

# SOCO ADVISORY

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## Overview of Stock Divestiture Requirements Under 10 U.S.C. § 988

All DoD personnel must continuously monitor for and prevent conflicts of interest between their official duties and their personal financial interests, including financial interests imputed to them under Federal law and regulation.<sup>1</sup> The purpose of this advisory is to remind ethics officials that DoD civilian Presidentially appointed, Senate confirmed (“PAS”) officials and senior DoD personnel in “key acquisition positions” (as identified by the Secretary concerned) are prohibited from holding certain stocks, regardless of whether a potential conflict of interest exists.

Historically, the Senate Armed Services Committee (SASC) has established policies concerning stock ownership by PAS officials and certain senior military officers, including those serving in key acquisition positions. In 2019, Congress enacted 10 U.S.C. § 988, which codified language similar to these SASC policies. Section 988 prohibits DoD PAS officials and senior officials in key acquisition positions from owning or purchasing the publicly traded stock of a company if that company is one of the 10 entities awarded the most amount of contract funds by the Department of Defense in a fiscal year during the five preceding fiscal years. This prohibition does not apply to:

- Holdings where the aggregate market value of company stock held by the official, their spouse, and their minor children, does not exceed the de minimis threshold established in Office of Government Ethics (OGE) regulations.<sup>2</sup>
- Stocks held in an Excepted Investment Fund (EIF) or a mutual fund.<sup>3</sup>

The current “Five Year Top Ten” list of DoD contractors is found on the SOCO website here: <https://dodsoco.ogc.osd.mil/ETHICS-TOPICS/Conflicts-of-Interest/>. Note that this list is developed using prior fiscal year data published by the General Services Administration each summer. The list of companies who are among the top ten defense contractors generally includes some combination of the same 11 contractors, though unanticipated events—like the COVID-19 pandemic—may occasionally result in changes. The relatively consistency of this list over time makes it easier for covered DoD personnel and ethics officials to effectively ensure compliance with the requirements of 10 U.S.C. § 988.

Ethics officials should ensure that officials subject to Section 988 are periodically reminded of these prohibitions and are monitoring not only their own holdings, but those of spouses and minor children, to avoid violations. If an official subject to Section 988 comes into possession of a prohibited holding, such as through inheritance or gift, ethics officials should work with that official to promptly accomplish divestiture. A Certificate of Divestiture (CD) may be available in such

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<sup>1</sup> 10 U.S.C. § 208; 5 C.F.R. § 2635.101(b)(2); 5 C.F.R. 2635.502.

<sup>2</sup> 5 C.F.R. § 2640.202.

<sup>3</sup> 5 C.F.R. § 2634.312(c).

instances. However, ethics officials should advise DoD employees to consult with their financial and tax advisors prior to requesting a CD to determine if a CD is advisable or beneficial based upon the official's specific financial situation.<sup>4</sup>

**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. This advisory is not intended to be and should not be used in lieu of legal advice, nor should it be cited as DoD policy or law.**

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<sup>4</sup> A CD only defers, but does not reduce or eliminate, capital gains, and it requires that the sale proceeds be re-invested in very limited permissible holdings. Therefore, a CD may not be advisable where the employee has no gains (e.g., the inherited stock received a stepped up tax basis) or the employee has other losses to offset any gains. DoD employees should consult with their financial and tax advisors for advice.