government and the private sector, and is essential to the success of many government programs. The statute bars only certain acts "detrimental to public confidence." 5 C.F.R. § 2637.101.

B. 18 U.S.C. § 207 applies to all former officers and civilian employees whether or not retired, but **does not apply to enlisted personnel** because they are not included in the definition of "officer or employee" in 18 U.S.C. § 202. Note: Employees on terminal leave must also heed the representation restrictions of 18 U.S.C. § 205, which applies to current government employees.

C. 18 U.S.C. § 207 imposes a **lifetime prohibition** on the former employee against communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:

1. The government is a party, or has a direct and substantial interest in the matter;

2. The former officer or employee participated personally and substantially in the matter while in his official capacity; and

3. At the time of the participation, specific parties other than the government were involved.

D. 18 U.S.C. § 207 prohibits, for **two years** after leaving federal service, a former employee from communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:

1. The government is a party, or has a direct and substantial interest in the matter;

2. The former officer or employee knew or should have known that the matter was pending under his official responsibility during the one year period prior to leaving federal service; and

3. At the time of the participation, specific parties other than the government were involved.

E. 18 U.S.C. § 207 prohibits, for **one year** after leaving federal service, "senior employees" (officers above the grade of O-6 and civilian employees above the grade of GS-15) from communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:

1. The matter involves the department or agency the officer or employee served during his last year of federal service as a senior employee; and

2. The person represented by the former officer or employee seeks official action by the department or agency concerning the matter.

F. 18 U.S.C. § 207 **does not** prohibit an employee from working for any entity, but it does restrict how a former employee may work for the entity.

1. The statute does not bar behind the scenes involvement.

2. A former employee may ask questions about the status of a particular matter, request publicly available documents, or communicate factual information unrelated to an adversarial proceeding.

V. DEALING WITH CONTRACTORS.

A. General Rule. Government business shall be conducted in a manner that is above reproach, with complete impartiality, and with preferential treatment for none. FAR 3.101-1.

B. Some pre-contract contacts with industry are permissible, and in fact are encouraged where the information exchange is beneficial (e.g., necessary to learn of industry's capabilities or to keep them informed of our future needs). FAR Part 5. Some examples are:

1. Research and development. Agencies will inform industrial, educational, research, and non-profit organizations of current and future military RDT&E requirements. However, a contracting officer will supervise the release of the information. AR 70-35, para. 1-5.

2. Unsolicited proposals. Companies are encouraged to make contacts with agencies before submitting proprietary data or spending extensive effort or money on these efforts. FAR 15.604.

VI. RELEASE OF ACQUISITION INFORMATION.

A. The integrity of the acquisition process requires a high level of business security.

B. Contracting officers may make available the maximum amount of information to the public <u>except</u> information (FAR 5.401(b)):

1. On plans that would provide undue discriminatory advantage to private or personal interests.

2. Received in confidence from offerors. 18 U.S.C.§ 1905; FAR 15.503(b)(v); FAR 15.506(e).

3. Otherwise requiring protection under the Freedom of Information Act.

4. Pertaining to internal agency communications (e.g., technical reviews).

C. Information regarding unclassified long-range acquisition estimates is releasable as far in advance as practicable. FAR 5.404.

D. General limitations on release of acquisition information. FAR 14.203-2; FAR 15.201.

1. Agencies should furnish identical information to all prospective contractors.

2. Agencies should release information as nearly simultaneously as possible, and only through designated officials (i.e., the contracting officer).

3. Agencies should not give out advance information concerning future solicitations to anyone.

E. Interim DOD Directive, Release of Acquisition-Related Information. 32 C.F.R. Part 286h (1996).

1. General Policy. DOD policy is to make the maximum amount of acquisition-related information available to the general public, except information for which release is restricted.

2. Information for which release is restricted includes:

a. Information for which release is subject to statutory restrictions;

b. Classified information;

c. Contractor bid or proposal information;

d. Source selection information; and

e. Planning, programming, and budgetary information.

VII. CONCLUSION.

INFORMATION PAPER

DAJA-SC
11 December 1998

SUBJECT: Contact with DoD Contractors

1. **Purpose:** To provide guidance on discussions with contractor representatives.

2. **Facts:**

a. General Policy - Preserve competitiveness; maintain a level playing field. Be sensitive to whether a specific meeting, an action, or release of information would give a competitive advantage to a contractor. All similarly situated contractors should receive equal treatment. When you meet with a contractor, assume that you are speaking to the entire DoD contractor community.

PRACTICE TIP: *If there has been a significant exchange of information in a meeting with a contractor, you may wish to publish publicly available information to the community of interested DoD contractors.*

b. Do not make unauthorized commitments, promises purporting to bind the government, or representations that would compromise the government's position.

c. Act impartially. Do not give preferential treatment to any private party. Accordingly, do not give VIP visitor treatment to contractor representatives who visit in that capacity or who intend to discuss contractor business; *i.e.* no government vehicle rides from the airport, no all-day escort; no officially-hosted free dining.

d. "Inside" Information. Do not release "inside" information which is not otherwise available to the public (or to a relevant community of DoD contractors). This includes:

(1) Information not available to the public under the Freedom of Information Act;

(2) Information protected under the Privacy Act, Trade Secrets, and classified material;

(3) Selective release of advance procurement information or Army requirements; and,

(4) Acquisition information, such as, unopened bids, proposed costs, the Army's estimate of costs, source selection plans, price evaluations, competitive range determinations, ranking of bids, proprietary information (such as labor rates), reports of Source Selection Evaluation Boards, and other information marked: "SOURCE SELECTION INFORMATION."

PRACTICE TIP: *Avoid private discussions about the contractor's business and its relationship with the Army. Conduct meetings in your office--not at the contractor's office. Your staff members should sit in on discussions.*

e. Gifts. Small gifts are occasionally offered in meetings with contractors. Food and refreshments that are not a meal (*e.g.* coffee and donuts) may be accepted. You may also accept presentation items, such as a commemorative coin, or items worth less than $20. Consult your legal advisor when something other than a nominal gift is offered. Gifts which may not be retained personally will usually become Army property.

f. Restricted Contacts with Former DoD Officials and Retired Military Officers.

(1) Former senior DoD civilian employees (SES level V and above) and retired general officers are prohibited from attempting to influence official actions in their former department or agency for one year after their departure. (This is the one-year "cooling off" restriction.) **18 USC 207(c)**

(2) Former officers and employees are forever prohibited from representing someone in a particular matter that involved non-Federal parties, and in which they were personally and substantially involved while working for the government. **18 USC 207(a)(1)**

(3) Former officers and employees are prohibited from representing someone else for two years after departing DoD on any matter which was under their general supervisory responsibility during their last year of government service. **18 USC 207(a)(2)**

(4) Federal officials who had authority to award contacts, make payments, set overhead rates, and settle claims of more than $10 million are prohibited for a period of one year after the official action, from working for the contractor who received the payment. **41 USC 423**

PRACTICE TIP*: You should decline meetings with competing contractors once a solicitation has been released, and avoid discussing or responding to questions on matters that are being litigated. In these situations, there is a very real danger of inadvertently making unauthorized disclosures.*

3. Conclusion: Within the limits of these restrictions, you may discuss matters of mutual interest with DoD contractors. They may present capability briefings and discuss technological developments. Do not hesitate to request the assistance of the Office of The Judge Advocate General or Army General Counsel.

Mr. Novotne/DSN 425-6713
Novotah@hqda.army.mil

INFORMATION PAPER

DAJA-SC
8 August 1997

SUBJECT: Representation of Local Reuse Authorities (LRAs) by Former Army Personnel

1. Purpose: To summarize the post-employment restrictions under 18 U.S.C. § 207 for former Army personnel seeking employment with LRAs.

2. Facts:

a. Local Reuse Authorities are an integral part of the BRAC process. The LRA is responsible, among other things, for receiving the property which is being converted to civilian use.

b. 18 U.S.C. § 207 is a criminal statute. It applies to all former Federal employees, to include military officers, whether or not they are retired. It does not apply to enlisted personnel.

c. **Lifelong Ban.** Former Federal employees are forever prohibited from communicating with or appearing before a current Federal employee with the intent to influence the employee on any particular matter involving non-Federal parties in which they participated personally and substantially as a Federal official.

(1) "Particular matter" includes any government action involving non-Federal parties. A "particular matter" may consist of a contract, cooperative agreement, grant, lease, permit, license, claim, application, negotiation, lawsuit, or other transaction involving non-Federal parties.

Example: A post engineer who has negotiated with a local government about sewer services during the post's closure cannot represent the local government on that issue, but may represent the local government on other issues, such as potable water supply (as opposed to waste water). If, after the former employee leaves Federal service, the Federal government decides to contract out for sewer services, the engineer also could represent a prospective contractor in negotiations, since this is not the same "particular matter" which he previously negotiated with the local government.

(2) "Participate personally and substantially" means significant personal involvement in the matter, including directing a subordinate's participation, conducting an investigation, providing advice or making recommendations.

Example: The Director of Engineering and Housing (DEH) has been assigned to do a local market survey to determine the prevailing rates for lead paint remediation in abandoned structures. The Post Commander will use this information in negotiating with the LRA. The DEH has not participated "personally and substantially" in negotiation with the LRA. However, if the Commander asks the DEH to evaluate the LRA's proposal, his participation will be personal and substantial.

d. **Two-year Ban**. For two years after leaving Federal service, former employees are prohibited from communicating with or appearing before a current Federal employee with the intent to influence official matters involving non-Federal parties that were under the former employee's "official responsibility" during his or her last year of Federal service.

(1) "Official responsibility" applies when there is supervision or control over a subordinate's activities. It applies to anyone in a supervisor's lower echelon. It is not limited to the immediate rating chain.

(2) "Official responsibility" does not require specific knowledge of the matter. Former employees are accountable for any action that was subject to their supervisory oversight.

Example: For a period of two years after leaving Federal service, a former garrison commander is barred from acting as a representative on all particular matters involving the LRA that were being negotiated at his post during his last year of Federal service.

e. "**Behind-the-Scenes" Exception**. ***Neither the lifelong nor the 2-year ban prohibits a former Federal employee from providing "behind-the-scenes" assistance to an LRA in connection with its communications to, or appearance before, Federal employees***. Former employees may work on the same particular matter in which they participated personally and substantially as a Federal employee. 18 U.S.C. § 207 only bars oral or written communications to, or appearances before Federal employees as the LRA's representative. Depending on the circumstances even mere attendance at a meeting could constitute an appearance.

f. **Conclusion.** These questions are complex and require detailed fact-finding. The responsible Staff Judge Advocate's Office should assist in determining whether a former employee's representational activities involve the same "particular matters" with which he or she participated while serving as a Federal official.

Mr. Novotne/DSN 227-0921

Approved By:
COL RAYMOND C. RUPPERT

RETIREMENT BRIEFING

I. Pre-Separation Matters [18 USC 208]

A. Negotiating for employment is the same as buying stock in a company. Any discussion, even if tentative, is negotiating for employment.

B. If you could own stock in a company without creating a conflict with your official duties, then you can negotiate for employment. No special action required.

C. If negotiating for employment creates a conflict -

1. Disqualification. With approval of supervisor, change duties so that you have no contact with actions affecting that company, or -

2. Termination of Discussion. Immediately terminate all discussion. Don't "leave the door open."

D. Travel, Meals & Reimbursements. Travel expenses to attend job interviews may be accepted if such expenses are customarily paid to all job applicants. If you file a Financial Disclosure Report (SF 278 or 450), report these payments on that form.

E. Terminal Leave. If you plan to work during terminal leave, remember that you are still on active duty.

1. All officers and employees are prohibited from representing anyone in any matter in a U.S. forum, or in any claim against the U.S. **[18 USC 205]**

2. Commissioned officers are prohibited from holding a state or local government office, or otherwise exercising sovereign authority. **[10 USC 973]**

II. "Switching Sides" [18 USC 207]

A. Applies to all former Federal employees, whether or not retired, but does not apply to enlisted personnel.

B. You are ***forever*** prohibited from trying to influence a Federal employee on any particular matter involving non-Federal parties in which you participated personally and substantially as a Federal official.

C. For two years, you are prohibited from trying to influence a Federal employee on a matter involving non-Federal parties that was under your supervision during your last year of active duty.

III. Senior Employees (GO/SES)(1 Year "Cooling Off") **[18 USC 207]**

A. For SES, only applies to pay level V and VI.

B. During first year of retirement, may not attempt to influence any official action in the department (Army) where the last year of active duty was performed.

C. For a period of one year, may not aid, advise, or represent any foreign entity to help influence any U.S. Government entity or employee.

IV. Procurement Integrity [41 USC 423] (after 1 January 1997)

A. If you are in one of the following categories:

1. Procuring contracting officer, source selection authority, member of source selection evaluation board, or chief of financial or technical evaluation team on a contract award of $10,000,000 or more;

2. Served as a program manager, deputy program manager, or administrative contracting officer on a contract of $10,000,000 or more;

3. Personally made a decision to award a contract, subcontract, modification, task order or delivery order of $10,000,000 or more;

4. Or approved a claim or made another personal decision to make a payment of $10,000,000 or more.

B. You may not accept compensation from the contractor or party who received the payment, for a period of one year from the date when the action occurred, or the date when you last served as an approval authority. This restriction does not apply to another division or affiliate of a contractor that does not produce the same product or services.

V. Foreign Government Employment (U.S. Constitution).

A. For retired military members, prohibited without the consent of Congress.

1. **37 USC 908** allows foreign government employment with approval of the Secretary of the Army. **[AR 600-291]**

2. Address the memorandum required under AR 600-291 thru CDR, USAR PERSCOM, ATTN: ARPC-SFS-I, 9700 Page Blvd., St. Louis, MO 63132-5200.

3. This applies to corporations owned or controlled by foreign governments, but does not apply to independent foreign companies. You may also work as an independent consultant to a foreign government, so long you are careful to maintain your independence.

B. Representing a foreign government or foreign entity may require registration as a foreign agent. **[22 USC 611 and 28 CFR 5.2]** Contact Registration Unit, Criminal Division, Department of Justice, Washington, DC 20530, 202-514-1219 for further information.

VI. Miscellaneous Provisions

A. Use of Title. Retirees may use military rank in private commercial or political activities so long as retired status is clearly indicated, no appearance of DoD endorsement is created, and DoD is not otherwise discredited by the use. **[JER, para. 2-304]**

B. Wearing the uniform. Retirees may only wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social, or ceremonial occasions. **[AR 670-1, para. 29-4]**

C. General Officers/SES. Public Financial Disclosure Reports (SF-278s), termination reports must be filed within 30 days of retirement.

D. Inside Information. All former officers and employees must protect "inside information," trade secrets, classified information, and procurement sensitive information after leaving Federal service. **[18 USC 794 and 1905]**

Army Standards of Conduct Office
2200 Army Pentagon, ATTN: DAJA-SC
Washington, DC 20310-2200
703-588-6714
novotah@hqda.army.mil

XXXX-ZT (600-50)

MEMORANDUM FOR (MY SUPERVISOR)

SUBJECT: Disqualification Statement

1. This is to notify you that I have a financial interest in Company, Systems, , and .

2. Pursuant to 18 U.S.C. § 208(a), and the "Standards of Ethical Conduct," (5 C.F.R. §§ 2635.402 and .604), I am required to disqualify myself from participation in any official matter that will have a direct and predictable effect on the financial interests of the organizations listed above. This means that I cannot act directly, or through others, in deciding, approving or disapproving official matters; nor may I recommend, investigate, advise or otherwise contribute to or influence official matters which will a direct and predictable impact on these companies.

3. Accordingly, any official matters that will conflict with my interest in the companies listed above must be handled without my knowledge or participation. Any such matters should be referred someone who is not under my supervision.

I.M. FEDSLUG
Deputy Assistant Secretary for
Automated Mess Kits

DISTRIBUTION:

Immediate Superior
Immediate Subordinates
Others Who Should Know
Ethics Counselor

POST-GOVERNMENT ETHICS QUESTIONNAIRE

The purpose of this questionnaire is to give **your ethics counselor** information needed for an opinion on applicability 41 USC 423.

41 USC 423 allows you to request a written agency ethics opinion on post-government employment restrictions. However, if the information provided is incomplete or false, or if you fail to follow your ethics counselor's advice, you cannot rely on this opinion as a defense to any civil or criminal action.

Ethics advice is based upon information given at that time. As circumstances change, the advice originally given may no longer be accurate. In such cases, you may want to submit a new questionnaire for another ethics opinion.

Information must be legible. Explain acronyms when used the first time.

SUBMIT REQUEST TO THE ETHICS COUNSELOR WHERE YOU WERE LAST ASSIGNED

P R I V A C Y A C T S T A T E M E N T

AUTHORITY: PRIVACY ACT OF 1974 (5 USC 552(A)(7)), 41 USC 423, 5 C.F.R. 2635.602, AR 340-21

PRINCIPAL PURPOSE: TO ENABLE ETHICS COUNSELORS TO RENDER ADVICE TO MILITARY AND CIVILIAN EMPLOYEES LEAVING GOVERNMENT SERVICE.

ROUTINE USE: INFORMATION PROVIDED IS NOT CONFIDENTIAL. THE ETHICS COUNSELOR IS THE GOVERNMENT'S REPRESENTATIVE. ***THERE IS NO ATTORNEY/CLIENT RELATIONSHIP ESTABLISHED BETWEEN THE ETHICS COUNSELOR AND THE INDIVIDUAL***, AND THE ETHICS COUNSELOR MAY NOT ACT AS AN ATTORNEY ON BEHALF OF ANYONE SUBMITTING THIS INFORMATION. THE INFORMATION WILL BE USED FOR PROVIDING WRITTEN ETHICS ADVICE. IT WILL BE RETAINED FOR SIX YEARS AND WILL BE AVAILABLE TO ETHICS COUNSELORS, FINANCE PERSONNEL, AND OTHER APPROPRIATE PERSONNEL RESPONSIBLE FOR COMPLIANCE WITH POST-GOVERNMENT EMPLOYMENT RESTRICTIONS.

DISCLOSURE: VOLUNTARY. NO CRIMINAL, CIVIL OR OTHER PENALTIES WILL FOLLOW FROM REFUSAL TO PROVIDE REQUESTED INFORMATION. HOWEVER, FAILURE TO FULLY DISCLOSE INFORMATION REQUESTED COULD RESULT IN RECEIPT OF INCOMPLETE ADVICE OR THE INABILITY TO PROVIDE WRITTEN ETHICS ADVICE PURSUANT TO 41 USC 423.

NOTE: ***THERE IS NEITHER AN ATTORNEY-CLIENT RELATIONSHIP NOR AN ATTORNEY-CLIENT PRIVILEGE CREATED BETWEEN YOU AND THE ETHICS COUNSELOR. INFORMATION PROVIDED ON THIS FORM OR TO THE ETHICS COUNSELOR IS NEITHER CONFIDENTIAL NOR PRIVILEGED.***

I

PRIOR ETHICS ADVICE

Have you received any oral or written ethics advice from a Government Ethics Counselor, inside or outside of DoD, concerning your job search or prospective employment?

YES ____ NO ____

If "YES" Provide details.

_____

_____

_____

II

BASIC INFORMATION

1. Name _____

2. Office Phone (__)_____ Address _____

_____

_____

Home Phone (__)_____ Address_____

_____

_____

3. Address to which you want your written ethics advice sent.

Home _____ Ofc _____

Grade or Rank: _____

4. Retirement Date: _____

Terminal Leave Date: _____

5. During the last year have you filed an SF 450, "CONFIDENTIAL FINANCIAL DISCLOSURE REPORT"?

YES ____ NO ____

If "YES", for which job?

_____
_____
_____

6. Have you issued a disqualification statement, changed jobs, had your duties changed, or taken any other action to resolve a potential conflict of interest?

YES ____ NO ____

If you have issued a disqualification, Provide details.

_____
_____
_____

7. What is your current (or last) DoD assignment? **Spell Out Acronyms**

_____
_____
_____
_____

8. Attach your OER support form or job description and describe your duties, focusing on duties relating to defense contracts, acquisitions, or functions related to contract management (include names of programs and contractors involved).

_____
_____
_____
_____
_____

9. With whom are you seeking employment?

_____
_____
_____

10. What actions have you taken concerning your future employment?

_____
_____

11. What is your proposed job title and description of duties? (You may attach a job description)
_____
_____
_____
_____

12. Expected date of future employment? _____

III

QUESTIONS RELATING TO PROCUREMENT INTEGRITY, 41 USC 423

1. Since 1 January 1997, have you been assigned to the following duties, or personally taken one of the following actions, involving a contract award, payment or claim **in excess of $10,000,000**?

A. PROCURING CONTRACTING OFFICER, OR SOURCE SELECTION AUTHORITY YES ____ NO ____

B. SERVICE AS A **MEMBER** OF A SOURCE SELECTION EVALUATION BOARD, OR AS **CHIEF** OF A FINANCIAL OR TECHNICAL EVALUATION TEAM YES ____ NO ____

C. PROGRAM MANAGER, DEPUTY PROGRAM MANAGER OR ADMINISTRATIVE CONTRACTING OFFICER YES ____ NO ____

D. AWARD OF A CONTRACT, SUBCONTRACT, MODIFICATION, TASK ORDER OR DELIVERY ORDER, OR PAYMENT OF A CONTRACT CLAIM YES ____ NO ____

E. ESTABLISHING OVERHEAD OR OTHER RATES YES ____ NO ____

F. APPROVAL OF A CONTRACT PAYMENT YES ____ NO ____

2. If you answered "YES" to any of these actions, identify the contract in which you performed that function.
_____
_____

_____
_____

3. On each of those actions to which you answered "YES," identify the date when you took the action or were last involved in that process.

_____
_____
_____

REQUEST

I request a written ethics opinion based on the information I provided in this Questionnaire, and I Certify the information to be true and correct to the best of my knowledge and belief.

Signed _____ Dated _____

SUBMIT REQUEST TO THE ETHICS COUNSELOR WHERE YOU WERE LAST ASSIGNED

Standards of Conduct Office 13 August 1997

Colonel
Office of
Washington, DC 20003

Dear Colonel :

This responds to your request for advice regarding post-Government employment restrictions and is based on the information which you provided. You will retire on September 29, 1997. In your last assignment you were attached to the where you worked as the Deputy Office Director, , Office of . You were responsible for managing day-to-day bilateral relations with , as well as multi-lateral relations.

Based on the information you provided, I have determined that 41 U.S.C. § 423, the Procurement Integrity statute, does not restrict your post-government employment activities.

You are advised, however, the Procurement Integrity statute also protects <u>any</u> source selection or contractor bid or proposal information to which you had access. In addition, 18 U.S.C. §§ 793, 794 and 1905 prohibit use or disclosure of trade secrets, confidential business information and classified information. Finally, you have a continuing obligation to protect any information not available to the public that would be damaging to the United States if disclosed.

Title 18 U.S.C. § 207 prohibits you from acting in a particular matter as a Federal official and later "switching sides" by representing someone else in the <u>same matter</u>.

a. Section 207(a)(1) is a lifetime bar against attempting to influence a U.S. employee on behalf of anyone, on a <u>particular matter</u> in which you <u>participated personally and substantially</u> as a Government officer where the United States has a direct and substantial interest.

"<u>Particular matter</u>" includes any Government action involving non-Federal parties. It is not limited to contracts.

"<u>Participate personally and substantially</u>" means supporting any decision, including recommendations, investigation, or advice. <u>Personal participation</u> includes directing a subordinate.

b. Section 207(a)(2) is the same as the lifetime bar, except that it only applies to your first two years of retirement, and to matters where you did not participate personally, but which were pending under your <u>official responsibility</u> during your last year of Government service.

"<u>Official responsibility</u>" means direct supervisory authority to approve, disapprove, or otherwise direct government action. This applies to all matters that were pending under your supervision during your last year of Federal service, whether or not you were aware of their existence.

You have applied for employment with position is contingent on whether this organization is awarded a contract by the Department to provide assistance to You were not involved in this project while working at the Department

This employment does not appear to conflict with the statutes discussed above.

I hope this information is helpful. This letter, issued under the authority of 41 U.S.C. § 423 and 5 C.F.R. § 2635.602, is the advisory opinion of an agency ethics official based on the information you provided.

Sincerely,

POST-GOVERNMENT BRIEFING ("Revolving Door" Restrictions)

I. Pre-Separation Matters [18 USC 208]

A. Negotiating for employment is the same as buying stock in a company. Any discussion, even if tentative, is negotiating for employment.

B. If you could own stock in a company without creating a conflict with your official duties, then you can negotiate for employment. No special action required.

C. If negotiating for employment creates a conflict -

1. Disqualification. With approval of supervisor, change duties so that you have no contact with actions affecting that company, or -

2. Termination of Discussion. Immediately terminate all discussion. Don't "leave the door open."

D. Travel, Meals & Reimbursements. Travel expenses to attend job interviews may be accepted if such expenses are customarily paid to all job applicants. If you file a Financial Disclosure Report (SF 278 or 450), report these payments on that form.

E. Terminal Leave. If you plan to work during terminal leave, remember that you are still on active duty.

1. All officers and employees are prohibited from representing anyone in any matter in a U.S. forum, or in any claim against the U.S. **[18 USC 205]**

2. Commissioned officers are prohibited from holding a state or local government office, or otherwise exercising sovereign authority. **[10 USC 973]**

II. "Switching Sides" [18 USC 207]

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C. For two years, you are prohibited from trying to nfluence a Federal employee on a matter involving non- Federal parties that was under your supervision during your last year of active duty.

III. Senior Employees (GO/SES)(1 Year "Cooling Off") **[18 USC 207]**

A. For SES, only applies to pay level V and VI.

B. During first year of retirement, may not attempt to influence any official action in the department (Army) where the last year of active duty was performed.

C. For a period of one year, may not aid, advise, or represent any foreign entity to help influence any U.S. Government entity or employee.

IV. Procurement Integrity [41 USC 423] For Federal employees who leave the Government after 1 January 1997,

A. If you are in one of the following categories:

1. Procuring contracting officer, source selection authority, member of source selection evaluation board, or chief of financial or technical evaluation team on a contract award of $10,000,000 or more;

2. Served as a program manager, deputy program manager, or administrative contracting officer on a contract of $10,000,000 or more;

3. Personally made a decision to award a contract, subcontract, modification, task order or delivery rder of $10,000,000 or more;

4. Or approved a claim or made another personal decision to make a payment of $10,000,000 or more.

B. You may not accept compensation from the contractor or party who received the payment, for a period of one year from the date when the action occurred, or the date when you last served as an approval authority. This restriction does not apply to another division or affiliate of a contractor that does not produce the same product or services.

V. Foreign Government Employment (U.S. Constitution).

A. For retired military members, prohibited without the consent of Congress.

1. **37 USC 908** allows foreign government employment with approval of the Secretary of the Army. **[AR 600-291]**

2. Address the memorandum required under AR 600-291 thru CDR, APERCEN, ATTN: ARPC-SFR-SC, 9700 Page Blvd., St. Louis, MO 63132-5200.

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B. Representing a foreign government or foreign entity may require registration as a foreign agent. **[22 USC 611 and 28 CFR 5.2]** Contact Registration Unit, Criminal Division, Department of Justice, Washington, DC 20530, 202-514-1219 for further information.

VI. Miscellaneous Provisions

A. Use of Title. Retirees may use military rank in private commercial or political activities so long as retired status is clearly indicated, no appearance of DoD endorsement is created, and DoD is not otherwise discredited by the use. **[JER, para. 2-304]**

B. Wearing the uniform. Retirees may only wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social, or ceremonial occasions. **[AR 670-1, para. 29-4]**

C. General Officers/SES. Public Financial Disclosure Reports (SF-278s), termination reports must be filed within 30 days of retirement.

D. Inside Information. All former officers and employees must protect "inside information," trade secrets, classified information, and procurement sensitive information after leaving Federal service. **[18 USC 794 and 1905]**

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Washington, DC 20310-2200
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5Jun97 Novotne

Twenty Basic Rules for Personnel Leaving DOD

These "20 Basic Rules" are a revision of the "21 Basic Rules" published last year by Alan E. Sommerfeld, Counsel, Joint National Test Facility, Ballistic Missile Defense Organization. The new rules reflect the changes made by implementation of the 1996 amendments to the Procurement Integrity Act, effective January 1, 1997.

(The following 20 rules assume you are currently working for DOD and plan to seek employment with a non-Federal entity. Many of the rules were derived from the "200 Rules on Outside Income, Job Hunting and Post-Government Employment" by Major Mark Stone, a US Air Force Judge Advocate. The categories of personnel to whom each rule applies and its statutory/regulatory authority appear at the end of each rule. To ease your transition into the private sector, the attachments provide sample formats for accomplishing many of the necessary actions. The rules are current as of 1 January 1997. If you retired/separated before 1 January 1997, previous Procurement Integrity rules may apply to your situation. Check with your Ethics Counselor for advice on the old rules or on any of the rules listed below which need amplification.)

Restrictions on Seeking Employment

Rule 1: You are prohibited from *taking action* in your official capacity concerning a person or company that has a financial interest in a matter in which you are participating while you are negotiating with that person or company. The financial interests of your spouse, your minor child, or your partner may also trigger this prohibition. [Title 18, United States Code (U.S.C.), Section 208(a) - Officers and Civilians] [Joint Ethics Regulation (JER), DOD 5500.7-R, paragraphs 8-200 to 8-201 - Officers, Enlisted and Civilians]

Rule 2: While you are participating in a matter which has a direct and predictable effect on the financial interest of a person or company, you are prohibited from *seeking* employment (including pre-negotiation activity) with that person or company. [5 Code of Federal Regulations (C.F.R.) 2635.601 thru 2635.604; JER 2-204c & d - Officers, Enlisted and Civilians]

Comment: The first rule is statutory; the second is regulatory and expands the prohibition to cover any form of seeking employment. If you want to seek a job with a specific company, you must determine if any official action you could take would have a direct and predictable effect on the person or company's financial interests. If you are participating in a matter affecting the company, you must provide a *written* memorandum to your supervisor stating that you are disqualified from future participation in the matter. (See Atch 1 for sample 208 disqualification memorandum.) Written disqualification is required before sending resumes or engaging in "informal" discussions with specific companies. Disqualification is not required before discussing opportunities with a "headhunter" as long as the identity of the potential employer(s) is not disclosed to you. If you are not participating in any matters affecting the company, no disqualification is required.

Rule 3: If you are participating personally and substantially in a procurement for a contract in excess of the simplified acquisition threshold (currently $100,000; $200,000 for contingency operations)**, you must promptly report in writing *any contact* with a bidder/offeror in that procurement concerning non-Federal employment and you must either reject the possible employment** (Atch 2) **or disqualify yourself from further participation in the procurement** (Atch 3)**.** Procurement Integrity [41 U.S.C. 423(c)**;** FAR 3.104-4(c) and 3.104-6; JER 8-300 and 8-301 - Officers, Enlisted and Civilians]

Comment: If you are participating personally and substantially in drafting a solicitation (including the Statement of Work/Specification) or selecting a contractor in a contract that has not yet been awarded, you may not try to get a job with any company that is competing or is reasonably likely to compete for the contract until the contract is awarded, until the procurement is canceled, or until you have disqualified yourself from the procurement. Check with your Ethics Counselor concerning the meaning of personal and substantial participation and any changes in the simplified acquisition thresholds. See Rule 14 for the effect of past participation in the procurement on your ability to work for the bidder/offeror.

Rule 4: You are prohibited from communicating inside information to prospective employers. [5 C.F.R. 2635.703; JER 8-400b - Officers, Enlisted and Civilians] **This includes the**

unauthorized disclosing of any contractor bid or proposal information or source selection information. [41 U.S.C. 423; FAR 3.104-4 and 3.104-5 - Officers, Enlisted and Civilians]

Rule 5: Once you have a job, you may not participate in any matter that affects the financial interests of the company with whom you have the employment arrangement. [18 U.S.C. 208(a) - Officers and Civilians] [5 C.F.R. 2635.606; JER 5-300 thru 5-303 - Officers, Enlisted and Civilian]

Rule 6: You may not use Government resources (except for authorized transition assistance benefits) in job hunting. [5 C.F.R. 2635.704 and JER 2-301 (equipment and telephones); 5 C.F.R. 2635.705 (time); 5 C.F.R. 2635.203(b)(7) (frequent flyer miles); 31 U.S.C. 1344 (vehicles); DOD Manual 4525.8 (postage); and 10 U.S.C. 892 (credit cards) - Officers, Enlisted and Civilians]

Comment: Some minor relaxation of this rule may occur in the case of a Federal Government downsizing, e.g. JER 2-301a(2) permits use of Government communications systems (telephone and computers) for job-searching if done on personal time, does not burden the communications system, etc. In addition, certain military members may use permissive TDY for seeking employment and finding new residences.

Rule 7: Even though a prospective employer is a Government contractor or other "prohibited source," you may accept meals, lodging, transportation and other benefits normally provided by the prospective employer in connection with bona fide employment discussions. [5 C.F.R. 2635.204(e)(3) - Officers, Enlisted and Civilians]

Comment: To avoid a violation of the rules prohibiting your acceptance of gratuities from a prohibited source, make certain the prospective employer provides the same job interview travel benefits to all potential candidates for the same or similar positions.

Rule 8: You may obtain a letter of recommendation *from other Government employees* on official letterhead if (1) the letter is based on the employee's personal knowledge of your ability or character and (2) either (a) the employee has dealt with you in the course of his/her Government employment or (b) you are applying for Federal employment. [5 C.F.R. 2635.702(b) - Officers, Enlisted and Civilians] **You may obtain a letter of recommendation *from a DOD contractor employee* as long as you do not use your Government position to coerce or induce the person to write the letter.** [5 C.F.R. 2635.702(a) - Officers, Enlisted and Civilians]

Rule 9: While still employed by DOD, you are prohibited from acting as a representative for anyone, including your new employer, before any Federal agency. [18 U.S.C. 205; JER 5-403 - Officers and Civilians]

Rule 10: While on terminal leave, you remain a Government employee and all of the above rules still apply.

Comment: Most Agencies/Agency Designees have implemented the requirement in JER 2-303 which requires you to file a request for off-duty employment before working during terminal leave (AF Form 3902 or equivalent/Atch 2).

<u>Restrictions on Post-Government Employment</u>

Rule 11: You face a lifetime ban on attempting to influence Federal officials (except Members of Congress and their legislative staffs) on behalf of someone regarding a matter on which you participated personally and substantially as a Government employee. [18 U.S.C. 207(a)(1); JER 9-300 and 9-400 - Officers and Civilians]

Comment: A "matter" for most Government employees means a particular Government contract. The lifetime ban therefore normally exists only as long as the specific contract in which the employee participated is still in existence.

Rule 12: You face a 2-year ban on attempting to influence Federal officials (except Members of Congress and their legislative staffs) on behalf of someone regarding a matter that was under your official responsibility during your last year of Government service. [18 U.S.C. 207(a)(2); JER 9-300 and 9-400 - Officers and Civilians]

Comment: A matter is under your "official responsibility" if you have the power, either directly or through a subordinate, to approve, disapprove or otherwise direct a Government action.

Rule 13: You face a 1-year ban on representing, aiding, or advising "the other side" (i.e., any other person except the United States) in trade or treaty negotiations in which you participated personally and substantially during your last year of government service. [18 U.S.C. 207(b) - Officers and Civilians]

Rule 14: You are prohibited from accepting compensation from a contractor for a period of 1 year after you:

a. Served as a procuring contracting officer, source selection authority, member of a source selection evaluation board, or chief of a financial or technical team in a procurement for a contract in excess of $10M;

b. Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of $10M awarded to that contractor;

c. Personally made a decision to award a contract, a subcontract, a modification of a contract or subcontract, a task order, or a delivery order, in excess of $10M;

d. Personally made a decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of $10M;

e. Personally made a decision to approve issuance of a contract payment or payments in excess of $10M to that contractor; or

f. Personally made a decision to pay or settle a claim in excess of $10M with that contractor.

HOWEVER, the above rule does not apply to compensation from any division or affiliate of the contractor that does not produce the same or similar products or services as the entity for which you took any of the actions listed above. Procurement Integrity [41 U.S.C. 423(d); FAR 3.104-4(d); JER 9-600 - Officers, Enlisted and Civilians]

Comment: You can still go to work for the contractor if you work for a division or affiliate that does not produce similar products or services. Or you can wait for the 1-year period to expire and go to work for the contractor in any capacity. Rules for calculating the 1-year period of prohibition are at FAR 3.104-8. Check with your Ethic Counselor to determine which prohibitions may apply to you and how to calculate the waiting period for those activities. You may request a procurement integrity ethics advisory opinion if you do not know whether you would be precluded by 41 U.S.C. 423(d) from accepting compensation *from a particular contractor*. (Atch 5).

Rule 15: You are prohibited from converting to your use or the use of another any government records or thing of value. This includes "inside information" obtained while in government service. [18 U.S.C. 641 - Officers, Enlisted and Civilians] **The specific prohibition against disclosing contractor bid or proposal information or source selection information also continues after you leave Federal employment.** [41 U.S.C. 423; FAR 3.104-4(a) and 3.104-5 - Officers, Enlisted and Civilians]

Comment: Inside information is any information not available to the general public which you obtained by reason of your official DOD duties.

<u>Rules Relating to Work for Foreign Employers</u>

Rule 16: You may not work for a foreign government or for a corporation or institution owned or controlled by a foreign government *without prior approval*. [37 U.S.C. 908; JER 9-701 - Retired Officers and Retired Enlisted]

Rule 17: You must register as a agent of a foreign principal if you wish to represent certain foreign activities in the U.S. Foreign Agents Registration Act [22 U.S.C. 611-621; 28 C.F.R. Part 5; JER 9-701c - Officers, Enlisted and Civilians]

<u>Additional Rules for Senior Officials</u>

Rule 18: You must file a final Standard Form 278 within 30 days after, but not earlier than 15 days before, the date of termination of your Federal employment (i.e. the end of your terminal leave). [5 U.S.C. App. 6, §§ 101-111; JER 7-200 to 7-209 - O-7 & above, SES employees]

Rule 19: You are prohibited from attempting to influence your former DOD component (i.e. Air Force, Army, Navy, DLA, etc.) regarding any official action for a period of 1 year (frequently called the "1-year no contact" rule). If your last job is at the DOD level, the restriction applies to attempts to influence DOD level organizations (e.g. defense agencies)

rather than your component. [18 U.S.C. 207(c); 5 C.F.R. Part 2641; JER 9-300 - O-7 & above, SES-5 & above]

Rule 20: You are prohibited, within 1 year of leaving your government position, from representing, aiding or advising a foreign entity with the intent to influence a US government decision. [18 U.S.C. 207(f); JER 9-300 - O-7 & above, and SES-5 and above]

Remember to seek advice from your Ethics Counselor. These rules highlight the primary areas of interest to most departing personnel; however, any areas of concern should be discussed in detail with your Ethics Counselor.

SAMPLE 208 DISQUALIFICATION MEMORANDUM

(Date)

MEMORANDUM FOR (Your Supervisor)

FROM: (Your Name/Office Symbol)

SUBJECT: Disqualification - Employment Discussions

1. My (approved) (contemplated) date of (retirement) (separation) is _____. I expect to commence terminal leave on _____. I contemplate entering into employment discussions with certain contractors prior to my (retirement) (separation). Pursuant to 18 U.S.C. 208(a) and 5 CFR 2635.604, I hereby submit the following notice of disqualification.

2. Both the Joint Ethics Regulation (DOD 5500.7-R) and the Standards of Ethical Conduct for the Executive Branch (5 CFR 2635) require me to conduct my personal affairs in a manner which upholds the public's trust and confidence in our Government workforce. Since 18 U.S.C. 208(a) requires me to disqualify myself from participation in any particular matter that will have a direct an predictable effect on the financial interests of a person or organization with whom I am negotiating or have any arrangement concerning prospective employment, I hereby give formal notice that I plan to conduct employment discussions with the companies named below. Until further notice, I am requesting disqualification from taking any official action that might have an impact on them.

(Firms)

3. I will accomplish this disqualification by avoiding any involvement in matters affecting these companies. In the event that any matter brought to me for action may have a direct or predictable impact upon these companies, I will immediately inform you and make arrangements to insure that I am not involved.

_____

(Your Signature Block)

cc:

(your section)
20 Rules - Attachment 2

SAMPLE PROCUREMENT INTEGRITY CONTACT NOTICE AND REJECTION OF EMPLOYMENT

(date)

MEMORANDUM FOR (Your Supervisor)
(Your Ethics Counselor)

FROM: (Your Name)

SUBJECT: Notice of Non-Federal Employment Contact and Rejection of Employment

1. I (was contacted by/contacted) _____ concerning possible future employment. In accordance with Title 41, United States Code, Section 423(c) and Federal Acquisition Regulation (FAR) 3.104-4(c), I hereby provide written notice of this contact.

2. The firm has an interest in our agency's procurement of _____ and I am an agency official participating as _____ in that procurement.

3. I reject the possibility of non-Federal employment with this firm. I wish to continue in my role as an agency official participating in the procurement.

_____
(Your Signature Block)

NOTE: Subject notice is required promptly after any contact concerning possible non-Federal employment with a person or firm bidding on a procurement in excess of the simplified acquisition threshold.

SAMPLE PROCUREMENT INTEGRITY CONTACT NOTICE AND DISQUALIFICATION MEMORANDUM

(date)

MEMORANDUM FOR (Your Supervisor)
(Your Ethics Counselor)
(Head of Contracting Activity or Designee)

FROM: (Your Name)

SUBJECT: Notice of Non-Federal Employment Contact and Disqualification for Purposes of Employment Discussions

1. I (was contacted by/contacted) _____ concerning possible future employment. In accordance with Title 41, United States Code, Section 423(c) and Federal Acquisition Regulation (FAR) 3.104-4(c), I hereby provide written notice of this contact.

2. I wish to engage in employment discussions with this firm. In accordance with FAR 3.104-4(c)(2)(ii), I am disqualifying myself from further participation in the following acquisition.

a. Name of procurement and solicitation number:
_____

b. To date, I have had the following involvement in this procurement:
_____ _____ This involvement occurred from _____to _____.

c. The firm is a bidder/offeror with the following interest in the procurement:
_____
_____
_____.

3. I acknowledge the agency's right to take appropriate administrative action under Title 5, Code of Federal Regulations, Section 2635.604(d) if my disqualification substantially interferes with my ability to perform my assigned duties. Nevertheless, in order to avoid any possibility of a conflict of interest and to permit an orderly transition of responsibilities, I request that I be excluded from, and relieved of, all matters and responsibilities regarding the _____ procurement.

4. I will conduct all employment discussions while on leave or during off-duty time.

_____

(Your Signature Block)

cc:
Contracting Officer
Source Selection Authority

NOTE: Your supervisor, in consultation with other Government officials, may determine that your disqualification precludes you from performing duties that are essential to your continued Federal employment. You should carefully discuss your situation with your supervisor and your Ethics Counselor before submitting a disqualification memorandum.

Insert local "Off-Duty Employment" Request and Approval Form as Attachment 4

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D.C. 20301-1600

06 MAR 1996

MEMORANDUM FOR SENIOR OSD EMPLOYEES

SUBJECT: Rules on Seeking Future Employment

We have had several inquiries in recent months concerning rules on seeking future employment. While your specific questions should be addressed to the Standards of Conduct Office (SOCO), I thought it would be useful to give you a general sense of the 0 responsibilities you have when discussing potential new jobs or business opportunities.

Seeking employment that will begin after you terminate your Government service will trigger certain standards of conduct rules. This memorandum highlights these rules and explains how they can affect your performance of DoD duties.

Generally, when you are seeking employment you must disqualify yourself from participating in any direct or significant way in a particular matter that could affect the finances of any prospective employer. This is done by written memorandum addressed to your supervisor or superior, with a copy to me as your Designated Agency Ethics Official.

"Seeking" employment begins early in the job-hunting process. Even unsolicited communications from you regarding possible employment can be enough to invoke the restrictions. For example, you must disqualify yourself in writing from participating in matters involving any entities to which you send your resume if the performance of your official duties could affect those entities.

Although the arrangement you are considering may not be characterized as prospective "employment, n you must also disqualify yourself from making decisions affecting the financial interest of anyone with whom you have a "covered relationship. n This includes any entity you "seek to do business with," if a reasonable person with all the facts would question your impartiality. For example, if you put in a bid to perform services for another company, you would have to disqualify yourself from official decision-making that could affect the financial interest of that company.

Any disqualification you write remains in effect for two months if there is no response to your resume from the entity. Otherwise, your disqualification remains in effect for as long as your decisions could effect the financial interests of the entity with which you seek employment or a business relationship. If a "headhunter" discusses possible employment with you but does not reveal the potential

employer, then you do not have to disqualify yourself. If you immediately and unequivocally reject the employment possibilities initiated by someone else, you do not have to disqualify yourself. Very rarely, application of the rules may be waived for you if specific determinations are made in accordance with the statutes and regulations. You may discuss the possibility of a waiver with any ethics counselor in the SOC0.

Individuals who participated personally and substantially in the conduct of a procurement ("procurement officials") under the Procurement Integrity Act, may not knowingly, directly or indirectly, solicit, accept or discuss future employment or business opportunities from a competing contractor during the conduct of a procurement. There is no disqualification procedure to allow employment discussions to take place. However, there is a procedure for procurement officials to request "recusal" from the head of their contracting agency. Employment discussions may not begin unless the recusal is granted. Recusal is not available to procurement officials who participated personally and substantially in the evaluation of bids or proposals, the selection of sources, or the conduct of the negotiations.

In addition to the rules described above, there are several rules regarding your post-Government service activities. The "post-employment" rules that apply to you vary depending on your grade and DoD duties.

I encourage you to schedule a personal post-employment briefing with SOC0 before you begin seeking employment. A SOC0 attorney will explain how the rules apply specifically to you. You may schedule a post-employment briefing by calling SOC0 at (703) 695-3422. SOC0 attorneys are also available to assist you with any other questions you may have regarding standards of conduct.

Judith A. Miller

CONTACTS BY FORMER SENIOR OFFICERS OR EMPLOYEES SEEKING INFORMATION OR OTHER ASSISTANCE

Mr. Michael J. Wentink
Standards of Conduct Office
Office of The Judge Advocate General

(U)

Periodically, Army employees seek the advice of their Ethics Counselors because a former officer or employee has contacted them and is seeking information or other assistance. Many times, this contact comes from a former senior Army official who may even have been the employee's commander or supervisor before he or she left Government service. As a result, they feel somewhat compelled or even pressured to respond as if that senior official was still in Government service.

This article is written to explain to you the ethical issues and parameters of such contacts.

You or any other agency employees who are contacted by a former officer or employee, such as a retired General Officer, for information or other assistance, need to ask and answer two questions:

(1) Does this contact violate any of the post-Government employment restrictions?

(2) Is it appropriate to provide the information or other assistance as requested?

Part I - Basic Restrictions on Contacts

Your first concern should be whether the former official should be making the contact at all. There are criminal restrictions on certain types of contacts by former Government personnel. The most relevant are as follows:

(1) For one year after leaving Government service, all former General Officers, members of the Senior Executive Service (Levels V and VI), and other former senior officials are prohibited from making any contact with or appearance before any official of the Government Agency in which they served in their last year, to attempt to influence any official action on behalf of someone else. If the senior official was paid at Level I of the Executive Schedule, the restriction is even broader.

(2) All former officers and employees, regardless of their rank, are prohibited forever from "switching sides" and representing someone else to attempt to influence official Government action concerning any particular matter involving a specific party in which they participated personally and substantially as a Government officer or employee. The prohibition lasts for only two years if they did not participate in this particular matter, but they were supervising the action, *i.e.*, it was under their official responsibility.

(3) In addition, most senior appointees have taken a pledge not to lobby any officer or employee of their agency for five years after they leave Government service.

Not all contacts with Army officials will be criminal or violate the pledge, not even those by a former senior Army official during his first year after leaving Army service. For the contact to be improper, representation of someone (*e.g.* contractor, consultant, labor union, professional association, or some other private organization) is required, along with an attempt to influence an official Army action.

A former officer or employee contacting you to merely seek information, even information that relates to a particular matter with which he/she was involved as an Army officer or employee, might not violate the strict letter of the law. However, you might want to consider that "discretion is oft-times the better part of valor" and discourage such contacts to avoid inappropriate appearances. Contacts like these, especially those by former senior officers and employees during their first year after leaving the Government, could result in embarrassment or worse, such as Inspector General or criminal investigations, contract protests or suspension and debarment actions, and other litigation. The closer to the "line," the more likely that there will be unwanted issues.

Because of this, ethics attorneys routinely advise former senior personnel, for the first year after leaving the Army and government service, not to attend symposia and similar gatherings where active duty Army personnel are sure to congregate. We also suggest that they generally avoid most other contacts with Army personnel during this first year; but, if they must, they need to ensure that the circumstances that make the contact legally correct are clear. Some legal contacts are: purely social

activities; dealings to help conclude an official matter that may have been left hanging upon departure; or an overture to suggest that the former senior employee, in his or her personal capacity, be put on contract (here, the former employee representing him or herself, not someone else).

Part II - Contacts Seeking Information

One value of former Army officials to their new employers is their knowledge of the Army: its systems and processes, its personnel, and how to obtain and interpret information. However, former Government officials are required to protect and not exploit classified, proprietary, contractor bid or proposal, and other "inside information" (*i.e.*, information obtained as part of his Government position which the Army would not release to the public under the Freedom of Information Act (FOIA)). Beyond that, they are free to market and use this valued experience for their own benefit and that of their new employers.

However, one of the capabilities that former Army officials may not, or *should* not, attempt to market to their new employers is ***access***! As a practical matter, retired senior officers or former officials certainly do have access to former colleagues and offices. As retired officers, they have access to military installations and organizations. Retired General Officers have even more access to current officials and information, even briefings, so that they are prepared to work with and assist the Army in the event of an emergency. Notwithstanding this legitimate access, former Army officials may not use, exploit or market this access to their civilian employer.

What if they do and they use their former positions to gain access to current Army officials and information that would not otherwise have been available to the public? Unless they do something illegal, such as violating the procurement integrity law, they are not subject to personal sanction. However, the current Army officials they approach and from whom they receive preferential treatment certainly are. The former Government employee puts the current employee at risk of being disciplined. In some cases, the result can be litigation that delays the agency action and where the only winners are the lawyers.

Army officials' exposure for giving preferential treatment by providing information to former officials include the following possible violations:

- Not adhering to basic obligations of public service as set out in Executive Order 12674.

- Use of public office for the private gain of friends or others with whom the employee is affiliated, or inducing others, such as subordinates, to provide some benefit to persons with whom the official is affiliated in a private capacity.

- Use of nonpublic information to further someone else's private interest, whether through advice or recommendation, or by knowing unauthorized disclosure.

- Unauthorized release of information protected by the Procurement Integrity law.

When a former officer or employee wishes to meet with you or asks you for information, it is your responsibility to ensure that honoring the request will not violate law or regulation. In addition, you should also ensure that those who work for you, especially those who might be intimidated by a request, which sounds like a demand, from a former high-ranking official, understand that it is not only permissible, but expected of them, to question the validity of responding to the request if they have any doubt. They should be encouraged to seek the advice of their supervisor, commander and Ethics Counselor.

Part III - "OK" & NOT "OK" Requests for Information

Here are some examples of **"OK"** requests for information and **"NOT OK"** requests for information. We assume that none of the post-Government employment restrictions apply that would "criminalize" the contact with you in the first instance.

- **"OK" Request.** A retired officer contacts the Standards of Conduct Office to determine the ethics implications of a private organization's proposal to invite current active duty officers to participate in a fundraising effort in support of an Army museum renovation. Any contacts to obtain ethics information and advice are proper.

• **NOT "OK".** After being advised of the ethics implications of active duty officers participating in his organization's fundraising effort in support of an Army museum, the retired officer requests research, analysis and an opinion concerning how the Army authorizes and establishes museums on its installations. Although the retired General was entitled to assistance with the ethics issues, Government resources may not be used to provide him and his organization legal advice concerning Army rules and policies concerning the operation of its museums.

• **"OK" Request.** A retired officer contacts a program manager for a briefing on his program to assist the retired officer in performing a study and writing the report that the Army has contracted with his employer to do. This is a perfectly reasonable and routine request that we would honor in the normal course of business.

• **NOT "OK".** The retired officer requests the same briefing so that he can better understand the program as he helps his employer put together its proposal in response to the Army's request for proposals.

• **"OK" Request.** A former senior employee, thirteen months after retirement, contacts an Army employee, a contracting officer who was one of her subordinates when she worked for the Army, and requests a meeting to try and resolve issues between her new employer and the Army concerning contract disputes that arose after she left her position. This contact involves dialogue and an exchange of information that would and should occur in the normal course of business. And the contracting

officer needs to treat her fairly: no better and no worse because of the former employee's senior position with the Army.

- **NOT "OK".** The former senior employee attempts to circumvent the system and makes contacts with other employees to engender inappropriate or accidental disclosures of information, or to bring pressure to bear on the contracting officer. That is not to say that, as an executive in her new company, she cannot attempt to have the issues elevated within the appropriate channels in the Army for discussion and resolution. But, it would not be proper for her to attempt to have high-level Army officials bring pressure on the contracting officer to decide in her favor.

- **"OK" Request.** A retired senior officer contacts his former deputy to obtain information to brief the Chief of Staff, Army, (CSA) on an issue that arose after he retired on which the CSA requested his input. It would even be **"OK"** if it related to a matter that he was involved in prior to his retirement because there is no attempt to influence official action on behalf of someone else. It would even be **"OK"** if the retired officer was now employed by an Army contractor; however, now the appearances might be such that "discretion is the better part of valor" and it would be better if the meeting did not take place.

In summary, providing information or assistance is appropriate if, at the time of the request, you would readily release this information to any other member of the public, or there is some other official Army reason that the former official is entitled to the information. It is **not** appropriate to release

information or provide assistance if the only reason is that the requester is a former colleague or senior official (the operative term here is "former"). Even if it is appropriate to release the information, it is not appropriate to provide an analysis, create additional information, or do projections if you would not do the same for others; the requester may have been entitled to your research and analysis as his or her former subordinate or colleague, but not just because he or she is a former senior officer or employee. In addition to the various possible violations of law and regulation, such favoritism creates terrible appearances and impugns the integrity of Army operations.

When you receive a contact and request for official information or other action from a former Army official, if you have any doubt as to the appropriateness of the contact or how you should respond, you should seek the advice of your Ethics Counselor.

Standards of Conduct Office August 28, 1998

MEMORANDUM FOR MEMBERS OF THE DoD ETHICS COMMUNITY

SUBJECT: Guidance on Application of the Procurement Integrity Law and Regulation

This memorandum provides guidance on applying the Procurement Integrity restrictions to issues that may arise as you provide advice to your clients. The purpose of this guidance is to foster uniformity of interpretation and application. Remember, however, that even though a procurement integrity restriction may not apply to a given situation, 18 U.S.C. §§ 207 and 208 may apply. The Procurement Integrity Act (the Act), 41 U.S.C. § 423, was revised by Section 4304 of the National Defense Authorization Act for Fiscal Year 1996. Pursuant to implementing regulations published on January 2, 1997, 61 F.R. 226-233, revisions to the Act became effective January 1, 1997.

The Act and its amendments regulate the conduct of Federal employees who are involved in procurements and the administration of contracts. Employees involved in procurements over $100,000 must report contacts with bidders or offerors regarding future employment to their supervisors and Ethic Counselors and must disqualify themselves from further participation if they do not immediately reject the contact. Certain employees who are involved in procurements or the administration of contracts, either of which is valued at $10 million or greater, are prohibited from working for the contractor for a period of one year following their involvement.

In early 1997, the Procurement Integrity Tiger Team (PITT) was formed to propose guidance on interpretation and application of the revised Act for dissemination within the Department of Defense (DoD), and to share information and lessons among the DoD ethics community. The Team, chaired by the DoD Standards of Conduct Office (SOCO), has representatives from the Department of Army SOCO (Office of the Judge Advocate General of the Army), the Department of Navy Office of General Counsel, the Department of Air Force Office of General Counsel and Office of the Judge Advocate General, the Defense Logistics Agency Office of General Counsel, and the National Security Agency Office of General Counsel. The Team also had the assistance of various procurement experts from DoD and the Military Departments.

1. What do we do with the term "procurement official?"

The simple answer is to avoid it. The term is not mentioned in the revised statute or new regulation; instead, the Act and regulation focus on other position descriptions, such as Program Manager, Source Selection Authority, and Administrative Contracting Officer.

2. For program managers, deputy program managers, and administrative contracting officers, to what contractors does the compensation ban extend?

The compensation ban extends only to the prime contractor.

For example, after leaving DoD, a former Program Manager of ABC program may work for a subcontractor on the ABC program, even though he or she dealt with the subcontractor in the

role of program manager. However, if in your opinion, a subcontract is a sham or a vehicle established to provide services by individuals for the prime contractor on the ABC program, compensation would be considered "indirect compensation" from the prime, which is restricted by the regulation. (48 C.F.R. §§ 3.104-4(d) and 3.104-3).

3. Under 48 C.F.R. § 3.104-4(d)(2), a former official is not prohibited from accepting compensation "from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract."

A. How do we determine what are the "same or similar products or services?"

The answer to this question is extremely fact dependent. As concrete situations are decided, we will issue guidance to provide examples in this area. In the meantime, we recommend that Ethics Counselors use the following standard: Employees must convince Ethics Counselors that a product or service is "dissimilar enough." For example, the Team recommends that advertising a particular product is the service, not advertising in general. Therefore, advertising for recruitment could be considered "dissimilar enough" from advertising the sale of used cars, so that former employees could accept compensation. It is not enough that a division is on the commercial, as opposed to government, side of the contractor's business.

There is no exception in the Act or regulation regarding the quantity of the service or product. Therefore, the fact that a particular division's workload is only 1% of the "same or similar product or service" is irrelevant. If that division produces any amount of the product, it would be included in the compensation ban.

B. What is a division?

This is also extremely fact-dependent. In the new world of corporate mergers and reorganizations, you will have to examine the facts and circumstances to decide whether the corporate unit may be considered a division. The unit may be called a "local area" or a "Business Component," yet be equivalent to a division and function as one. On the other hand, just because something is called a division does not mean that it is a division for purposes of the regulation. Also, some companies may not have divisions.

C. How do the words "entity of the contractor that is responsible for the contract" influence the determination?

The PITT has not yet reached a consensus. The issue concerns a division that does not produce a product that is the "same or similar" to products in the DoD program, but does produce a product that is also produced by the division "responsible for the contract," even though it is unrelated to the program. Another part of the question is the interpretation of "entity of the contractor." If it is interpreted as something other than "division," the "entity" producing the similar product that is unrelated to the program may be an important fact. If you see any of these issues in your practice, please contact one of the organizations listed in the preamble to this guidance so that the PITT may consider specific, actual fact situations.

4. When team awards are made, to whom does the compensation ban extend?

It will depend on the legal structure of the team -- for example, whether the team is a prime/sub contractor arrangement or a joint venture. When a team award designates one prime contractor, with the others in the team as subcontractors or not addressed, the employment ban extends only to the named prime contractor. If a joint venture is awarded the contract, every party to the venture is awarded the contract. The compensation ban extends to each party of the joint venture.

5. Do employees need to report employment contacts under the Procurement Integrity Act if the procurement is sole source?

Although employees do not have to report these employment contacts under the Act (because reports are required only if employees are personally and substantially involved in competitive procurements, and sole source procurements are not competitive), they nevertheless may be disqualified from any further participation under 18 U.S.C. § 208 and 5 C.F.R. § 2635.604. Under section 2-204.c. of the Joint Ethics Regulation (JER), DoD 5500.7-R, employees must submit a written notice of disqualification. Further, employees are advised to inform their supervisor and seek the guidance of their Ethics Counselor as soon as possible. If a decision on the acquisition strategy hasn't been made, assume that a procurement is competitive and that a report would be required.

6. Does the right of first refusal granted to A-76 government employees constitute seeking employment?

In procurements conducted under OMB Circular A-76, the Federal Acquisition Regulation requires a clause in the solicitation and the contract that gives government employees who are adversely affected by the award of the contract a right of first refusal for employment under the contract. This right of first refusal, standing alone, is not an employment contact for the purposes of 48 C.F.R. § 3-104-4(c).

7. What is the date of selection?

Section 48 C.F.R. § 3.104-8 calculates the period of prohibition from receiving compensation. For employees who serve in a covered position on the date of selection, but not the date of award of the contract, the prohibition begins on the date of selection. At some point after the source selection panel's recommendation to the Source Selection Authority (SSA), a decision-maker awards the contract. In some cases, especially where the Procuring Contracting Officer (PCO) and the SSA are the same person, the award decision may also be the selection decision. Where it is anticipated that the selection and award decisions will coincide, we recommend that evaluation board member appointment documents state that members serve until the date of award, thus eliminating the difficulty of trying to determine a separate date of selection for those employees who are still in Federal service on the date of award, but are no longer working in a covered position.

In other cases, there is a clear demarcation between the selection and award decisions -- for

example, when the SSA records the selection decision in a decision memorandum and award is made later by the PCO. In addition, there may be a gap of several days or weeks between the selection and award decisions -- *e.g.*, due to the PCO waiting for receipt of funding for the contract or waiting for authorization from the Milestone Decision Authority for the overall program to proceed into the next program phase. In these cases, there should be no difficulty in determining the dates of the selection and award decisions. Moreover, in these cases, it may be considered unfair to extend the evaluation board members' service until the date of award and thereby delay the start of the 1 year compensation ban for them.

8. What is a contact regarding possible non-Federal employment for agency officials participating personally and substantially in an agency procurement, defined at 48 C.F.R. § 3-104-3?

Under 48 C.F.R.§ 3.104-4(c), when a contact is made, 2 actions must be taken: prompt reporting of the contact in writing and either rejection of the offer or disqualification from participation. To determine when a contact is made, the regulations at 5 C.F.R. § 2635.601, *et seq.*, should be consulted. There is no contact under the Procurement Integrity provisions if the employee is not "seeking employment" under 5 C.F.R. § 2635.601, *et seq.* For example, under those regulations, requesting a job application is not considered "seeking employment," so there would be no contact with the recipient of the request for purposes of the Procurement Integrity Act. However, if the employee then submits the application, he or she must then report the contact and disqualify himself from further participation, even if he is a "key" employee.

9. How should government employees on transition or annual leave prior to retirement be handled?

The prohibitions in 48 C.F.R § 3.104-4(d) apply to former officials. Technically, military members on transition leave, or civilian employees on annual leave prior to retirement, could accept compensation from an entity from which they could not accept compensation after retirement. Under the JER, sections 2-303 and 3-306.e., employees and military members who file a financial disclosure report, which should include everyone described in 48 C.F.R. § 3.104-4(d), must obtain prior written approval from their Agency Designees before accepting compensated employment with a prohibited source while serving with the Department. We recommend that such designees withhold approval in this circumstance, as it would potentially detract from readiness. It is possible that bid protests or performance delays could result. This situation illustrates the need for employees to ask for advice prior to their seeking employment.

10. What action may be taken against employees who disqualify themselves so that they may seek employment with DoD contractors?

If a civilian employee or military service member is ordered to perform duties consistent with his or her position, such as perform the duties of Source Selection Authority, and that individual takes actions that require disqualification from those duties, that individual may be subject to administrative action. Actions taken by an employee that result in disqualification may be construed as a refusal to perform assigned duties. This could result in disciplinary or adverse action. For example, if a contracting officer has special expertise that results in working almost

exclusively on the contracts of a certain contractor or on contracts in a certain specialized area, and that individual is disqualified from acting with regard to that contractor or to contractors in the specialized area, he or she may be disciplined.

Under 5 C.F.R. § 2635.604(d), where an agency determines that a civilian employee's or military officer's action in seeking employment will require disqualification from matters that are so central or critical to the performance of official duties that his or her ability to perform those duties would be "materially impaired," the agency may allow the individual to take annual leave or leave without pay while seeking employment. Where this is not possible or feasible, the agency may take appropriate administrative action, which may include disciplinary or adverse action. Under section 1-300.b. of the JER, this regulation is made applicable to enlisted members of the uniformed services.

Depending on the circumstances, while individuals may seek employment and disqualify themselves, by doing so, they also may subject themselves inadvertently to administrative or adverse action. The disqualification could also bring a procurement action under a cloud of suspicion. This is why we recommend that Ethics Counselors frequently and strongly encourage their civilian employees and military service members to discuss their job seeking plans with their supervisors and Ethics Counselors prior to the start of their job hunting. If, however, an individual does take action that requires disqualification from the majority of his or her duties, that person may be the subject of administrative action, which may include reassignment, or disciplinary action, which may include removal from the position.

11. **Who is a Program Manager for the purpose of the procurement integrity compensation ban?**

The Civilian Agency Acquisition Council and the DAR Council decided not to define that term in the regulation because of an inability among the agencies to reach consensus on a definition. Therefore, we are adopting the general meaning of program manager (PM) within DoD for use under the Act. A PM is the individual who actively manages the program cost, performance and schedule, regardless of the title given the individual. See 10 U.S.C. § 1737(a)(1) and Section E.1.M. of DoDD 5000.1. For example, a PM could be considered the individual responsible for the Pentagon renovation project, but would not be the individual responsible for the particular products procured under that project, such as escalators. To be covered by the Act, the program must include at least one contract in excess of $10 million. For any particular DoD program, there may be more than one employee who meets this definition of program manager. As specific situations are decided, we will issue guidance to provide examples in this area. We recommend that Ethics Counselors examine the duties of employees when there is uncertainty.

We are also adopting the general meaning of deputy program manager (DPM) within DoD for use under the Act. A DPM is the individual who has authority to act on behalf of the PM in his or her absence, regardless of the title given the individual. See 10 U.S.C. § 1737(a)(2). However, just because an employee holds the title of Deputy Program Manager does not necessarily mean he or she is a DPM for purposes of the Act. For example, if a DPM manages only personnel or administration of the program office, this DPM should probably not be subject to the compensation ban for purposes of the Act.

Examples of positions that should be excluded from the PM/DPM terms are:

1. "Program Executive Officer (PEO)", provided the PEO does not perform the functions of a program manger for any particular program.

2. A program manager for a program for which no contract has been awarded. Examples include "other transactions" under 10 U.S.C. § 2371, a cooperative agreement or grant under 10 U.S.C. § 2358, and an "other" transaction to carry out a prototype project under section 845 of the National Defense Authorization Act for FY 1994, as amended by Section 804 of the National Defense Authorization Act for FY 1997.

/s/
Davi d W. Ream
Director
DoD Standards of Conduct Office

Chapter Q

Professional Responsibility Videotape (Optional)

Insert Outline here

NOTES

1ST BASICS FOR ETHICS COUNSELORS WORKSHOP

"ETHICS IS LEADERSHIP"

PRINCIPLES OF ETHICAL CONDUCT

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.

***The Ethics Counselor Forum on LAAWS BBS and SOC Database on Lotus Notes*:**

http://www.jagcnet.army.mil

DoD Standards of Conduct Office Web Site:

http://www.defenselink.mil/dodgc/defense_ethics

U.S. Air Force Materiel Command Web Site:

http://www.afmc.wpafb.af.mil/public/HQ-AFMC/JA/lo/lojaf/ethics/index.htm

U.S. Office of Government Ethics Web Site:

http://www.usoge.gov

The Judge Advocate General's School
United States Army
Charlottesville, Virginia