INTERAGENCY ETHICS COUNSEL AND ASSOCIATION OF CORPORATE COUNSEL (NATIONAL CAPITAL REGION) JOINT MEETING

GOT A TRICKY CONTRACTOR/GOVERNMENT ETHICS ISSUE?

JANUARY 4, 2018
AGENDA

- **IEC Announcements** -
  Jeffrey Green – Senior Attorney, DoD’s Standards of Conduct Office

- **USDA Ethics Mobile App** -
  Stuart Bender-Director, USDA Office of Ethics

- **Reservists and Employee Issues** -
  Thomas Serrano- Associate General Counsel, Defense Human Resources Activity; and
  Steve Epstein- Chief Counsel Ethics & Compliance, The Boeing Company

- **Post-Government Employment Hot Issues** -
  Scott Thompson – Senior Attorney, DoD’s Standards of Conduct Office.

- **Hot Gift Issues Between Government and Industry** -
  Dani Irvine- Senior Attorney, DoD’s Standards of Conduct Office; and
  Steve Epstein -Chief Counsel Ethics & Compliance, The Boeing Company
Using Technology to Make Ethics More Engaging: The USDA Ethics Mobile App
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Welcome to USDA’s New Ethics App

- 15 Categories
- 50 Sub-Categories
- 18 Ethics Forms
- 10 Videos
- 8 Links to Websites
- FAQ Section

NOTE: This app is 508 compliant.
Anyone who has an Apple OR an Android smart phone can download the USDA Ethics App for free . . .

Just search “USDA Ethics”

Download

And within 20 seconds, you will have a powerful ethics resource at your fingertips!
Home Screen

1 Easily navigate to specific ethics issues in the Ethics library.

2 Readily Download USDA Ethics forms.

3 Have an ethics question? Contact information for Ethics is at your fingertips.

4 Watch educational videos that walk you through some thorny ethics issues.
Ethics Library

Easily refer to the USDA Ethics Guide. This interactive library is easy to navigate.

The library includes a smart glossary of terms, a searchable index and the ability to bookmark and add personal notes.
Forms

Download a library of all the USDA ethics-related forms. Tap on the section you want, then select the specific form. Email it to your e-mail.
Resources

Access these USDA Office of Ethics resources by email or link to websites.
USDA Ethics Video Library

The Video Library links to the USDA Ethics videos on YouTube.
RC Personnel and Ethics

Steve Epstein
Thomas Serrano
Potential RC Ethical Issues

- Applicability of rules
- Conflicts of interest
  - Personal and organizational
- Outside employment and business enterprises
- Gifts
- Supplementation of salary
- Post-government employment
Scenario #1: Active Duty COI

- The Army ordered a Reserve Colonel and Master Sergeant to active duty for operational support (ADOS) for 120 days to support certain medical programs. In their civilian jobs, the Colonel and Master Sergeant were co-workers and were contractors to the same military office. Because they were familiar with the programs in the Army office, including the support contracts, their military supervisor directed them to manage the support contracts (including their own).

- 18 U.S.C. 208 and 5 CFR 2640
- Section 5-301 of DoD 5500.7-R (Joint Ethics Regulation)
- 18 U.S.C. 207:
- 18 U.S.C. 203 & 205:
- Section 5-408, DoD 5500.7-R (Joint Ethics Regulation)
Scenario #2: Gifts

• A National Guard unit from Virginia has been mobilized and deployed to Afghanistan for the past year in support of the war. They have redeployed to the U.S. and are currently at Ft Bliss undergoing demobilization activities (they are still on active duty but only until the end of the month). A local citizen who is a veteran and who actively supports the military offers to pay each member of the unit $250 for their service. Can they accept?

• 18 U.S.C. 209
• Section 5-404, DoD 5500.7-R (Joint Ethics Regulation)
• 10 U.S.C. 12601
• 5 CFR 2635 Subpart B: Gifts
Scenario #3: Return from Active Duty

- A Marine Corps Reserve General is an employee of a defense contractor. The General manages the contractor’s contract to repair USMC aircraft. In this role, he interfaces with USMC personnel daily. Last year he was ordered to active duty for operational support (ADOS) for 180 days. Yesterday, he returned to his civilian position to resume his contractor duties and daily interface with the USMC. Any issues?

- 18 U.S.C. 207
- 18 U.S.C. 203 & 205
Scenario #4: Continued Pay

- A Reserve unit is being ordered to active duty and deployed to the CENTCOM theater. A local businessman, who is an ardent supporters of the reservists, offers to continue to pay their employees their full salaries while they are on active duty. Can they accept this payment?

- 10 USC 12601
Scenario #5: Organizational Conflict of Interest

- A reservist whose full time job is as an engineer working for a defense contractor, serves her two-week drill at the Army Material Command. For this year’s work, she is assigned to help review proposals from several bidders (not including her employer) for UAVs similar to those produced by her employer. What should she do?

- Section 5-408, DoD 5500.7-R (Joint Ethics Regulation)
- Procurement integrity issues
Navigating the Revolving Door

Ethics Considerations When Moving Between Government and Industry Employment

Scott Thompson
Senior Attorney
DoD Standards of Conduct Office
Restrictions on Federal Employees

• **Financial interest (18 USC 208; 5 CFR 2640.103):**
  – Employee may not participate in a particular matter that would have a direct and predictable effect on his/her financial interest
  – e.g., stock ownership or ongoing employment
  – Waivers by OGE are rare

• **“Covered relationship” restrictions on participating in particular matters where former employer or client is, or represents, a party**
  – **First year:** 5 CFR 2635.502. “Agency Designee” may authorize participation. In DoD, Agency Designee is the GC
  – **Second year:** Ethics Pledge (EO 13770). Applies to all political appointees. Only White House may grant **waiver**

• **Merely receiving information is usually okay, but the Gov’t employee must be cautious**
Dealing With Restrictions

- Document the employee’s recusal

- Establish formal screening process (for senior officials, put it in writing and designate key staff)

- Educate and train, train, train the employee and staff
  - The more people aware of the recusal obligation, the more people there are to help issue spot

- Determine in advance the necessity and scope of any authorization and waiver that may be required

- How can industry compliance officials help?
  - Call agency counsel if you learn that a former employee with a conflict of interest recusal obligation has been asked to participate in a particular matter where your company is or represents a party
Restrictions on the Way Out of the DoD

• Except for certain former procurement officials, most former Gov’t employees may work for a defense contractor
  – may be limited to “behind the scenes” for some period

• 18 U.S.C. 207(a): Former Gov’t employee may not “appear” before any Fed Gov’t agency on behalf of new employer with intent to influence any particular matter
  – he/she participated in personally and substantially (for lifetime of the matter); or
  – that was pending under his/her responsibility (for two years after leaving Gov’t)

• 18 U.S.C. 207(c): Political appointees / senior officials may not appear before their former agency on any matter for one year after leaving Gov’t
  – Defining “former agency” requires understanding whether OGE has allowed the agency to define separate “components”

• Additional restrictions apply to lobbying activities (EO 13770, FY18 NDAA)

• A word about the Emoluments Clause
Gifts
Implementing the New Rules

Steve Epstein
&
Dani Irvine

IEC Meeting
January 2018
Gift Rules Recent Revisions

- Changes became effective January 1, 2017
- Free attendance on day of speech/presentation is now excluded from definition of gift.
- WAG determinations must be in writing.
- New exception for gifts of informational materials.
- Emphasizes values-based decision-making in applying gift exceptions: New rule includes a standard to evaluate not only whether a gift may be accepted, but also whether it should be accepted.
New WAG Rule – Impact

• Blanket WAGs?
  • Inefficient to have numerous separate written determinations for events where large number of persons from one organization/agency expected to attend
  • Avoids risk of those at lower levels not obtaining required written determination

• How to handle informal/ad hoc invites?
  • Ancillary events held during larger conference/training event
  • Hosts planning to invite Federal employees need to consider this
2635.204 (m) - Allows acceptance of gifts of certain informational materials

- $100 limit per CY, unless agency designee makes certain written determinations
- Informational materials = writings, recordings, documents, records, or other items:
  - Educational/instructive in nature;
  - Not primarily for entertainment, display, or decoration; and
  - Relate to employee's duties/position/profession/field of study, agency programs/operations, or other topic of agency interest.

Provides alternative means to accept gifts of written materials often given to commemorate completion of a project or program.
New “Considerations”

- 2635.201 Now discusses considerations for declining otherwise permissible gifts, to include:
  - High market value
  - Timing in relation to pending official actions
  - Potential that recipient’s duties substantially affect donor’s interests
  - Acceptance provides donor with disproportionate access.
- Considerations do not render an otherwise acceptable give unacceptable
- Considerations useful in determining whether to offer a gift as well
  - Public perception is an issue for everyone
Questions?

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