

ETHICS COUNSELOR'S DESKBOOK

Post-Government Service Employment Restrictions



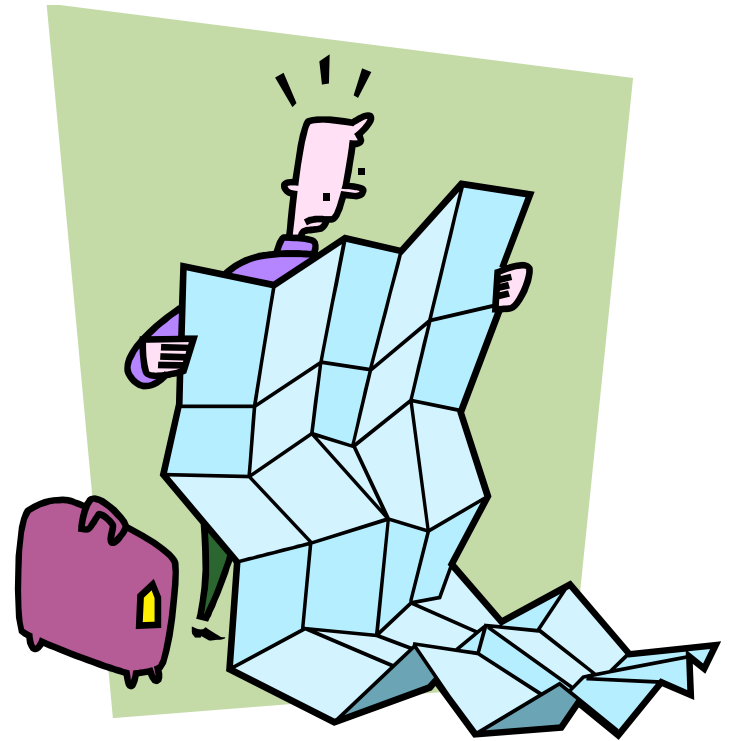
In 2004, Darleen Druyun, a former procurement executive in the Air Force, plead guilty to illegal job talks with Boeing and showing bias to the company in exchange for a \$250,000/year vice president job and employment for her daughter and future son-in-law.

She later served nine months in jail, had a \$5,000 fine, served 150 hours of community service and had seven months of community confinement after release.



Road Map

- Purpose of Restrictions
- Seeking Employment
- Federal Employment Restrictions
- Private Employment Restrictions
- Foreign Employment Restrictions



Seeking Employment

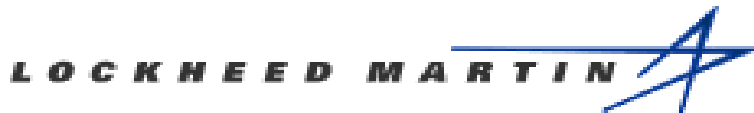
- Conflicts of Interest
- Gifts From Prospective Employers
- Working on Terminal Leave



Conflicts of Interest

18 U.S.C. § 208
5 C.F.R. § 2635.402

- You may not take any official action that affects a company with which you are negotiating for employment or have an arrangement concerning prospective employment
- JER 5-301 applies to National Guard and enlisted personnel



Careers



Seeking Employment

- Discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person

“Seeking Employment”

- 5 C.F.R.2635.603(b)
- You are “seeking employment” when you:
 - engage in negotiations
 - make unsolicited employment contact
 - includes sending resume
 - excludes requesting job application
 - respond to unsolicited proposal (except unconditional rejection)



Seeking Employment Examples

5 C.F.R. 2635.603 (ten examples)

Not seeking:

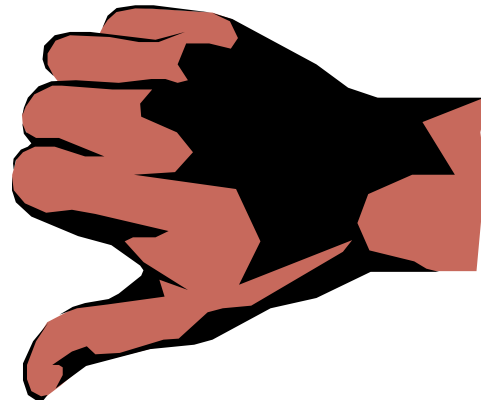
- posting resume on line
- stating “I am not talking to anyone about employment until I leave the Government”

Seeking

- Deferring job discussion until the project is finished
- When you learn the headhunter gave your resume to two companies and you don't reject the
²⁰²³ company overture

Termination of Seeking Employment

- You are no longer “seeking employment” when:
 - either party rejects proposal and discussions have terminated, or
 - two months have passed after mailing resume and no response



Disqualification

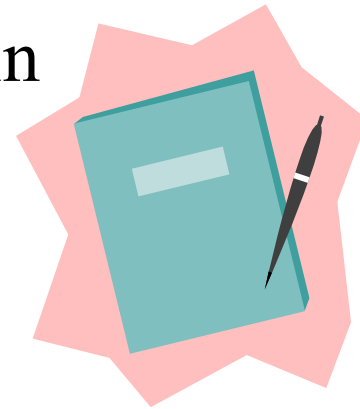
- To avoid violation:
 - Take no action
 - Written notice to supervisor (JER 2-204)
 - Supervisor response:
 - written
 - shielding procedures
 - copy to Ethics Counselor, subordinates



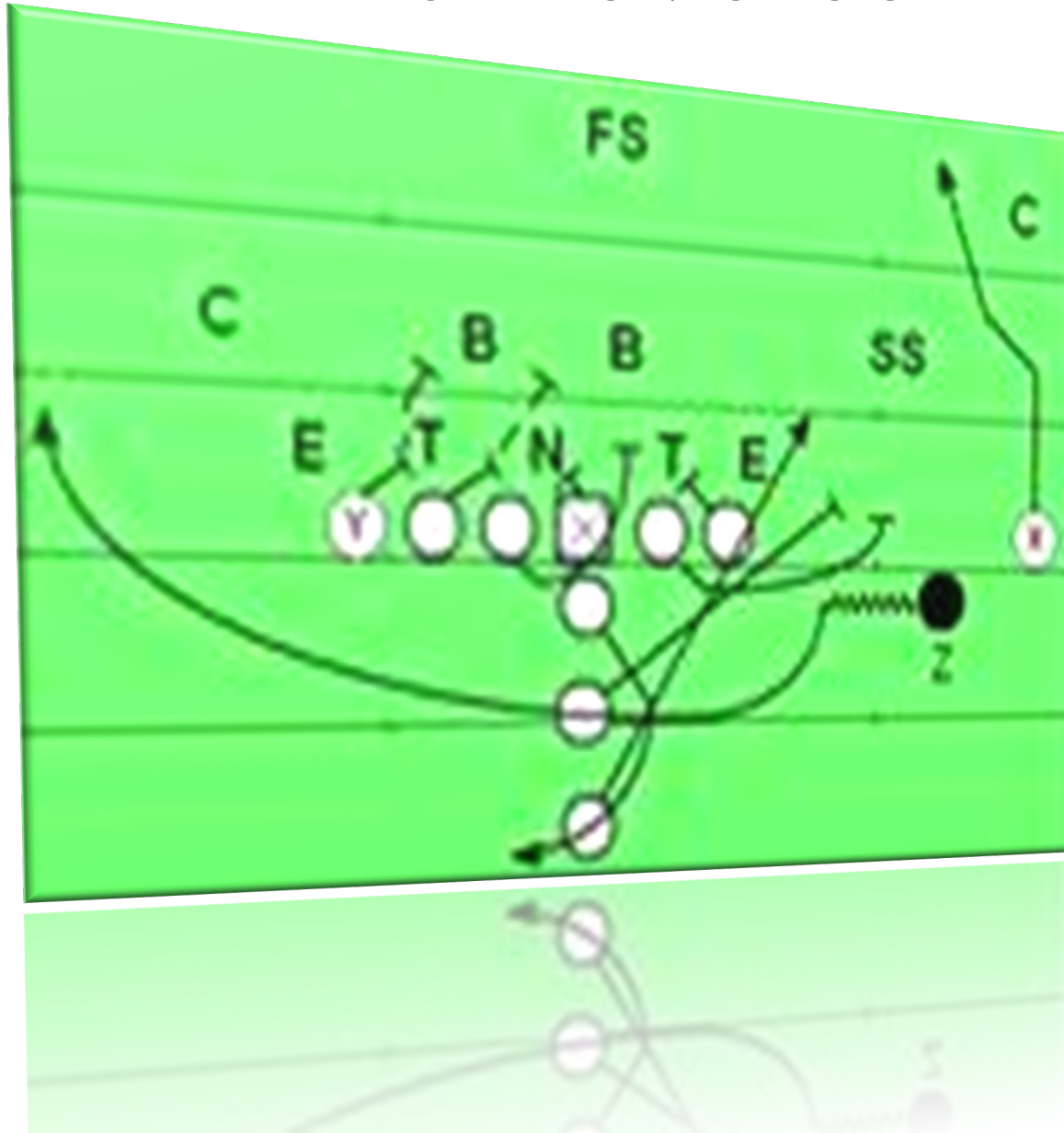
Former

Procurement Integrity Act

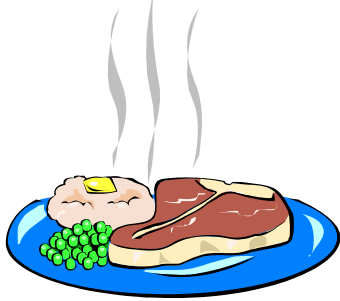
- Special reporting rules for procurement officials
 - Contacts with bidders/offerors in procurements \geq \$250K
 - Written “contact report”
 - Special disqualification notice
- Pre-award disclosure of procurement information prohibited (present and former officials)



The Reverse



Gifts From Prospective Employers



5 C.F.R. § 2635.204(e)(3)



- Meals, lodging, transportation, etc. *customarily* offered
- Don't forget to disqualify
- if necessary



Terminal Leave

- May work while on terminal leave
- Financial disclosure form filers (450/278) must obtain agency designee approval if employer will be prohibited source
- Active Duty Officers may not accept outside employment that will interfere with duty performance or require separation from service – 10 U.S.C. 973(a)



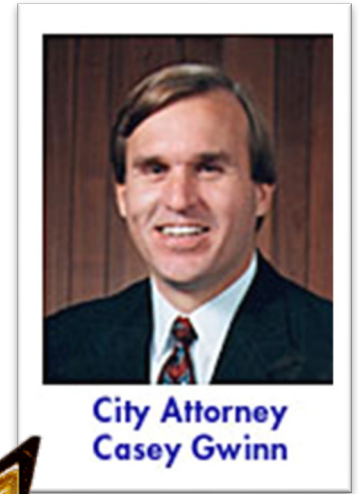
Federal Employment While on Terminal Leave

- If not a “civil office”
 - may receive pay for Federal position and military pay and allowances during terminal leave
 - 5 U.S.C. 5534a
 - DODD 1344.10



No Civil Offices During Terminal Leave!

- Civil Office Statute - 10 U.S.C. § 973
 - Active duty military officers may not hold civil office
 - Federal/State/Local
 - Exercise Sovereign Power
 - USA/DA/City Attorney
 - AUSA/ADA



UNITED STATES ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF IOWA



Can't Be an Agent While on Terminal Leave!

- 18 U.S.C. §§ 203/205
- Cannot act as an agent for another before any Federal agency



Retired At Last!!!





Restrictions on Federal Employment



- 6-month cooling-off period
before working in DoD



6-Month Cooling-Off Period

- No civilian employment within DoD for 6 months (5 U.S.C. 3326)
- Applies to all retired military members
- Waivers available from Secretary of hiring component
- Emergency exception no longer available



Representational Restrictions

18 U.S.C. § 207

- Designed to curb “switching sides”
- ***DOES NOT*** prohibit acceptance of employment →
- ***MAY*** restrict scope of former employee’s activities



Representational Restrictions

18 U.S.C. § 207; 5 C.F.R. 2641

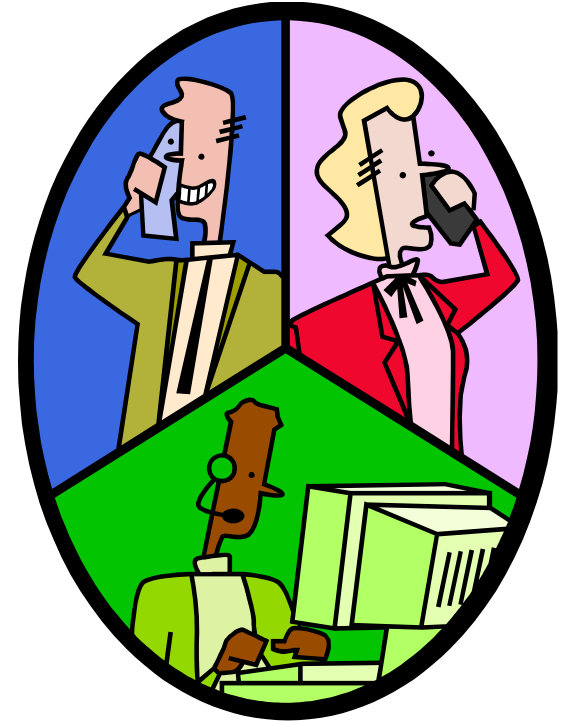
- Prohibits representing another before U.S. Government with intent to influence
 - Lifetime ban
 - 2-year ban
 - 1-year cooling-off period for senior employees
 - 1-year ban on treaty negotiations
 - 1-year ban on senior employees representing foreign entities



“We represent the Lollipop Guild!”

Lifetime Ban

- 18 U.S.C. § 207(a)(1)
- May not:
 - Communicate/appear on behalf of another
 - With “intent to influence”
 - Regarding a “particular matter”
 - Involving specific parties
 - Where participated “personally and substantially” as Federal employee
 - Behind-the-scenes assistance permitted



Communication or Appearance

5 C.F.R. 2641.201(d)

- Communication – any oral, written, or electronic communication that former employee intends to be attributed to himself
- No requirement that former employee be recognized by current employee
- Appearance – Physically present
- Behind the scenes assistance – permitted but be careful of 3rd party intermediary

2023 communications

Intent to Influence

5 C.F.R. 2641.201(e)

- Present when made for the purpose of
 - Seeking a government ruling, benefit, approval, or other discretionary action or affecting government action in a matter involving a dispute or controversy
- Not Present when made for the purpose of
 - Making routine requests not involving a potential controversy, factual statements not involving element of dispute or effort to seek discretionary act of government, and social contacts

Intent to Influence (cont)

- Mere physical presence – relevant factors to consider set forth in 5 C.F.R. 2641.201d(e)(4)

Particular matter involving specific parties

- Particular matter – includes a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, or investigation. Generally, does not include rulemaking, formulation of general policy, standards or objectives, or other matters of general application.

Particular matter involving specific parties

5 C.F.R. § 2641.201(h) (cont)

- Would not include matters of general applicability (legislation or rulemaking)
- International agreements – maybe depending on focus (e.g. specific claim)
- Must be specific parties at all relevant times (both when participating as a government employee and making the post-employment communication or appearance)

Same Particular Matter Involving Specific Parties

5 C.F.R. § 2641.201(h)(5)

- Contracts, grants, or agreements
 - Generally new particular matter does not arise simply because of a contract modification
 - Generally successive or otherwise separate contracts are new particular matters
 - Generally, a contract is a single particular matter
 - Individual delivery order or task order could be a separate particular matter in some cases

Before an Employee of the US

5 C.F.R. § 2641.201(f)

- Includes any current Federal employee
- Public Commentary – address at a public gathering, conference, seminar, or other similar forum as a speaker or panelist is not a prohibited communication if forum is
 - Not Government sponsored or co-sponsored
 - Attended by a large number of people
 - Significant portion of attendees are not US employees

On Behalf of Another Person

5 C.F.R. § 2641.201(g)

- “Person” broadly defined. It includes an individual, corporation, company, association, firm, partnership, society, joint stock company or any other organization, institution, or entity.
- It does not include the former employee himself or any sole proprietorship owned by
2023 the former employee

Personal and Substantial

- Participate personally and substantially
– to participate directly and significantly by decision, approval, recommendation, rendering of advice or investigation.
Includes actions of a subordinate if actually directed by the former employee.

Representational Restrictions

2-Year Ban

- *18 U.S.C. § 207(a)(2)*. May not, within 2 years of termination of Government service
 - Communicate/appear on behalf of another
 - With “intent to influence”
 - Regarding a “particular matter”
 - Involving specific parties
 - Under “official responsibility” during last year of Government service
- Behind-the-scenes assistance permitted



Representational Restrictions

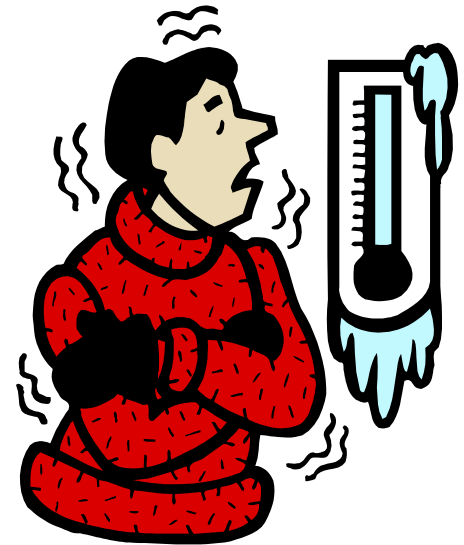
Definitions

- Official responsibility – direct administrative 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 direct Government action.
- “Acting” – official responsibility may be affected
- Leave status – official responsibility is not affected by annual, sick, or terminal leave, excused absence or leave without pay.
- Disqualification – official responsibility **is not affected**

Representational Restrictions

1-Year Cooling-Off Period

- *18 U.S.C. § 207(c)*
 - Applies to former senior employees (personnel whose basic pay exceeded 86.5 percent of the rate for level II of the Executive Schedule (EL II)).
 - Prohibits communication or appearance before *former agency*, on behalf of another with intent to influence, on any matter where official action is sought



Section 1045 of the National Defense Authorization Act for 2018

- Effective December 12, 2017, Congress enacted additional post-Government employment restrictions for senior personnel departing the Department of Defense after that date. Section 1045 restricts “lobbying activities” with respect to DoD matters by certain senior civilian officials and officers. Departing flag and general officers and senior civilian equivalents are prohibited from lobbying the Department or certain other executive branch officials regarding DoD matters for a one or two year period after departure, depending on seniority. (no componenting). Must be subject to 207(c) to be subject to 1045.

Section 1045 of the National Defense Authorization Act for 2018(cont)

- O-9 and O-10 and SES Tier 3 have a two year cooling off
- O-7 and O-8 and SES Tier 1 and 2 have a one year cooling off

Section 1045 of the National Defense Authorization Act for 2018(cont)

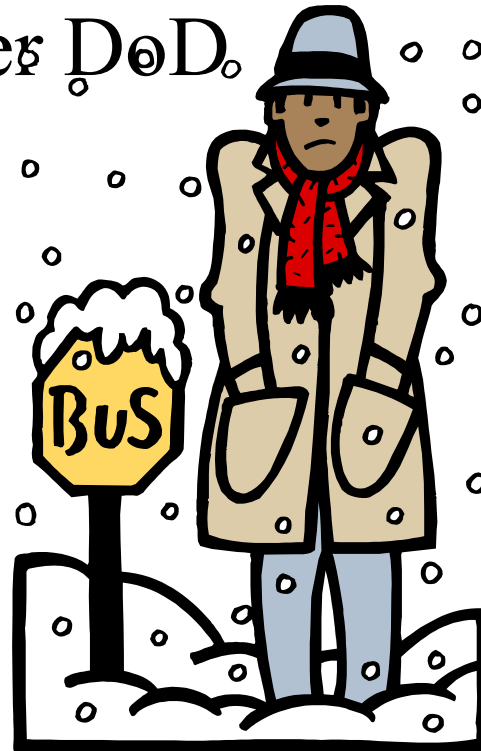
- *Note, however, “behind the scenes” assistance is only prohibited when performed by a former senior official in support of a lobbying activity with a covered executive branch official outside of the Department of Defense (DoD) pertaining to a matter with respect to the DoD.*

Section 1045 of the National Defense Authorization Act for 2018(cont)

- *“Behind the scenes” assistance is NOT prohibited in support of lobbying activities with a covered executive branch official in DoD. Former senior officials are still prohibited from participating in a lobbying contact with a covered executive branch official in DoD or outside of DoD pertaining to a matter with respect to DoD “Covered Executive Branch Official” includes all political appointees and O-7 and above military members. So you could appear before a career SES or a GS-15 or below.*

1-Year Cooling-Off Period under 18 U.S.C. section 207 but not 1045

- Behind-the-scenes assistance permitted
- Communications to other DoD components permitted
- Dual-Hatted



DoD 10 Separate Components FOR PURPOSES OF 18 U.S.C. section 207 and not 1045

- Defense Information Systems Agency
- Defense Intelligence Agency
- Defense Logistics Agency
- Defense Threat Reduction Agency
- Department of the Air Force
- Department of the Army
- Department of the Navy
- National Geospatial-Intelligence Agency
- National Reconnaissance Office
- National Security Agency
- Defense Advanced Research Projects Agency

Existing Government Contract that you worked on

- For Purposes of 207, a violation if you work on it and represent company back before the same part of DoD
- Ok Under 1045

Representational Restrictions

1-year Ban on Treaty Negotiations

- *18 U.S.C. § 207(b)*. May not **represent, aid, or advise anyone** concerning ongoing treaty negotiations if:
 - participated personally and substantially in negotiations during last year of service
 - had access to inside information
 - representation, assistance, or advice is based on such inside information
- **NO** behind-the-scenes assistance allowed



SOUTH KOREA

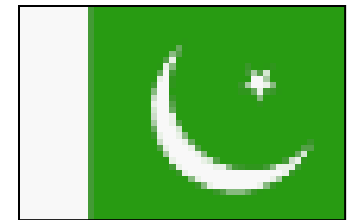


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Representational Restrictions

1-Year Ban Relating to Foreign Entities

- *18 U.S.C. § 207(f)*
 - Applies to former senior employees (personnel whose basic pay exceeded 86.5 percent of the rate for level II of the Executive Schedule (EL II).)
 - Prohibits, within 1 year of terminating Government service:
 - **representing foreign entity before any U.S. department, agency, etc. with intent to influence**
 - **aiding or advising foreign entity with intent to influence decision of U.S. official**



207 Exceptions/Waivers

- See table in 5 C.F.R. 2641.301(l) for specific applicability
- Include:
 - Acting on behalf of State or Local government, hospital or medical research organization, accredited degree granting institutions (“university exception but must be employee; not independent contractor or consultant .301(c)(2))
 - Furnishing scientific or technological information
 - Testimony under oath

Procurement Integrity Act

- No longer has a name;
codified on 1/4/11 at 41 U.S.C. 2101-2107
- Still Applies to employees who retire on or
after 1 January 1997; just finally codified
- Bars acceptance of compensation from
contractor for 1 year after certain
participation in procurement of:
 - contracts, subcontracts,
modifications, and other
actions > \$10M



Triggers



- Served as Procuring Contract Officer, Source Selection Authority, Source Selection Evaluation Board Member, Chief of Financial or Technical Evaluation Team for procurement > \$10M
- Served as Program Manager, Deputy Program Manager, or Administrative Contracting Officer for procurement > \$10M
- Personally made decision to:
 - award a contract, subcontract, modification, or task order > \$10M
 - establish overhead or other rates applicable to contract > \$10M
 - approve issuance of a contract payment > \$10M
 - pay or settle a claim > \$10M



Executive Order 13989 and Pledge

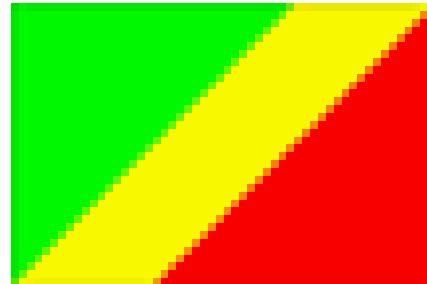
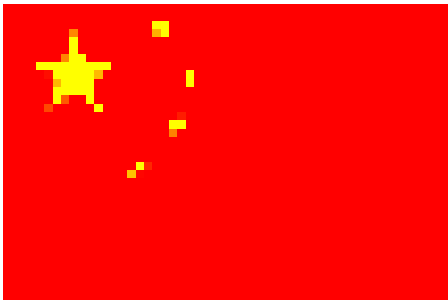
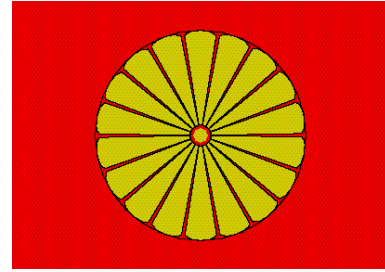
- Applies to Civilian Political Appointees
- No former political appointee can lobby covered executive branch official for a certain period.
- One year “cooling off under 18 U.S.C. 207 is extended to two years.
- Restriction on representing Foreign Governments before the Federal Government

STOCK Act

- Within 3 days of negotiating salary with a non-Federal employer, the public financial disclosure filer must file a notice of negotiation.
- For 0-7 and above and SES, we often use a combined disqualification and Stock Act Notice

Foreign Entity

- Foreign government
- Person/group exercising sovereign political jurisdiction
- Foreign political parties
- Foreign commercial corporation if exercises the function of a sovereign



Foreign Employment

- Constitution, Article I, § 9, clause 8
 - No title of nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.



Foreign Employment (Retired Military)

- Congressional Consent via Statute

- Civil Employment
- Military forces of
“newly democratic nation”

- SEC of SERVICE and

SECSTATE approval required
for employment with a foreign government

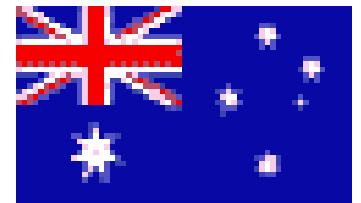
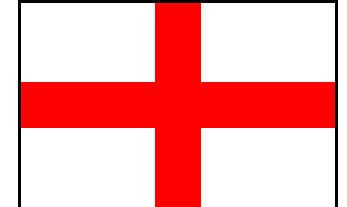
- includes any entity owned or controlled by a foreign government, e.g., commercial or educational entities

SEC of SERVICE only if not compensation



Foreign Employment

- May require registration as a Foreign Agent with Department of Justice
- Loss of Citizenship?
 - Generally means loss of military retiree pay
- POCs
 - ECC Deskbook for each service



Public Financial Disclosure Report Filers

- Must file termination OGE 278e
 - not more than 30 days after retirement date (Note OGE regulation permits filing up to 15 days before leaving)



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JER CHANGES

- Must include discussion of post-employment and disqualification issues in annual ethics training
- Annual certification that public disclosure filers are aware of post employment laws
- Ethics officials provide post-employment counseling as part of exit briefing

OPM Notice

- Departments and agencies must notify all public filers subject to 18 U.S.C. 207(c) what the restrictions are, restrictions regarding 18 U.S.C. 207(f), and the penalties for violating 18 U.S.C. 207.
5 C.F.R. part 730

Senate Armed Services Committee Requirement

- Maintain database of PSGE opinions for SES, General and Flag Officers paid at 0-7 or above, Procurement Officials set forth in 41 U.S.C. 423 which is now 41 U.S.C. 2101-2107, and those officials in an Executive Schedule position under subchapter II of Chapter 53, Title 5, United States Code (political appointees),

Senate Armed Services Committee Requirement (cont.)

- who, within two years after leaving service in the Department, expect to receive compensation from a defense contractor.
P.L. 110-181, section 847

Senate Armed Services Committee Requirement (cont.)

- These officials must request the opinion in the situation where they participated personally and substantially in an acquisition in excess of \$10,000,000.

Senate Armed Services Committee Requirement (cont.)

- Retain opinions for 5 years
- Centralized Database is AGEAR (After Government Employment Advisory Repository) (Must load 847 opinion into AGEAR in a timely manner)

Materials

- PGE Service Employment Questionnaire
DD Form 2945
- Form Letters

Questions

Form letter and Form 2945

Check Tool box under post-employment on the DoD website