

SOCO ADVISORY

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OSD.SOCO@MAIL.MIL

Guidance Regarding Section 1117 of the National Defense Authorization Act for Fiscal Year 2022

Section 1117 of the National Defense Authorization Act for Fiscal Year 2022 ("Section 1117") enacted new "enhanced" recusal requirements for all DoD personnel effective December 27, 2021. The purpose of this advisory is to provide DoD personnel with background information and implementation guidance relating to these new requirements. DoD ethics officials should update all training materials, employee handouts, and other relevant guidance accordingly.

I. Background

During the drafting of the National Defense Authorization Act for Fiscal Year 2022 ("FY22 NDAA"), Congress devoted considerable attention to ethics laws. The House and the Senate each considered proposals to expand recusal requirements for DoD employees. The Senate version of the FY22 NDAA would have required all DoD personnel to be recused for four years from matters involving a former employer, as well as any client or competitor of a former employer, with no authority for a waiver or authorization to permit participation. S. 2792, 117th Cong. (2021). The House bill included an identical section, except that the recusal period was two years. H.R. 4350, 117th Cong. (2021). In its final form, however, Congress significantly revised Section 1117 to align more closely with the recusal standard in the Office of Government Ethics (OGE) regulation at 5 C.F.R. § 2635.502 and the Biden Administration's Ethics Pledge, Exec. Order No. 13,989, 86 Fed. Reg. 7029 (Jan. 25, 2021). DoD ethics officials should implement Section 1117 consistent with OGE regulations at Subparts E and F of 5 C.F.R. § 2635.

II. Summary of Section 1117 Recusal Requirements

Section 1117 prohibits DoD personnel from participating personally and substantially in a particular matter involving specific parties where any of the following organizations is a party or represents a party to the matter: (1) any organization, including a trade organization, for which the DoD officer or employee has served as an employee, officer, director, trustee, or general partner in the past two years; and (2) any organization with which the DoD officer or employee is seeking employment. Section 1117 allows an agency designee to authorize an officer or employee to participate in such a matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the officer or employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. As used in Section 1117, the term DoD "officer or employee" should

be interpreted to include all DoD civilian and military personnel. The Joint Ethics Regulation, DoD 5500.7-R will be revised to make it clear that the new law applies to enlisted personnel.

A. *“Former Employer” Recusal.* Section 1117 creates a new two-year statutory “former employer” recusal requirement that only applies to DoD personnel. This recusal is in addition to the two “former employer” recusals under Subpart E of 5 C.F.R. § 2635 (applicable to all Federal employees) and the Biden Administration’s Ethics Pledge (applicable to all Federal political appointees). Section 1117 closely tracks the language and uses the same recusal and authorization standards as Subpart E of 5 C.F.R. § 2635. The most notable differences are the length of the recusal period and the categories of former positions that trigger the recusal requirements. Attachment 1 to this Advisory provides a comparison chart of the “former employer” recusals under Section 1117, OGE’s regulation at Subpart E of 5 C.F.R. § 2635, and the Biden Administration’s Ethics Pledge.

The two-year “former employer” recusal under Section 1117 will apply to DoD personnel who terminate non-Federal employment on or after December 27, 2021, regardless of the individual’s appointment date with DoD. *Examples:*¹

1. John quits his job at Company A on November 12, 2021 and starts DoD employment on November 15, 2021. Section 1117 does not apply retroactively to prohibit his participation in particular matters to which Company A is or represents a party.
2. John quits his job at Company A on January 7, 2022 and starts DoD employment on January 10, 2022. John has a two-year recusal under Section 1117 that prohibits him from participating in particular matters where Company A is or represents a party until January 7, 2024.
3. John was appointed to a DoD position in 2019, but continued to engage in outside non-Federal employment with Company A until January 10, 2022. John has a two-year recusal under Section 1117 that prohibits him from participating in particular matters where Company A is or represents a party until January 10, 2024.

B. *“Seeking Employment” Recusal.* Section 1117 creates a new statutory “seeking employment” recusal requirement that applies to DoD personnel in addition to the “seeking employment” recusal requirement for all Federal employees in Subpart F of 5 C.F.R. § 2635. The primary difference between the two provisions is that the recusal standard in Subpart F of 5 C.F.R. § 2635 is broader than the recusal standard in Section 1117 of the NDAA for FY22. The recusal standard in Subpart F of 5 C.F.R. § 2635 prohibits all personnel from participating in a particular matter that could have a “*direct and predicable effect*” on the financial interest of a prospective employer. Comparatively, the recusal standard in Section 1117 more narrowly prohibits DoD personnel from participating in a “*particular matter involving specific parties*” where a prospective employer is or represents a party to the matter. When applying the “seeking

¹ Ethics officials must also consider whether the “former employer” recusals under Subpart E of 5 C.F.R. § 2635 and the Biden Administration’s Ethics Pledge apply.

employment” recusal under Section 1117, DoD ethics counselors and employees should use the definition of “seeking employment” set forth in 5 C.F.R. § 2635.603(b). Attachment 2 to this Advisory provides a comparison chart of the “seeking employment” recusals under Section 1117 and OGE’s regulation at Subpart F of 5 C.F.R. § 2635.

C. Authorizations. Section 1117 does not require authorizations to be in writing. However, SOCO considers it a best practice for agency designees and employees to create a written record of the authorization. When issuing an authorization under Section 1117, SOCO recommends that agency designees assess the factors set forth in 5 C.F.R. § 2635.502(d) and consider whether the corresponding regulatory requirement requires a written authorization.² For consistency, the agency designee should address both the statutory and regulatory provisions in the authorization.

For the purposes of issuing an authorization under Section 1117, an “agency designee” should be given the same meaning as 5 C.F.R. § 2635.102(b). DoD has defined “agency designee” in Section 1-202 of the Joint Ethics Regulation, DoD 5500.7-R.

III. Notification.

Recusal is accomplished by not participating in the matter. Consistent with the OGE Government-wide standards at 5 C.F.R. §§ 2635.502(e) and 2635.604, Section 1117 does not require recusals to be in writing. However, appropriate oral or written notification of the employee's disqualification should be made to the employee’s supervisor and coworkers to ensure that the employee is not involved in a particular matter involving specific parties from which he or she is disqualified. Although a written disqualification is not required, SOCO considers it a best practice for an employee to create a record of his or her actions by providing written notice to an agency ethics official and a supervisor. Neither the OGE Government-wide standards nor Section 1117 limit an agency ethics official or a supervisor from requiring an employee to file a written recusal statement when the agency ethics official or a supervisor determines it prudent to create a record of the employee’s recusal.

Employees who file a Public Financial Disclosure Report must always comply with the requirement in 5 C.F.R. § 2635.607 to file a written disqualification within three days of commencing negotiations or concluding an agreement for future employment.

DISCLAIMER: The purpose of this advisory is to disseminate relevant information and sources of general guidance, policy and law on Government Ethics issues to the Department of Defense ethics community. Advisories are not intended to be and should not be cited as authoritative guidance, DoD policy, or law.

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² 5 C.F.R. § 2635.502(d) states that authorizations made by an agency designee shall be documented in writing at the agency designee’s discretion or when requested by the employee. In contrast, both 5 C.F.R. 2635.605(b) and the Biden Administration’s Ethics Pledge require authorizations and waivers to be made in writing.

Attachment 1: Comparison of “Former Employer” Recusals

	Section 1117 of the FY22 NDAA.	Subpart E of 5 C.F.R. § 2635	Exec. Order No. 13989
Applicability	All DoD personnel.	All Executive Branch employees.	All civilian political appointees.
Covered Positions	Any organization, including a trade organization, in which the DoD officer or employee served as an employee, officer, director, trustee, or general partner. Section 1117(a)(1) of the FY22 NDAA.	Any person for whom the employee served as an employee, officer, director, trustee, general partner, agent, attorney, consultant, or contractor. 5 C.F.R. § 2635.502(b)(iv).	Any person for whom the DoD employee served as an employee, officer, director, trustee, general partner, agent, attorney, or consultant. Exec. Order No. 13989, sec 2, para (k) and (l). ¹
Length of Recusal	2 years from the date the DoD officer or employee last served in a “covered position.” Section 1117(a)(1) of the FY22 NDAA.	1 year from the date the employee last served in a “covered position.” 5 C.F.R. § 2635.502(b)(iv).	2 years from the date of appointment to the DoD position. Exec. Order No. 13989, sec 1, para 2.
Restricted Activity	Participating personally and substantially in a particular matter involving specific parties where an organization, with whom the DoD officer or employee served in a “covered position” is or represents a party to the matter. Section 1117(a)(1) of the FY22 NDAA.	Participating personally and substantially in a particular matter involving specific parties to which a person, with whom the employee served in a “covered position” is or represents a party to the matter. 5 C.F.R. § 2635.502(a).	Participating personally and substantially in a particular matter involving specific parties to which a person, with whom the DoD employee served in a “covered position,” is or represents a party to the matter, including regulations and contracts. Exec. Order No. 13989, sec 2, para (m). ¹
Authorization or Waiver	Agency designee may authorize a DoD officer or employee to participate in such a matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the officer or employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. ² Section 1117(b) of the FY22 NDAA.	Agency designee may authorize an employee to participate in such a matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the officer or employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 C.F.R. § 2635.502(d).	The Director of OMB, in consultation with the Counsel to the President, may grant a <i>written waiver</i> when the application of the restriction is inconsistent with the purpose or a waiver is in the public's best interest. Exec. Order No. 13989, sec 3, para (a).

¹ The Biden Administration Ethics Pledge has additional restrictions for political appointees who were registered under the Lobbying Disclosure Act, 2 U.S.C. 1601 et seq., or the Foreign Agents Registration Act (FARA), 22 U.S.C. 611 et seq., within the 2 years before the date of appointment. Exec. Order No. 13,989, sec 1, para 3.

² SOCO recommends that agency designees use the factors set forth in 5 C.F.R. § 2635.502(d) to determine whether an authorization is warranted.

Attachment 2: Comparison of “Seeking Employment” Recusals

	Section 1117 of the FY22 NDAA.	Subpart F of 5 C.F.R. § 2635
Applicability	All DoD personnel.	All Executive Branch employees.
Length of Recusal	As long as the DoD officer or employee is “seeking employment.” ¹	As long as the employee is “seeking employment,” as defined at 5 C.F.R. § 2635.603(b).
Restricted Activity	Participating personally and substantially in a <i>particular matter involving specific parties</i> where an organization, with whom the DoD officer or employee is “seeking employment” is or represents a party to the matter. Section 1117(a)(2) of the FY22 NDAA.	Participating personally and substantially in a particular matter that has a <i>direct and predicable effect</i> on the financial interests of a prospective employer with whom the employee is seeking employment. 5 C.F.R. § 2635.604(a).
Authorization	Agency designee may authorize a DoD officer or employee to participate in such a matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the officer or employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. ² Section 1117(b) of the FY22 NDAA.	Agency designee may issue a <i>written authorization</i> for an employee to participate in such matters in accordance with the standards set forth in 5 C.F.R. § 2635.502(d). <i>See</i> 5 C.F.R. § 2635.605(b). ³

¹ For the purposes of Section 1117, SOCO recommends using the definition of “seeking employment” at 5 C.F.R. § 2635.603(b).

² SOCO recommends that agency designees use the factors set forth in 5 C.F.R. § 2635.502(d) to determine whether an authorization is warranted.

³ Where an employee is engaged in employment *negotiations*, a separate waiver under the regulations implementing 18 U.S.C. 208 would be required. *See* 5 C.F.R. § 2635.605(a).

Attachment 3: Section 1117 of the FY22 NDAA

SEC. 1117. ENHANCEMENT OF RECUSAL FOR CONFLICTS OF PERSONAL INTEREST REQUIREMENTS FOR DEPARTMENT OF DEFENSE OFFICERS AND EMPLOYEES.

(a) **IN GENERAL.**-Except as provided in subsection (b), in addition to the prohibition set forth in section 208 of title 18, United States Code, an officer or employee of the Department of Defense may not knowingly participate personally and substantially in any particular matter involving specific parties where any of the following organizations is a party or represents a party to the matter:

(1) Any organization, including a trade organization, for which the officer or employee has served as an employee, officer, director, trustee, or general partner in the past 2 years.

(2) Any organization with which the officer or employee is seeking employment.

(b) **AUTHORIZATION.**-An agency designee may authorize the officer or employee to participate in a matter described in paragraph (a) based on a determination, made in light of all relevant circumstances, that the interest of the Government in the officer or employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

(c) **CONSTRUCTION.**-Nothing in this section shall be construed to terminate, alter, or make inapplicable any other prohibition or limitation in law or regulation on the participation of officers or employees of the Department of Defense in particular matters having an effect on their or related financial or other personal interests.