



U.S. Department of Defense Standards of Conduct Office

NON-SENIOR EMPLOYEE POST-GOVERNMENT EMPLOYMENT RESTRICTIONS

Purpose: This document summarizes the Government ethics rules that may impose restrictions on your employment after departure from the Department of Defense (DoD).

Application: For purposes of these restrictions, Military Personnel E-1 through O-6 and Civilian Personnel whose rate of base pay is less than 86.5% of the rate for Executive Schedule Level II (less than \$176,201 in 2022).

Legal Notice: This information identifies statutes and regulations that restrict or otherwise affect activities of DoD personnel after they leave Government service. This information is a summary of the rules and is not intended to serve as legal advice. Departing personnel should consult with their local ethics official(s) for advice concerning their specific situations. **For OSD personnel only** - contact the Standards of Conduct Office (SOCO) at (703) 695-3422 or by e-mail at OSD.SOCO@MAIL.MIL

Advice from ethics officials with respect to these matters is advisory only, and is provided in accordance with 5 C.F.R. § 2635.107 and 41 U.S.C. § 2104. Ethics officials are acting on behalf of the United States Government, and not as your personal representative. No attorney-client relationship is created.

I. REPRESENTATIONAL RESTRICTIONS AFTER LEAVING DOD (18 U.S.C. § 207)

A. Personal Participation: Lifetime Representational Ban

Simplified Rule: After you leave Government service, you may not represent someone else to the Government regarding *particular matters* involving specific parties that you worked on while in Government service. This ban remains for the lifetime of the particular matter.

Rule: A former Government officer or employee may not knowingly, with the intent to influence, make any communication to or appearance before an employee of the Executive or Judicial branches of the U.S. Government, on behalf of another person or entity in connection with a particular matter involving a specific party or parties, in which the officer or employee participated personally and substantially while employed as a Government employee and in which the United States is a party or has a direct and substantial interest. 18 U.S.C. § 207(a) (1). This rule does not apply to former military enlisted personnel.

Definitions:

- ***Particular Matter Involving Specific Parties:*** Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific non-Federal party or parties in which the United States is a party or has a direct and substantial interest. Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties. For example, a procurement may be a *particular matter*, but it might not become one involving *specific parties* until prospective or actual contractors are identified.
 - ***Particular Matters of General Applicability Not Covered.*** Legislation or rulemaking of general applicability and the formulation of general policies, standards, or objectives that are narrowly focused on the interests of a discrete and identifiable class of persons are not particular matters involving specific parties.
 - ***Specific parties at all relevant times.*** The particular matter must involve specific parties both at the time the official participated as a Government employee and at the time the former official makes the communication or appearance, although the parties need not be identical at both times.
- ***Personal*** participation means that you are directly participating in the matter or that you are actively directing one or more of your subordinates in their participation. Your participation does NOT have to be outcome determinative.
- ***Substantial*** participation means that the DoD official's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. If you are merely responsible for reviewing the matter for compliance with administrative or budgetary considerations, you are not substantially involved.

Example #1: A DoD official approved a specific university's grant application for a DoD research initiative. The former DoD official may not represent the university in relation to that grant as it is a particular matter involving specific parties in which the former DoD official participated personally and substantially as a DoD official.

Example #2: A DoD official performed certain feasibility studies for a possible procurement of a missile system. At the time the official was involved in the matter, DoD had not identified any prospective vendors. After the official left, DoD issued a request for proposals to construct the new system. The former DoD official now seeks to

represent one of the offerors in connection with this procurement. Section 207(a)(1) does not prohibit the official from doing so. The procurement was not a particular matter involving specific parties at the time of the official's participation because specific parties had not yet been identified.

Example #3: A former DoD employee participated personally and substantially in the development of a DoD policy establishing new safety standards that affect military aircraft manufacturers. While the policy is a particular matter of general applicability that is narrowly focused on the interests of a discrete and identifiable class of persons, non-Federal persons cannot be a "party" to a DoD policy. Therefore, it is not a matter involving specific parties, and Section 207(a)(1) would not prohibit the former employee from representing a non-Federal entity back to the Government in connection with this policy.

B. Official Responsibility: Two Year Representational Ban

Simplified Rule: For *two years* after leaving Government service, you may not represent someone else to the Government regarding *particular matters involving specific parties* that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

Rule: For two years after the termination of Government service, a former DoD official may not knowingly, with the intent to influence official action, make any communication to or appearance before an employee of the Executive or Judicial branches of the U.S. Government, on behalf of another person or entity in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which the former DoD official knows or reasonably should know was actually pending under the former DoD official's responsibility within the last year of DoD service. 18 U.S.C. § 207(a) (2).

Definitions: See the preceding section for the definitions of *particular matter involving specific parties* and *personal and substantial participation*.

- ***Official Responsibility*** means direct administrative or operating authority to approve, disapprove, or otherwise direct, Government actions. For instance, all particular matters involving specific parties under consideration in an agency are under the official responsibility of the agency head. It also includes a supervisor at any level having responsibility for the actions of a subordinate employee who actually participates in a matter. Official responsibility for a matter is not eliminated through a recusal or avoidance of personal participation in a particular matter involving specific parties.

Example: A DoD supervisor owned stock in Company A and was recused from participating in matters that could affect the financial interests of Company A. During the last year of the supervisor's DoD service, a subordinate personally and substantially participated in a contract with Company A. After retirement, the former DoD official is still subject to the Section 207(a)(2) two-year representational ban with regard to that contract. (If the supervisor personally directed the subordinate in participating in the

contract, the supervisor would be subject to the Section 207(a)(1) “lifetime” representational ban.)

C. Trade or Treaty Assistance: One Year Representational Ban

Rule: For a period of one year after leaving Government service, former employees or officers may not knowingly represent, aid, or advise someone else on the basis of *covered information*, concerning any ongoing *trade or treaty negotiation* in which the employee participated personally and substantially in his or her last year of Government service. 18 U.S.C. § 207(b).

Definitions:

- **Trade negotiations** are those undertaken pursuant to the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 2902).
- **Treaties** are international agreements that require the advice and consent of the Senate.
- **Covered information** means agency records accessible to the employee but exempt from disclosure under the Freedom of Information Act.

Exceptions to Representational Bans

There are exceptions to the restrictions of 18 U.S.C. § 207. For additional details, please consult an ethics counselor for specific guidance.

Common exceptions include:

- Acting on behalf of yourself.
- Acting on behalf of the U.S. Government.
- Aiding, advising, and representing certain international organizations with prior Secretary of State certification.
- Making statements based on special knowledge, if unpaid. (*§ 207 (c), (d), and (e) only*)
- The lifetime representational ban does not apply to communications that furnish scientific or technological information with prior, published certification by the Secretary of Defense. (*§ 207 (c), (d), and (e) only*)
- Subject to limitations, certain testimony under oath is exempt from the prohibitions of 18 U.S.C. § 207.

D. Penalties and Injunctions

A violation may subject you to imprisonment for up to five years, a criminal or civil fine, and a court order prohibiting you from engaging in the conduct in the future.

II. PROHIBITED COMPENSATION

Rule: Former DoD officials are prohibited from sharing in any compensation for representational services before the Executive and Judicial Branches of the Federal Government, rendered personally or by another, at a time when the former employee was still employed by the DoD. This prohibition may affect former DoD officials who share in the proceeds of a partnership or business for representational services that occurred before the official left DoD. Examples of such representational activities include lobbying, consulting, and legal representation.

III. PROCUREMENT INTEGRITY ACT COMPENSATION BAN (48 C.F.R. 3.104-3(d))

Rule: For a period of one year after the applicable *designated date*, a former official may not accept *compensation* from a prime contractor that has been awarded a competitive or sole source contract in excess of \$10 million, if the former official served or acted in any of the following capacities:

Capacity:

- Procuring contracting officer;
- Source selection authority;
- Member of source selection evaluation board; or
- Chief of financial or technical evaluation team.

Designated Date:

- If the official served in one of the positions listed above on the date the contractor was selected, but not on the date of award of the contract – the date the contractor was selected is the designated date.
- If the official served in one of the positions listed above on the date of award of the contract – the date of award is the designated date.

Capacity:

- Program Manager or Deputy Program Manager for an Acquisition program;
- Administrative Contracting Officer.

Designated Date:

- The designated date for the above positions is the last date of service in the position

Capacity:

Personally made any of the following decisions:

- To award contracts, subcontracts, or modifications of contracts or subcontracts, or task or delivery orders in excess of \$10,000,000;
- To establish overhead or other rates valued in excess of \$10,000,000;
- To approve issuance of a contract payment in excess of \$10,000,000;

- To pay or settle a claim in excess of \$10,000,000.

Designated Date:

- The designated date for the above positions is the last date of service in the position

A. Definitions:

- **Compensation** includes wages, salaries, honoraria, commissions, professional fees, and any form of compensation, provided directly or indirectly for services rendered. Compensation is indirectly provided if it is paid to an entity other than an individual, specifically in exchange for services provided by the individual.
- A **\$10 million contract** is determined by the following:
 - Value or estimated value at the time of award of the contract, including all options;
 - Indefinite-delivery/indefinite quantity or requirements contract - total estimated value of all orders at the time of award under a contract;
 - Any multiple award schedule contract, unless contracting officer documents a lower estimate;
 - Basic Ordering Agreement - value of delivery order, task order or order under a basic ordering agreement;
 - Claims - amount paid or to be paid in settlement of claim;
 - Estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

Exception: This restriction does not prohibit an official from working for another division or affiliate of the contractor, provided such division or affiliate does not produce the same or similar products or services as the division or affiliate responsible for the contract in which the official was involved.

IV. RESTRICTIONS FOR RETIRED MILITARY PERSONNEL AND RESERVISTS

A. Foreign Employment

Rule: The Emoluments Clause of the U.S. Constitution prohibits retired military personnel and reservists from receiving pay from *Foreign Governments* without Congressional authorization. This may extend to receipt of pay from a U.S. contractor or subcontractor for providing services to a Foreign Government and profit sharing at any commercial firm or business. In 37 U.S.C. § 908, Congress has authorized the Secretary of State and Secretary of the appropriate Military Department to approve such receipt of pay. Each Military Service has implementing procedures for this approval process. The penalty for violating the Emoluments Clause is forfeiture of retired military pay received during the period of the violation. *Foreign Governments* may include educational and commercial entities that are substantially owned or controlled by foreign governments.

B. Employment During Terminal Leave

1. Holding a civil office in state or local government: While on active duty (including transition leave) military *officers* are prohibited by 10 U.S.C. § 973(b) from holding a "civil office" with a state or local government.

2. Civilian position in the U.S. Government: Military personnel on transition leave are authorized to accept a civilian position, career, or non-career, in the U.S. Government and receive the pay and allowances of that position as well as their military pay and allowances. (5 U.S.C. § 5534a)

3. While on transition leave, military personnel are still active-duty service members, and the restrictions that apply to them while on active duty still apply. For example:

- Restrictions on political activities.
- Restrictions on outside employment. If permission prior to engaging in outside employment is required, that requirement will most likely carry over to transition leave. *Check with your supervisor.*

4. Restriction on representing others to the Federal Government: During transition leave:

- **Military officers** may not represent anyone before an agency or court of the Federal Government, with or without compensation, on a matter in which the United States is a party or has a substantial interest. 18 U.S.C. §§ 203, 205. Enlisted members are not subject to 18 U.S.C. §§ 203 or 205.
 - For example, *military officers* may not interact or appear on behalf of their non-Federal employer before Federal employees – whether or not in a Federal workplace. Being present in a Federal workplace on behalf of a non-Federal employer is a representation, with limited exceptions. *Military officers* on transition leave may work for a non-Federal employer, but only "behind the scenes" at the non-Federal employer's office, or otherwise away from the Federal workplace.

V. BIDEN ADMINISTRATION RESTRICTIONS FOR POLITICAL APPOINTEES

Political appointees signed the Ethics Pledge set forth in Executive Order 13989, committing to additional ethics obligations including the following post-Government employment restrictions:

Upon leaving Government service, the political appointee may not lobby any covered Executive Branch official or non-career Senior Executive Service appointee, or engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2021, would require that the political appointee register under the Foreign Agents Registration Act, for the remainder of the Administration or two years following the end of the political appointee's appointment, whichever is later. For the purpose of this provision, "lobby" means to act as a registered lobbyist.

VI. REQUIREMENT TO REQUEST AN OPINION

If you will be receiving compensation from a defense contractor within two years of leaving DoD, you are required to request a written opinion regarding the applicability of the post-employment restrictions to the activities you undertake on behalf of the defense contractor. This requirement applies to any employee who participated personally and substantially in an acquisition with a value in excess of \$10M **and** who serves or served in: (1) an Executive Schedule position; (2) a Senior Executive Service position; (3) a general or flag officer position; or (4) in the position of 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. You must obtain this written opinion prior to accepting compensation from the contractor.

VII. ADMINISTRATIVE REMINDERS

A. Financial Disclosure Report: A DoD official who is a Public Financial Disclosure Report (OGE 278) filer must file a Termination report not later than the 30 days after separation. If the DoD official files more than 30 days late, the DoD official is subject to a \$200 late filing fee. In addition, if a DoD official knowingly and willfully fails to file this report, the DoD official will be referred to the Department of Justice which could result in imposition of substantial civil penalties in excess of \$50,000.

- Note: No Termination report is required if the official goes to another Federal public financial disclosure filing position within 30 days.

B. Use of Nonpublic Information: Even though a DoD official has left Federal service, s/he still may not use nonpublic information to further his/her own private interests, or those of another, including the DoD official's non-Federal employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.

C. Accepting a Buy-Out: If a DoD official accepted a *buy-out* or separation payment, s/he has re-employment restrictions. *Please contact your personnel office if you are unsure of those provisions.*

D. Questions? Individuals should contact their local ethics official for information pertaining to the individual's specific circumstances. For OSD personnel only - contact the Standards of Conduct Office (SOCO) at (703) 695-3422 or by e-mail at OSD.SOCO@MAIL.MIL.

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