

ETHICS PRIMER

FOR

**THE NATIONAL ASSESSMENT
GOVERNING BOARD**

November 2019
Ethics Division
Office of the General Counsel
U.S. Department of Education

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EXECUTIVE SUMMARY

Now that you are a member of the National Assessment Governing Board (“NAGB”) you need to know what ethics laws and rules apply to you. The following is a very brief summary of these rules. For a more detailed discussion of how these rules apply to you, please refer to the attached summary entitled “Ethics Laws and Rules Applicable to SGEs.”

Your Status as a Special Government Employee

You are considered an SGE and not a regular federal employee because NAGB anticipates that you will be serving the federal government through your position for only 130 days or less during any period of 365 consecutive days. Whether or not you are paid by the Board for your service is irrelevant. This summary discusses how the ethics rules apply to SGEs.

Criminal Statutes Apply to Your Activities

Some of the ethics laws that apply to you carry criminal penalties. Below is a brief summary of the most important of these laws.

- The chief conflict of interest law bars you from participating personally and substantially in your capacity as a member of NAGB in any particular matter before the federal government that has a direct and predictable effect on your own financial interests or the financial interests of others with whom you have certain relationships. See 18 U.S.C. Section 208.
- If you find yourself with a financial conflict of interest, you have four options: (1) disqualify yourself (you don’t participate in any way in the matter); (2) resign from the outside entity that is the basis for the conflict; (3) sell or divest the stock or other financial interest that is the basis for the conflict; or (4) request and obtain a statutory waiver.¹
- Two other laws prohibit you from representing a third party, *with or without compensation*, before any court or agency in connection with any particular matter involving specific parties in which the United States is a party or has a direct and substantial interest and in which you have participated personally and substantially as an SGE. In addition, if you serve the federal government for more than 60 days during the immediately preceding period of 365 consecutive days, these restrictions apply to any matter that is pending with NAGB. But remember that these restrictions do not apply to particular matters of general applicability, such as broadly applicable policies, rulemaking proceedings or legislation, that do not involve specific parties. See 18 U.S.C. Sections 203 and 205.

¹ In rare circumstances, with the concurrence of the U.S. Office of Government Ethics, you may obtain a waiver of the conflict of interest.

- Another criminal law limits some of your activities after your service on NAGB ends. This law prohibits you from representing others in connection with the same particular matter involving specific parties in which you participated personally and substantially during your service to NAGB. This prohibition lasts for your lifetime. See 18 U.S.C. Section 207.

Standards of Ethical Conduct for Employees of the Executive Branch

The Standards of Ethical Conduct for Employees of the Executive Branch (Standards), 5 C.F.R. Part 2635, are regulations that apply both to regular federal government employees and to SGEs. However, a few exceptions exist in the Standards in recognition of the fact that SGEs are working for the government only in a very limited way. A brief synopsis of some these rules and their exceptions follow.

- **Fundraising:** You may not use your official title, position and authority to engage in fundraising.
- **Gifts:** You may not accept gifts from a “prohibited source” or offered to you because of your official position on NAGB. A prohibited source includes any person: seeking official action from NAGB; doing or seeking to do business with NAGB; conducting activities regulated by NAGB; or having interests that may be substantially affected by your official duties. There are many exceptions to this rule that are discussed in more detail in the accompanying memorandum.
- **Lobbying:** In your role as a member of NAGB, you may not urge others to contact Congress or a state legislature to urge the passage or defeat of legislation. Additional restrictions exist regarding lobbying. You should contact Department of Education’s Ethics Division before engaging in any type of lobbying.
- **Misuse of Position:** You may not use your position on NAGB or nonpublic information gained through your service on NAGB to seek advantage for yourself or others. In addition, you may not use your NAGB title in a manner that makes it appear that NAGB is sanctioning your views, products, services or personal enterprises.
- **Political Activities:** You may not engage in political activity when you are on duty or in a federal government building or car, and you may never use your official title as a member of NAGB in connection with political activities.
- **Teaching, Speaking and Writing:** You may not receive compensation for teaching, speaking or writing if: (1) the invitation was offered to you because of your position on NAGB; (2) the information conveyed by you draws substantially on nonpublic information that you obtained by working on NAGB; (3) the invitation was extended to you by an organization or person who has interests that may be substantially affected by your performance on NAGB; or (4) the subject of your work deals in a significant way

with a matter involving specific parties that you worked on while on NAGB. Again, there are some exceptions to this rule that are outlined in more detail in the accompanying memorandum.

Required Filing of a Financial Disclosure Report By SGEs

As a member of the NAGB, you are required to file a confidential financial disclosure report (also referred to as a “450” Report) when you are first appointed, and annually thereafter if you are reappointed. The purpose of the financial disclosure form is to protect you from inadvertently violating any of the criminal conflict of interest statutes and so that NAGB can know that your advice is free from any real or perceived conflicts of interest.

Please do not rely solely on this “Executive Summary” before undertaking your duties. There are many subtle nuances that are not discussed in this summary that may apply to your specific situation. The attached expanded summary provides additional detail that will help you better understand the ethics rules. Please feel free to call or e-mail Marcella Goodridge in the Ethics Division of the Office of the General Counsel at the U.S. Department of Education at (202) 401-8309, or Marcella.Keiller@ed.gov, for answers to any specific ethics questions that may arise in the course of your service on NAGB.

ETHICS LAWS AND RULES APPLICABLE TO SGES

I. INTRODUCTION

Although the ethics rules are numerous and detailed, a single, simple principle underlies these rules: *You should never use your public office for private gain, either for yourself, or for any third party.* In addition, you must refrain not only from engaging in any activity that violates the ethics rules, but you must also refrain from any activity that creates the appearance of a violation of any of these rules. The summary below is designed to help you avoid violating any ethics rules covering your activities as a member of NAGB.

II. YOUR STATUS AS A SPECIAL GOVERNMENT EMPLOYEE

A. What is a “special Government employee”?

Because you have been appointed to be a member of the NAGB and you are expected to perform your duties for not more than 130 days during the 365 days subsequent to the date of your appointment, you are, by law, a “special Government employee” (SGE). As an SGE, you *are* a federal government employee. This means that upon appointment, you assume the responsibilities, obligations, and restrictions that are part of public service. Because SGEs are not full-time employees, several of these restrictions apply only in limited circumstances.

B. Do the ethics restrictions apply when I am not working for NAGB?

Yes, any restrictions concerning your private activities (representational services, expert witness activities, etc.) apply equally on days when you serve the federal government through your position on NAGB and on days when you do not, except with respect to political activity. If you have not provided any services for the federal government for some time, but have not received a termination date for your appointment, you must seek a formal resolution of the matter before engaging in conduct prohibited by the ethics rules.

III. CONFLICTS OF INTEREST

A. What criminal conflict of interest statutes apply to SGEs?

While you are employed as an SGE, you need to pay particular attention to four criminal conflict of interest laws found in Chapter 11, Title 18 of the United States Code: 18 U.S.C. Sections 203, 205, 207 and 208. These criminal laws include some special provisions for the treatment of SGEs. A discussion of these laws and certain related requirements found in other laws and regulations follows.

B. What financial conflicts of interest may arise for SGEs under section 208?

Section 208 prohibits you from participating personally and substantially in any particular matter that has a direct and predictable effect on your financial interests, including certain interests of others that are imputed to you under the statute. This means that you may not work on NAGB matters if you have certain connections – through the ownership of stock, through employment, or by virtue of other circumstances – with an organization that has a financial interest in the matter. For example, you may not work at all on a contract competition if you own stock valued at a certain amount in a company competing for the contract. You may not participate in a discussion of whether to modify an existing contract with a company if you work for that company. And, you may not assist in the development of a scope of work for a contract competition if you know that an organization on which you serve on the Board of Directors plans to compete for that contract.

Keep in mind that when you are disqualified from a matter such as a contract competition, the particular matter that you must recuse yourself from is the entire competition for this contract. You are prohibited from doing anything at all with respect to this competition. This means, for example, that you may not review other proposals that are in competition with that of the organization in which you have a direct or imputed financial interest.

In addition to your own personal financial interests, the financial interests of the following persons or organizations are imputed to you and also disqualify you from participating in a particular matter:

- (1) your spouse;
- (2) your minor child;
- (3) your general partner;
- (4) an organization for which you serve as an officer, director, trustee, general partner or employee; and
- (5) any prospective employer.

Example 1 You are on the governing board of ABC, a nonprofit organization. ABC's financial interests are imputed to you under the statute. This means that for the purpose of determining whether you have a conflict of interest, ABC's financial interests are treated as if they were your own. Accordingly, you may not participate in any NAGB matter in which ABC has a financial interest. Similarly, if you were in the process of discussing employment with ABC, you would be barred from participating in any NAGB matter affecting the financial interests of ABC.

Example 2 You are on the governing board of ABC (or employed by ABC, own stock in ABC, seeking employment with ABC, etc). You are asked to participate in the process of reviewing and scoring contract proposals for a contract competition for a NAGB project. Fifteen organizations have submitted a bid. When you open the proposal from one organization, you note that ABC's name is one of the organizations that has submitted a bid. Or, perhaps ABC is listed as a subcontractor in one of the proposals. This contract competition is a "particular

matter” that will have a “direct and predictable effect” upon the financial interests of ABC. In other words, as a result of the contract competition, ABC will either gain business or not, and this decision will affect ABC financially – either negatively or positively. The amount of financial interest is not relevant – as long as ABC’s finances will be affected, unless a regulatory exemption or waiver permits you to do so, you may not work on this competition. And, because each proposal is competing against all of the others, your evaluation of competing proposals will affect the chances ABC has of winning the contract. Accordingly, you may not review any of the proposals.

You must recuse yourself from a matter as soon as you realize that you have a conflict. If, for example, you notice that you have a conflict when you are in the middle of reviewing contract proposals, you put the proposal back in its envelope and call up an NAGB staff member and let that person know that you think that you are disqualified from working on the competition. If there is any question, you should contact the U.S. Department of Education Office of the General Counsel’s Ethics Division for guidance. Once you have determined that you may not work on this matter, send the proposal back to NAGB staff.

You are permitted to participate in a particular matter affecting one campus of a multi-campus institution of higher education, where the disqualifying interest arises from your employment with a separate campus of the same institution, provided that you have no multi-campus responsibilities at the institution. If you are employed with a large university with multiple campuses and you do not have any multi-campus responsibilities, you may participate in official matters--such as grants, contracts, applications, and other particular matters--that affect the financial interests of another campus in the same university system where you are employed. Below are some examples of how section 208 may apply to your activities.

NOTE: Apart from the criminal conflicts of interest statutes discussed above, a regulation also exists that prohibits you from participating in a matter involving specific parties if a reasonable person would question your impartiality.

Example 3 You are employed as a professor at the University of California-Berkeley. NAGB is planning to evaluate the impact of computer-based testing on students with disabilities and English language learners. UC-Berkeley’s science and technology department has submitted a bid. NAGB’s actions will have a direct and predictable effect on the university’s financial interest. Therefore, you may not participate in any way on this matter.

Example 4 You are employed as a researcher at the University of California-Berkeley. NAGB is planning to evaluate the impact of computer-based testing on students with disabilities and English language learners. The University of California-Los Angeles (UCLA) has submitted a bid to be the contractor for NAGB’s evaluation. You may participate in this matter because it will not have a direct and predictable effect on either your financial interests or UC-Berkeley’s.

C. How do I resolve a conflict of interest?

1. Disqualification

A common method of resolving a conflict of interest is to disqualify yourself from participating in the matter.

Example 5 You are serving on NAGB's Ad Hoc Committee that will examine issues related to computer-based testing for students with disabilities and English language learners, including developing a study of computer-based testing methodologies. The Request for Proposals has been disseminated. One of the bids submitted is from ABC Corporation (ABC). You own \$20,000 worth of stock in ABC. You must advise the U.S. Department of Education Office of the General Counsel's Ethics Division that you own stock in ABC and you will not be able to participate in any way in the entire contract competition. If ABC is awarded the contract, you will also need to disqualify yourself from the entire matter.

2. Divestiture

Divestiture of a disqualifying interest (usually through the sale of stock) is another remedy available to avoid a potential violation of section 208. SGEs are not eligible for a Certificate of Divestiture (CD). A CD is a tax benefit that allows the deferral or nonrecognition of capital gain where an employee divests a financial interest in order to comply with conflict of interest requirements. Unfortunately, Congress specifically excluded SGEs from eligibility to receive CDs. 26 U.S.C. § 1043(b)(1)(A).

3. Resignation

On some very rare occasions when none of the aforementioned options are available or feasible, an SGE may need to resign from participating in an outside activity with an entity if his or her official activities as an SGE have a direct and predictable effect on the financial interest of that entity creating an irreconcilable conflict.

4. Waiver or Authorization

Another remedy to avoid a conflicting financial interest is to request and obtain a statutory waiver by contacting the Department of Education's Ethics Division (an authorization is similar to a waiver, but only applies to non-statutory conflicts of interest - what are often referred to as "appearances of a conflict"). You may be granted a waiver only if your financial interest is not so substantial as to be deemed to be likely to affect the integrity of your services.

Any waiver or authorizations that you receive will be limited. It is very important that you read it carefully, as it will often contain detailed information about the types of matters from which you remain disqualified, despite the waiver or authorization.

Example 6 In the scenario described in Examples 1 and 2 above, you are granted a waiver permitting you to participate in a general policy matter that affects ABC's financial interests as

long as the matter affects all similarly situated entities in the same manner. But you would remain disqualified from participating in a matter that specifically involves ABC, which in this case means the entire contract competition.

D. What restrictions apply to my representation of third parties under sections 203 and 205?

With regard to particular matters in which you have participated personally and substantially while serving NAGB, you are prohibited from representing a third party on those particular matters, **with or without compensation**, before any court or agency, when the United States is a party or has a direct and substantial interest in the matter. See 18 U.S.C. Sections 203 and 205.

In addition, if you serve the federal government for more than 60 days during the immediately preceding period of 365 consecutive days, you are prohibited from representing a third party on any matter involving specific parties pending before NAGB, even if your work at NAGB did not involve these matters. These restrictions do not apply to particular matters of general applicability, such as broadly applicable policies, rulemaking procedures or legislation that does not involve specific parties.

IV. POST-EMPLOYMENT

After your appointment terminates at NAGB, you need to pay particular attention to one more criminal statute that subjects you to restrictions regarding certain matters that you may have worked on as a member of NAGB. Pursuant to 18 U.S.C. Section 207, you may never represent any third party, other than in the performance of your official government duties, in connection with the same particular matter involving specific parties in which you participated personally and substantially as a member of NAGB. This is a lifetime prohibition. For example, if you participated in a NAGB discussion concerning a contract to State University, you may never represent State University with respect to that same contract before any official of the Executive Branch of the federal government and you may never represent State University with respect to that contract in any federal court.

Further, if you serve on NAGB more than sixty days and are compensated above a certain level, you may be subject to a one-year “cooling-off” period during which you would be barred from representing before NAGB certain third parties in connection with any matter. There are some exceptions to this law as well, and you should contact the Department of Education’s Ethics Division for guidance.

V. STANDARDS OF ETHICAL CONDUCT AND OTHER ETHICS RULES

The Standards of Ethical Conduct for Employees of the Executive Branch (Standards), 5 C.F.R. Part 2635, are regulations that apply both to regular federal government employees and to SGEs. Although you are treated generally the same as regular employees under the Standards, a few

exceptions do exist for SGEs in recognition of the fact that SGEs are working for the government only in a very limited way. In addition, there are other rules that govern your conduct as an SGE, including the Hatch Act, anti-lobbying rules, the Federal Acquisition Regulation, and rules about accepting gifts and compensation from foreign governments. A brief synopsis of some of these rules follows.

A. What restrictions apply if I want to engage in fundraising?

You may not use your NAGB title, position or authority to solicit funds for any organization. In addition, you may not personally solicit funds or other support from persons whose interests may be affected substantially by the performance or nonperformance of your official duties.

B. What restrictions are there on my acceptance of gifts?

You are prohibited from accepting gifts (almost anything of monetary value) from a “prohibited source” or gifts given because of your official position as a member of NAGB, unless a specific exception applies. The definition of “prohibited source” includes any person:

- seeking official action from NAGB;
- doing or seeking to do business with NAGB; or
- having interests that may be substantially affected by your official duties at NAGB.

The definition also includes organizations the majority of whose members fall within any of these categories. You may accept various benefits resulting from your outside business or employment activities, if a reasonable person would conclude that such benefits are not offered or enhanced because of your official position. The most commonly applicable exceptions to the gift rule allow you to accept:

- Modest items of food other than a meal, such as coffee, soft drinks, or donuts;
- Most plaques, certificates and trophies;
- Discounts available to all Government employees;
- Anything for which you pay market value;
- Gifts valued at \$20 or less per occasion, totaling no more than \$50 in a calendar year from any one source;
- Gifts clearly motivated by friendship or family relationship;
- Gifts resulting from your outside business activities, including those of your spouse; and
- Free attendance or meal which is provided by:
 1. The sponsor of the event for the day on which you are speaking or you are otherwise expected to present information on behalf of the Board at the event, or for a widely-attended gathering of mutual interest to a number of parties when the necessary determination of agency interest has been made; or
 2. someone other than the sponsor of a widely-attended gathering of mutual interest to a number of parties when more than 100 people are expected to attend, the

aggregate value of the gift is under \$335, and the necessary determination of agency interest has been made.

C. What restrictions apply if I want to “lobby” Congress?

NAGB and its members are permitted to communicate directly with Congress in their official capacity on matters that are related to legislation or appropriations deemed necessary to conduct NAGB’s “public business” (i.e., the NAGB’s statutory functions and responsibilities). However, the Anti-Lobbying Act, 18 U.S.C. Section 1913, prohibits you, in your official capacity at NAGB, from engaging in “grass-roots lobbying” (i.e., directly or indirectly suggesting or requesting that others contact Congress or a state legislature to urge the passage or defeat of proposed or pending legislation), even if it is related to the NAGB’s public business. The Anti-Lobbying Act also requires that any permissible direct communications with Congress in your official capacity at NAGB be made only through official channels.

None of these restrictions prohibit you from lobbying members of Congress or state legislatures, or urging others to do so, on your own time in your personal capacity. If you lobby Congress or state legislatures in your personal capacity, and the issue is related to NAGB’s business, you should make it clear that you are not representing NAGB and not acting in your official capacity as a member. Also, please note that when you are lobbying as a private citizen, you are not permitted to use government resources or equipment (including, but not limited to, computers, telephones, fax machines, copy machines, stationery), or seek assistance from NAGB staff.

D. What does “misuse of position” mean?

You may not use your position on NAGB to seek advantage for yourself or others. You also may not use nonpublic information gained through your service at NAGB to seek advantage for yourself or others. Finally, you may not use your NAGB title in a manner that makes it appear that the NAGB is sanctioning your views, products, services or personal enterprises. Of course, you may list your membership on NAGB on your curriculum vitae, but you may never use your status as an NAGB member to advertise or promote your personal activities. Please seek advice from the Department of Education Office of the General Counsel’s Ethics Division if you have any questions in this area.

E. May I keep my day job and still serve on NAGB?

Yes, you may continue to collect your regular salary from an outside employer for days on which you are providing services to the federal government (whether your federal government service is paid or unpaid). However, if you have another consultant or advisory position with NAGB or any other federal department or agency, you may not receive per diem or salary from NAGB for the same day for services performed for the two positions.

F. Are there any restrictions on my political activities?

You may not engage in any political activities while you are on duty (i.e., performing

government services) or when you are in a government building or vehicle. Although you are not subject to any restrictions on your political activities when you are not performing government services, you may never use your official title as a member of NAGB in connection with any political activities.

G. What restrictions do I face if I want to teach, speak, or write on matters that are related to the duties I perform for NAGB?

You may not receive compensation for teaching, speaking, or writing if:

- the activity is performed as part of your official duties (e.g., a speech on behalf of NAGB);
- **the invitation to engage in the activity was extended primarily because of your official position at NAGB, rather than expertise in the subject matter;**
- the invitation or offer of compensation was extended to you by someone with interests that may be affected substantially by your duties;
- the information conveyed through the activity draws substantially on nonpublic information obtained through your service at NAGB; or
- **the activity deals, in significant part, with a matter involving specific parties to which you are currently assigned or had been assigned during your current NAGB appointment.**

Notwithstanding the restrictions in bold **type** you may accept compensation for teaching a course requiring multiple presentations offered as part of: (a) the regularly established curriculum of various specified types of educational institutions; or (b) educational or training programs sponsored and funded by federal, State, or local government. However, if you teach at an educational institution, you must not participate in any NAGB matters that involve that institution.

H. What restrictions apply if my government duties involve the awarding of contracts?

If you are involved in the awarding of any contracts, please seek advice from the Ethics Division. There are special provisions that cover your involvement in the awarding of contracts. For example, you may not accept compensation as an employee, officer, director, or consultant of a contractor within the one-year period after leaving Government service where you participated in certain procurement matters pertaining to that contractor. In addition, if you disclose certain information pertaining to Federal procurements that you obtained during your service on a committee, you may face sanctions, including criminal penalties.

I. What restrictions apply to my interaction with foreign entities?

The emoluments clause of the U.S. Constitution prohibits you from receiving any emolument, office or title of any kind from a foreign government, including political subdivisions of a foreign government. An emolument is compensation received by virtue of holding an office or having employment with a foreign government and includes, for example, salary, honoraria, transportation, per diem allowances, household goods, shipment costs, and housing allowances. This clause has been interpreted to be broader than the traditional notion of employment and includes, for example, income received through a partnership when an identifiable portion of the partnership draw can be attributed to the partnership's fees from such foreign government. This provision has particular relevance to positions with foreign universities that are government-operated, as opposed to private institutions. United States Constitution, art. I § 9, cl. 8. There are also statutory provisions restricting acceptance of gifts from foreign governments. 5 U.S.C. § 7342. You should seek advice from the Ethics Division regarding the details about these restrictions. Additionally, a criminal statute bars employment or consultation with a foreign entity for the purpose of providing foreign agent representation or lobbying. 18 U.S.C. § 219.

The ban on participating in foreign agent activities covered by the Foreign Agents Registration Act (FARA) prohibits representation of foreign governments or foreign political parties before the United States Government, as well as a number of other activities conducted within the United States on behalf of such entities. There are certain FARA exceptions related to trade or commerce, legal representation, humanitarian fundraising, and religious, scholastic, or scientific pursuits. The Lobbying Disclosure Act of 1995 requires certain covered Federal officials who serve as agents of foreign principals (other than foreign governments or foreign political parties) to register if they work on behalf of foreign corporations, associations, or other organizations.

Finally, certain restrictions apply after your position with NAGB terminates. Specifically, 18 U.S.C. § 207 includes restrictions on former employees who participated in trade or treaty negotiations on behalf of the United States (18 U.S.C. § 207(b)) and on former senior employees who wish to represent, or aid or advise in the representation of, a foreign entity with the intent to influence a decision of a Federal employee or agency (18 U.S.C. § 207(f)).

J. What do I do if I am called to be an expert witness?

Government employees generally may not participate as an expert witness, with or without compensation, other than on behalf of the United States, in any proceeding before a federal court or agency in which the United States is a party or has a direct and substantial interest. This restriction applies to most SGEs only if the SGE actually participated officially in the same proceeding or in the particular matter that is the subject of the proceeding. If you are appointed by the President, serve on a commission established by statute, or serve (or are expected to serve) for more than 60 days in a period of 365 days, the restriction on expert service also applies to any proceeding in which NAGB is a party or has a direct and substantial interest.

K. May I keep and use frequent flyer miles that I earn when I am on official NAGB travel?

Yes, you may use frequent flyer miles or other airline awards or promotions accumulated on official NAGB travel for your own personal use.

VI. CONCLUSION

We understand that these laws are complex and may not be intuitive. Again, we caution you that this summary is merely an introduction to the ethics laws and rules that apply to you. You should always feel free to contact the Department of Education Office of the General Counsel's Ethics Division with any questions or concerns.

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