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APR 16 2014

STANDARDS OF CONDUCT OFFICE

MEMORANDUM FOR DoD DESIGNATED AGENCY ETHICS OFFICIALS

SUBJECT: Interpretation of "Covered Department of Defense Officials" Under Section 847

In the course of reviewing and reinforcing Section 847 compliance processes and procedures in your agencies, several of you asked my office how to interpret the statute's term "covered Department of Defense officials" as it applies to outgoing and former officials who must seek a Section 847 ethics opinion. In particular, you have asked how many years to look back into a departing employee's Federal career to determine whether he or she participated in the kinds of matters that trigger application of the law. As a reminder, under Section 847 of the FY 2008 NDAA, "covered Department of Defense officials" must request and receive a written opinion before accepting compensation from a defense contractor within two years of leaving DoD service.

There is no legislative history to help inform our interpretation of the term "covered Department of Defense officials." So my office put together a small working group of experts from the Military Departments to review the Procurement Integrity Act<sup>1</sup> and the post-Government employment statute (18 U.S.C. § 207) to help guide our efforts to define this term in a way that is consistent with the intent of both of these statutes, which appear to be the underpinning of Section 847.

To promote uniform application of Section 847 throughout DoD, and better ensure that ethics counselors are uploading the proper documents into AGEAR (the electronic database in which all Section 847 requests and ethics opinions must be stored for inspection by the DoD IG), please use the following clarifying guidance on the term "covered Department of Defense officials."

For purposes of Section 847, a covered DoD official is an official or former DoD official who, within two years after leaving DoD service, expects to receive compensation from a DoD contractor, and who, within the two year period prior to his or her departure from DoD:

- (1) Participated personally and substantially in an acquisition as defined in section (4)(16) of the Office of Federal Procurement Policy Act<sup>2</sup> with a value in excess of \$10,000,000 while serving—

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<sup>1</sup> Office of Federal Procurement Policy Act, formerly known as the Procurement Integrity Act, now codified at 41 U.S.C. §§ 2101-2107.

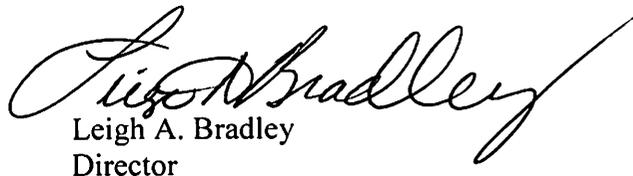
<sup>2</sup> An "acquisition" means the process of acquiring, with appropriated funds, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency. It does not include grants or cooperative agreements.



- (A) In an Executive Schedule position under subchapter II of Chapter 53 of title 5, United States Code;
  - (B) In a position in the Senior Executive Service under subchapter VIII of Chapter 53 of title 5, United States Code; or
  - (C) In a general or flag officer position compensated at the rate of pay for grade 0-7 or above under section 201 of title 37, United States Code; or
- (2) Served as a program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of \$10,000,000.

I also want to take this opportunity to clarify the steps you should take if an official requests a Section 847 opinion, but is uncertain as to what his or her defense contractor job responsibilities will entail. Section 847 explains that the legal opinion from the appropriate ethics counselor should address *the applicability of post-employment restrictions to the activities that the former official may undertake on behalf of the contractor*, i.e., an opinion specifically tailored to the official or former official's new position and duties. In our experience, on occasion, a DoD official or former official will seek a written opinion from an ethics counselor before he or she has specific information regarding his or her future employer, position, and duties to be performed. Although it may be possible to provide that individual with a general opinion summarizing the post-government employment restrictions, it is not possible to provide that official with the type of tailored written opinion required by Section 847. Accordingly, such a request should not be considered valid for a Section 847 opinion and, therefore, would not trigger the requirement in Section 847 to provide a written opinion within 30 days of the request or the requirement to upload the request and opinion into the AGEAR database. In such a circumstance where the requirements of 847 are not triggered, you should, of course, continue to provide post-Government employment advice to the departing official as you would in your normal course of practice. Nothing in this memorandum is intended to limit or change the manner in which you advise departing employees of their post-Government employment restrictions.

This guidance will be incorporated into the policies and procedures implementing AGEAR, the use of which is mandatory in DoD for collection and storage of Section 847 opinions. The next revision of the DD Form 2945, Post-Government Employment Advice Opinion Request, will similarly reflect this guidance in its instructions and require information from requestors only for the relevant periods.

  
Leigh A. Bradley  
Director