ETHICS FOR SPECIAL GOVERNMENT EMPLOYEES

Advisory Council on Alzheimer's Research, Care and Services

Leah Stromberg, Rob Schafer
OGC / Ethics Division
Ph: (202) 690-7258

Goals Today

- General familiarity with the criminal statutes and ethics regulations that apply to your committee service as Special Government Employees (SGEs)
- Know where to go with questions
  - Rohini Khillan, Advisory Council's Designated Federal Official (DFO)
  - Asim Akbari, Ethics Division, Office of the General Counsel

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What is a Special Government Employee?
18 U.S.C. § 202(a)

[A]n officer or employee . . . Who is retained, designated, appointed, or employed by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days.

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What Rules Apply to SGEs?

- The good news: generally, the ethics rules are somewhat less restrictive for SGEs than for full time employees.
- Today we're going to focus on:
  - Criminal Conflict of Interest Statutes
  - Federal Ethics Regulations

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Matters that Matter

- To better understand how the statutes and ethics regulations that apply, you need to understand what they mean by the term "Particular Matter," of which there are two subsets:
  - Matters of General Applicability
  - Specific Party Matters

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Particular Matters

Particular matters involve **deliberation, decision or action** focused on the **interests of:**

- **a discrete and identifiable class of unspecified entities**
  = **Matters of General Applicability** (e.g. - rulemaking, legislation, policy-making, and any recommendations of the committee related to the same) ⇒ **most of your committee work**
- **specific entities**
  = **Specific Party Matters** (e.g. grants, contracts, cooperative agreements, etc.) ⇒ **of greater ethical concern**

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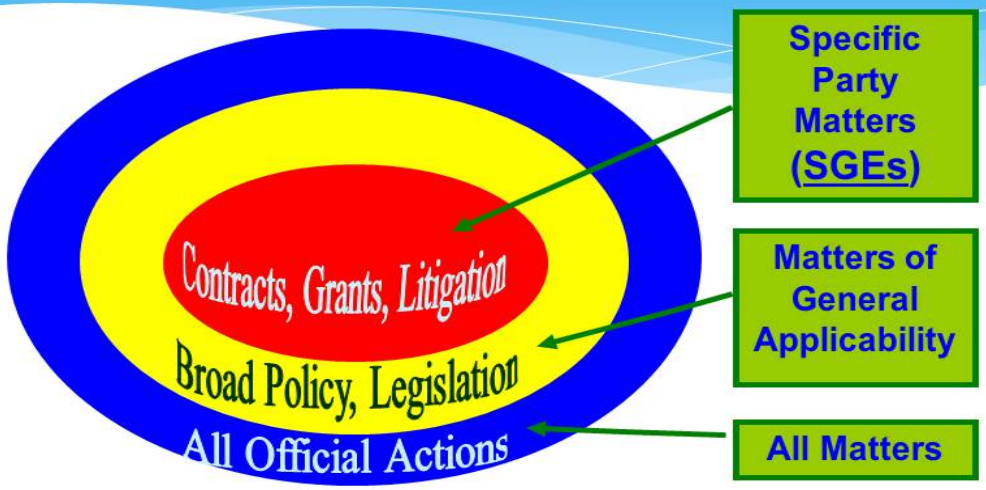
Universe of Official Matters



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Criminal Statutes
18 U.S.C. §§ 201-209

- Representational Restrictions (203, 205)
- Conflicts of Interest (208)
- Bribery of Public Officials and Witnesses (201)
- Post Employment Restrictions (207)

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Representational Restrictions

18 U.S.C. § 203

As SGEs, you are prohibited from receiving or soliciting **compensation** for **representational services** rendered personally or by another before any court or Federal agency in connection with any **specific party matter**:

- in which you participated personally & substantially, or
- that is pending before HHS, **IF** you have served more than 60 days in the past 365.

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Representational Restrictions

18 U.S.C. § 205

As SGEs, you are prohibited from **representing** an outside party, with or without compensation, **to the Federal Government**, on matters in which the Government is a party or has a direct and substantial interest, in connection with any **specific party matter**:

- in which you participated personally & substantially, or
- that is pending before HHS, **IF** you have served for more than 60 days in the past 365.

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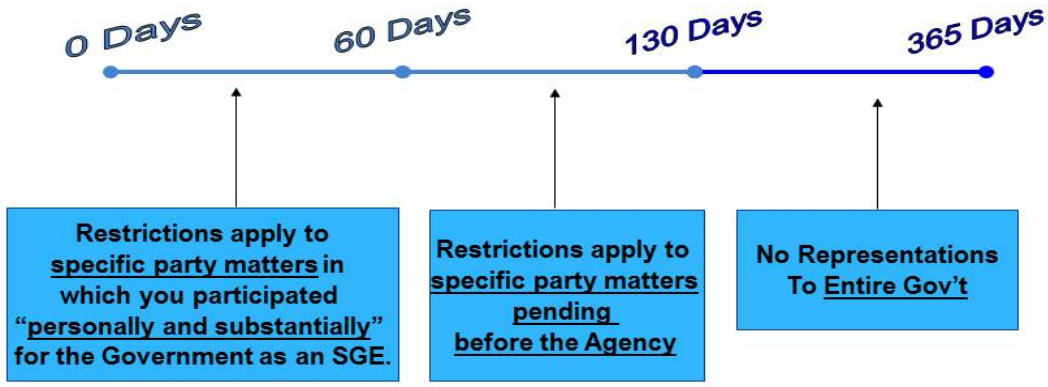
Application of Representational Restrictions Depends on Days as SGE

Special Gov't Employee **Regular Employee**



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Conflicts of Interest – 18 U.S.C. § 208

- SGEs may not participate in **particular matters** (specific party matters **or** matters of general applicability) that would have a **direct and predictable effect** on
  - the SGE's **financial interests**, or
  - other **financial interests imputed** to the SGE under the statute

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Conflicts of Interest – 18 U.S.C. § 208

Imputed to the SGE are the financial interests of:

- their spouse, minor child, or general partner;
- an organization/entity in which the SGE serves as officer, director, trustee, general partner or employee; and
- a person or organization with which the SGE is negotiating for prospective employment.

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Appearance Concerns
5 C.F.R. § 2635.502

- An SGE should not participate in a **specific party matter** that could have a **direct and predictable effect** on:
  - the financial interests of a member of the SGE's household, or
  - someone with whom the SGE has a "**covered relationship,**" if that person is or represents a party,
- where circumstances would cause a reasonable person with knowledge of the relevant facts to question the employee's impartiality in the matter

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Appearance Concerns
5 C.F.R. § 2635.502

"Covered Relationship"

- Business, contractual, or financial relationship;
- Member of the SGE's household;
- Relative with a close personal relationship to the SGE;
- Person for whom the SGE's spouse/parent/dependent child serves as officer, director, trustee, general partner, agent, consultant, employee, contractor;
- Person for whom SGE served within the last year as director, trustee, general partner, agent, contractor, consultant, employee
- Organization in which SGE is an active participant

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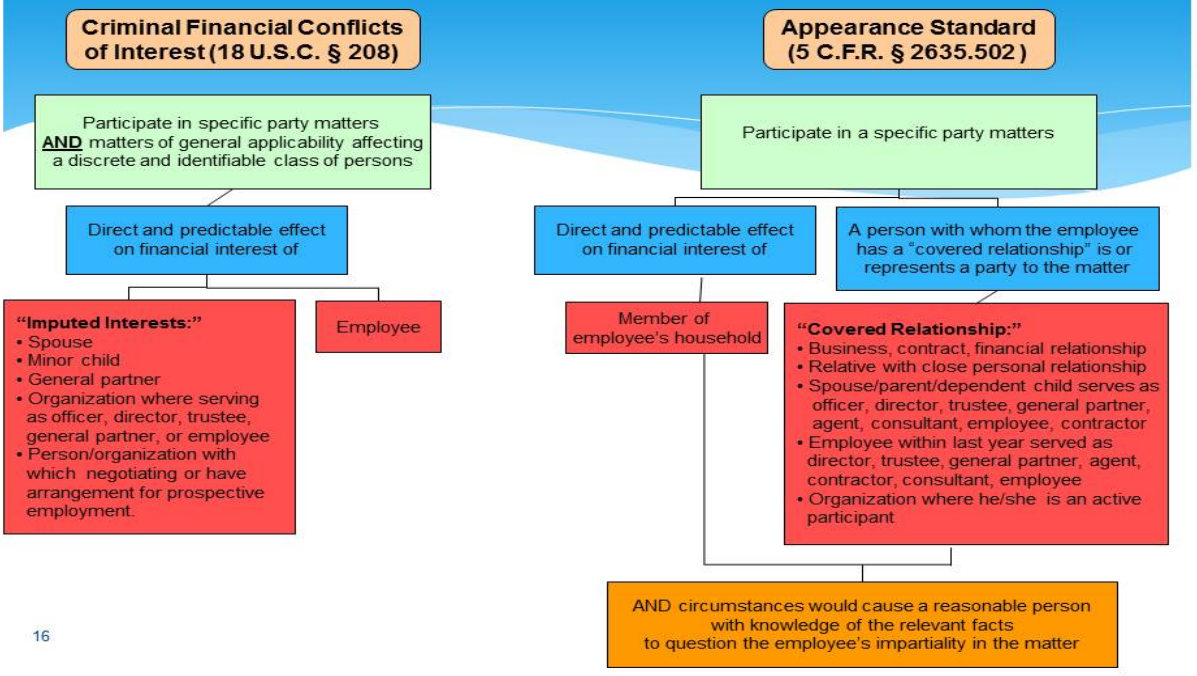
Framework for Ethics Determinations



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Resolving Conflicts of Interest and Appearance Concerns

- Step 1: Do not participate
- Step 2: Seek advice

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Resolving Conflicts of Interest and Appearance Concerns

Regulatory Exemptions – Securities

Mutual fund holdings deemed not to raise concerns:

- Diversified Mutual Funds (i.e. funds that do not concentrate their investments in any industry, business, single foreign country, or bonds of a single U.S. state.)
- Sector Mutual Funds (i.e. funds that do invest in particular industries, businesses, a single foreign country or bonds of a single U.S. state), **IF** → aggregate value < $50,000

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Resolving Conflicts of Interest and Appearance Concerns

Regulatory Exemptions – Securities

The conflict is deemed to be waived for stock holdings

- in entities that are **parties to a specific party matter**, if
  - ➔ valued < $15,000
- in entities that are **not parties** to a matter but **are affected by the specific party matter**, if
  - ➔ valued < $25,000
- in an **industry affected** by a **matter of general applicability**, if
  - ➔ the individual stock value < $25,000, and
  - ➔ the aggregate value of investments in the sector < $50,000.

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Resolving Conflicts of Interest and Appearance Concerns

Regulatory Exemption – SGE Employment

- Applies where the disqualifying financial interest arises from an SGE's non-federal employment
  - Does not apply to SGE's stock interests in employer
  - Allows participation in **matters of general applicability affecting SGE's employer**, provided the matters will not have a special and distinct effect on the employee or employer other than as part of a class
  - Does not apply to specific party matters affecting SGE's employer

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Waivers

Where regulatory exemptions do not apply, and recusal from the matter is not practical:

- Waivers may be granted where the need for a particular SGE's services outweighs the potential for a conflict of interest posed by the financial interests involved.
- Waivers do not cover participation in matters that:
  - Specifically and uniquely affect the financial interests of SGE
  - Involve specific parties

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Post-Employment Restrictions
18 U.S.C. § 207(a)(1)

- Former SGE's may not knowingly make a **representation**, with the intent to influence, before any employee of any department, agency, or court on behalf of another person (except U.S.) with respect to a **specific party matter**:
  - In which the employee participated **personally and substantially**; and
  - In which the U.S. is a party or has a direct and substantial interest.
- Restriction lasts the lifetime of the matter

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Gifts

- SGE's may not accept or solicit gifts
  - From a prohibited source, or
  - Given because of an employee's official position
- Among other exceptions:
  - Gifts based on personal or outside business relationships;
  - Not a considered a "gift": Any unsolicited item under $20
    - But not more than $50 from one source in one year.

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Outside Activities

- Expert witness: If SGE works **more than 60 days**, may **not** serve as an expert witness, with or without compensation, in Federal court or where U.S. is a party or has a direct and substantial interest, if SGE participated in his official capacity in the proceeding unless:
  - Testifying on behalf of Federal government
  - Authorized by HHS Ethics official

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Outside Activities

Teaching, Speaking, Writing

- Rule: SGE may not receive compensation for teaching, speaking, writing, or editing that **"relates to official duties"**
- **Important Exception**: does not relate to official duties if it is "within the SGE's discipline or inherent area of expertise based on their educational background or experience."

"Related to official duties"

- Activity undertaken as official government duty
- Invitation was extended primarily because of official positions
- Invitation was extended by a person who has interests that may be substantially affected by performance or non-performance
- Information draws substantially on ideas or official data that are confidential
- If working more than 60 days, activities that deal in significant part with any matter assigned during the previous one-year period

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Misuse of Position

- Endorsement
  - May not use or permit the use of position, title, authority associated with office to endorse any product, service, enterprise.
- Creating appearance of government sanction
  - May not use official position, title, or authority in a manner that implies the government approves his or her personal activities or those of another individual or entity

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Misuse of Position

Teaching, Speaking, Writing

- SGE must not refer to official position when teaching, speaking, or writing in personal capacity UNLESS:
  - Used as part of a biographical sketch along with other biographical information and not prominently displayed; or
  - Article published in scientific or professional journal, provided it accompanies prominent disclaimer that satisfies Agency

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Misuse of Position

Non-public Information

- May not disclose non-public information
- May not use non-public information in a financial transaction to further SGEs financial interests or those of another
- "Non-public information" is information the SGE knows or reasonably should know is not available to the public, such as:
  - Exempt from disclosure under FOIA
  - Protected by statute, Executive Order, regulation
  - Designated by an agency as confidential

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Political Activity Restrictions – The Hatch Act

- The Hatch Act is the law governing the political activity of Federal executive branch employees.
- You may not engage in partisan political activity while:
  - On duty;
  - In a Federal room or building;
  - While wearing a Government uniform; or
  - While driving a Government vehicle

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Political Activity Restrictions – The Hatch Act

- Applies **only during the period of any day** in which the SGE is actually **performing Government business**.
- **Prohibited activities** while on duty, or in a federal room/building:
  - Distributing or displaying campaign materials
  - Send a partisan political email
  - Wearing or displaying partisan political buttons, t-shirts, signs
  - May not use official authority to interfere with election
  - May not solicit, accept, or receive political contributions
  - May not knowingly solicit or discourage political activity of anyone with business before the agency
  - May not actively participate as a candidate for public office in a partisan election

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Contact information

- Asim Akbari

  Ethics Division, Office of the General Counsel

  asim.akbari@hhs.gov

  202-205-2820

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