

## POST-GOVERNMENT SERVICE EMPLOYMENT RESTRICTIONS (INCLUDING THE PROCUREMENT INTEGRITY ACT)

*“Always do right. This will gratify some people and astonish the rest.”*  
*Mark Twain*

### I. REFERENCES

#### A. Statutes.

1. 18 U.S.C. § 208, Acts affecting a personal financial interest.
2. 41 U.S.C. §§ 2101-2107, formerly known as the Procurement Integrity Act.
3. 18 U.S.C. § 207, Restrictions on former officers, employers, and elected officials of the executive and legislative branches.

#### B. Regulations.

1. 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.
2. 5 C.F.R. Part 2637, Regulations Concerning Post Employment Conflict of Interests. These regulations only apply to employees who left Federal service before 1 January 1991. The Office of Government Ethics, however, continues to rely on them for issuing guidance for employees who left Federal service after 1 January 1991. Regulations providing guidance concerning 18 U.S.C. 207 to these employees was last published in the 2008 edition of title 5 of the Code of Federal Regulations, revised as of January 1, 2008.
3. 5 C.F.R. Part 2641, Post-Employment Conflict of Interest Restrictions (JER 9-200).
4. 5 C.F.R. Part 2640, Interpretations, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208 (Acts Affecting a Personal Financial Interest).
5. GENERAL SERVS. ADMIN. (GSA), FEDERAL ACQUISITION REGULATIONS SYSTEM. 48 C.F.R. (referred to in the outline as 48 C.F.R. or as FAR) Part 3 (Improper Business Practices and Personal Conflicts of Interest).
6. DEFENSE ACQUISITION REGULATIONS SYSTEM, DEPARTMENT OF DEFENSE. 48 C.F.R. Part 203 (Improper Business Practices and Personal Conflicts of Interest).

7. National Defense Authorization Act for Fiscal Year 2004 (PL 108-136), section 1125.
- C. Department of Defense Directive 5500.07-R, JOINT ETHICS REGULATION (JER) (August 30, 1993).
- D. Miscellaneous:
1. Summary of Post-Employment Restrictions of 18 U.S.C. 207, <https://www.oge.gov/web/oge.nsf/Resources/18+U.S.C.+%C2%A7+207:++Restrictions+on+former+officers,+employees,+and+elected+officials+of+the+executive+and+legislative+branches>
  2. Memorandum for Amy Comstock, Director, Office of Government Ethics from U.S. Department of Justice, Office of Legal Counsel, dated January 19, 2001. (<https://www.justice.gov/file/19276/download>) (A one-man corporation is providing survey results to his former agency through others and his corporation. This could constitute a “communication” violating 207)
  3. Post-Government Service Advice. See Publications and Handouts in the Ethics Resource Library at the DoD SOCO Web site. [http://ogc.osd.mil/defense\\_ethics/ethics\\_counselors/topics/post\\_govt\\_employ.html](http://ogc.osd.mil/defense_ethics/ethics_counselors/topics/post_govt_employ.html)
    - a. Seeking Employment Restrictions (Rules When You Are Looking For a New Job)
    - b. Post-Government Employment Restrictions (Rules Affecting Your New Job After DoD) for Military Personnel E-1 through O-6 and Civilian Personnel Paid at less than 86.5% of the rate for Executive Schedule Level II (Non-Senior Employees)
    - c. Post-Government Employment Restrictions (Rules Affecting Your New Job After DoD) for Civilian Personnel Paid at or above 86.5% of the rate for Executive Schedule Level II and Flag and General Officers (Senior Employees)
    - d. Post-Government Employment Disqualification Statements
    - e. Procurement Integrity Act Restrictions (Rules When You Are Looking For a New Job & Rules Affecting Your New Job After Leaving DoD)

4. 5 C.F.R. 2641, App. B , Department of Defense separate component designations for 207(c) purposes: Department of the Army, Department of the Navy, Department of the Air Force, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Threat Reduction Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, and the National Security Agency. *Id.*

5. Office of Personnel Management Notice of 18 U.S.C. 207(c) restrictions, 5 CFR 730.104.

6. Office of Government Ethics DAEOgram DO-04-029: Seeking Employment.)

<https://www2.oge.gov/Web/OGE.nsf/0c373046e722a7b085257f6b00420525/5fcb7d240063404785257e96005fbdbd?OpenDocument>

7. DoD components shall provide guidance on relevant Federal and DoD Post-Government service restrictions as part of out-processing. Section 9-402 of the Joint Ethics Regulation, DoD 5500.07-R (JER). Annual certification required to be signed by all public financial disclosure filers. Section 8-400 of the JER. Post-employment is included in annual ethics training pursuant to section 11-301 (d) of the JER.)

8. (S.1, P.L. 110-81). SOCO advisory Number 08-03, April 28, 2008. ([http://ogc.osd.mil/defense\\_ethics/ethics\\_counselors/resources/advisories/2008\\_03\\_advisory.html](http://ogc.osd.mil/defense_ethics/ethics_counselors/resources/advisories/2008_03_advisory.html) )

9. OGE Post-employment regulation, final rule. (<https://www.govinfo.gov/content/pkg/FR-2008-06-25/pdf/E8-13394.pdf> )

10. National Emergency Extension. <https://www.govinfo.gov/app/details/FR-2016-09-01/2016-21284> But note the emergency provision in the statute was abolished in the National Defense Authorization Act for Fiscal Year 2017 on December 23, 2016, section 1111, S. 2943-451. <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>

11. January 21, 2009 Obama Executive Order and Pledge and OGE interpretation. <http://edocket.access.gpo.gov/2009/pdf/E9-1719.pdf>. (outlines Executive Order) <https://www2.oge.gov/web/oge.nsf/Resources/DO-09-005:+Signing+the+Ethics+Pledge> (signing of the Pledge)

[https://www.oge.gov/Web/OGE.nsf/All+Advisories/932CE93AEBE302785257E96005FBB84/\\$FILE/029ce5b77e7d42928f551da8a94d21492.pdf?open](https://www.oge.gov/Web/OGE.nsf/All+Advisories/932CE93AEBE302785257E96005FBB84/$FILE/029ce5b77e7d42928f551da8a94d21492.pdf?open)

\_(who must sign the Pledge

[https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-011:+Revolving+Door+Ban+of+the+Ethics+Pledge+\(Ban+on+All+Appointees+Entering+Government\)](https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-011:+Revolving+Door+Ban+of+the+Ethics+Pledge+(Ban+on+All+Appointees+Entering+Government))

(ban coming into government under Pledge)

<https://www.oge.gov/Web/OGE.nsf/0c373046e722a7b085257f6b00420525/fab59d2dfea696ac85257e96005fbb80?OpenDocument>

(speeches under the Pledge)

<https://www.oge.gov/Web/OGE.nsf/Resources/DO-10-004:+FAQs+on+Post-Employment+under+the+Ethics+Pledge>

(post employment restrictions under the Pledge)

12. Trump Executive Order 13770 <https://www.whitehouse.gov/presidential-actions/executive-order-ethics-commitments-executive-branch-appointees/> and OGE Legal Advisory 17-03 [https://www.oge.gov/web/oge.nsf/0/CE52BD5FD1149C85852580EA005E039A/\\$FILE/LA-17-03.pdf](https://www.oge.gov/web/oge.nsf/0/CE52BD5FD1149C85852580EA005E039A/$FILE/LA-17-03.pdf)
13. Change in the Simplified Acquisition Threshold, 75 FR 53129-53135 (Aug. 30, 2010) effective October 1, 2010. (<http://edocket.access.gpo.gov/2010/pdf/2010-21025.pdf>); and amended in the NDAA for Fiscal Year 2018, <https://www.congress.gov/115/crpt/hrpt404/CRPT-115hrpt404.pdf>, section 805.
14. Change in the “minimal value,” January 12, 2017, effective January 1, 2017. <https://www.gsa.gov/portal/content/129418>
15. Section 1045 of the NDAA for Fiscal Year 2018. <https://www.congress.gov/115/crpt/hrpt404/CRPT-115hrpt404.pdf>

## **II. INTRODUCTION**

- A. The conflict of interest prohibitions of 18 U.S.C. § 208 as they apply to government personnel who are seeking outside employment.
- B. The coverage of what was formerly referred to as the Procurement Integrity Act.
- C. The procurement-related restrictions on seeking and accepting employment when leaving government service.
- D. The post-government service employment restrictions of 18 U.S.C. § 207

## **III. ROAD MAP**

- A. Purpose of Restrictions
- B. Seeking Employment
- C. Federal Employment Restrictions
- D. Private Employment Restrictions
- E. Foreign Employment Restrictions

#### **IV. PURPOSE OF RESTRICTIONS**

- A. Prevent Conflicts of Interest

- B. Promote Economy in Federal Government
- C. Expand Employment Opportunities in the Federal System
- D. Preserve the Public's Confidence in Government Integrity

## V. RENDERING COMPETENT ADVICE

- A. Need Full Disclosure (Client Questionnaire)
- B. Who is the Client? (JER section 9-500)
- C. Effect of Advice?
- D. OGE will audit whether counseling is provided, records are kept, and the advice is accurate.

## VI. FINANCIAL CONFLICTS OF INTEREST.

18 U.S.C. § 208; 5 C.F.R. § 2640.103. Prohibits an employee from participating **personally and substantially** in his or her official capacity in any **particular matter** in which he or she has a **financial interest**, if the particular matter will have a **direct and predictable effect** on that interest.

- A. Specifically, an employee may not work on an assignment that will affect the financial interest of someone with whom the employee either has an arrangement for employment or is negotiating for employment.
- B. Definition of key terms.
  - 1. Financial Interests. Defined as a potential for gain or loss on interests such as stocks, bonds, leasehold interests, mineral and property rights, deeds of trust, liens, options, or commodity futures. 5 C.F.R. § 2635.403(c); 5 C.F.R. § 2640.103(b). The financial interest of a person with whom the employee is negotiating for employment or has an arrangement concerning prospective employment (5 C.F.R. § 2635.402(b)(2)(v); 5 C.F.R. § 2640.103(c)) is imputed to the employee.
  - 2. Personally. Defined as direct participation, or direct and active supervision of a subordinate. 5 C.F.R. § 2635.402(b)(4); 5 C.F.R. § 2640.103(a)(2).

3. Substantially. Defined as an employee's involvement that is significant to the matter. 5 C.F.R. § 2635.402(b)(4); 5 C.F.R. § 2640.103(a)(2).
4. Particular Matter. Defined as a matter involving deliberation, decision, or action focused on the interests of specific persons, or an identifiable class of persons. However, matters of broad agency policy are not particular matters. 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.103(a)(1).
5. Direct and Predictable Effect. Defined as a close, causal link between the official decision or action and its effect on the financial interest. 5 C.F.R. § 2635.402(b)(1); 5 C.F.R. § 2640.103(a)(3).

C This statute does not apply to enlisted members, but the JER subjects enlisted members to similar regulatory prohibitions. See JER, para. 5-301 (which also includes members of the National Guard). Regulatory implementation of 18 U.S.C. § 208 is found in the JER, Chapters 2 and 5.

D. Options for employees with conflicting financial interests.

1. Disqualification. With the approval of his or her supervisor, the employee may disqualify to eliminate any contact or actions affecting the company with whom the employee is negotiating employment or has an arrangement concerning prospective employment. 5 C.F.R. § 2635.402(c); 5 C.F.R. § 2640.103(d). JER section 2-204(c) requires that the disqualification be in writing.
2. Waiver. An employee otherwise disqualified by 18 U.S.C. § 208(a) may be permitted to participate personally and substantially in a particular matter on a case-by-case basis after the employee fully discloses the financial interest to the agency and receives a written waiver. The criterion is whether the employee's conflicting financial interest is not so substantial as to affect the integrity of his or her service to the agency. 5 C.F.R. § 2635.402(d)(2)(ii); 5 C.F.R. § 2640.301(a).

(Practice Note: Since most employees derive a substantial portion of their income from their employment, it is rare that a 208(b)(1) waiver will apply under these circumstances.)

E. Negotiating for employment. The term "negotiating" is interpreted broadly. United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).

1. Any discussion, however tentative, is negotiating for employment.

Something as simple as going to lunch to discuss future prospects could be the basis for a conflict of interest. If the company does not do business with the Department, then that person may negotiate for employment with that company. No special action is required.



2. Conflicts of interest are always analyzed in the present tense. If an employee interviews for a position and decides not to work for that company, then he or she is free to later work on matters affecting that company.
3. Disqualification and Waiver.
  - a. With the approval of his or her supervisor, the employee must disqualify or change duties to eliminate any contact or actions with the prospective employer. 5 C.F.R. § 604(a)-(b). Written notice of the disqualification is required. JER § 2-204(c).
  - b. An employee may participate personally and substantially in a particular matter having a direct and predictable impact on the financial interests of the prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. § 208(b)(1) or (b)(3). The waivers are described in 5 C.F.R. § 2635.402(d) and 5 C.F.R. Part 2640 and generally cannot be waived because an “employment” interest is a rather substantial financial interest.
  - c. Disqualification. Please note that the STOCK Act, Pub. L. 112-105, section 17, 2012, as amended, requires that the employee who files a public financial disclosure report file a notice of negotiation within three (3) days of negotiating a salary with a private sector entity regardless of whether the employer has interests that could be affected by performance or nonperformance of the employee’s duties.

F. Violating 18 U.S.C. § 208 may result in imprisonment up to one year, or, if willful, five years. 18 U.S.C. § 216. In addition, a fine of \$50,000 to \$250,000 is possible. See 18 U.S.C. § 3571.

#### G. Seeking Employment

1. The Office of Government Ethics (OGE) regulations contain additional requirements for disqualification of employees who are “seeking employment.” 5 C.F.R. §§ 2635.601 - 2635.606. “Seeking employment” is a term broader than “negotiating for employment” found in 18 U.S.C. § 208.

An employee begins “seeking employment” if he or she has directly or indirectly:

- a. Engaged in employment negotiations with any person. “Negotiations” means discussing or communicating with another person, or that person’s agent, with the goal of reaching an agreement for employment. This term is not limited to discussing specific terms and conditions of employment. 5 C.F.R. § 2635.603(b)(1)(i).

- b. Made an unsolicited communication to any person or that person’s agent about possible employment. 5 C.F.R. § 2635.603(b)(1)(ii).
  - c. Made a response other than rejection to an unsolicited communication from any person or that person’s agent about possible employment. 5 C.F.R. § 2635.603(b)(1)(iii).
2. An employee has not begun “seeking employment” if he or she makes an unsolicited communication for the following reasons:
    - a. For the sole purpose of requesting a job application. 5 C.F.R. § 2635.603(b)(1)(ii)(A).
    - b. For the sole purpose of submitting a résumé or employment proposal only as part of an industry or other discrete class. 5 C.F.R. § 2635.603(b)(1)(ii)(B).
  3. An employee is no longer “seeking employment” under the following circumstances:
    - a. The employee rejects the possibility of employment and all discussions have terminated. 5 C.F.R. § 2635.603(b)(2)(i). However, a statement by the employee that merely defers discussions until the foreseeable future does not reject or close employment discussions. 5 C.F.R. § 2635.603(b)(3).
    - b. Two months have lapsed after the employee has submitted an unsolicited résumé or employment proposal with no response from the prospective employer. 5 C.F.R. § 2635.603(b)(2)(ii).
  4. While seeking employment, the employee must disqualify or change duties to eliminate any contact or actions with the prospective employer. 5 C.F.R. § 604(a)-(b). Written notice of the disqualification is required. JER § 2-204(c).

## **VII. THE PROCUREMENT INTEGRITY ACT**

On January 4, 2011, the Procurement Integrity Act (PIA) was codified for the first time at 41 U.S.C. 2101-2107. The codified statute does not have a name but will be referred to in this deskbook as “the Procurement Integrity Act.” Prior to January 4, 2011, the PIA was found at Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-665 (1996). Section 27, Office of Federal Procurement Policy Act (OFPPA) amendments of 1988, 41 U.S.C. § 423. Codification did not make any changes to the old PIA passed effective 1997.

- A. Background Information about the former PIA.

1. Effective date: January 1, 1997 (this has not changed as a result of the codification).
  2. The basic provisions of the statute are set forth in FAR 3.104-3.
    - a. Prohibitions on disclosing and obtaining procurement information apply beginning January 1, 1997, to:
      - (1) Every competitive federal procurement for supplies or services,
      - (2) From non-federal sources,
      - (3) Using appropriated funds.
    - b. Requirement to report employment contacts applies beginning January 1, 1997, to competitive federal procurements above the simplified acquisition threshold (\$250,000).
    - c. Post-employment restrictions apply to former officials for services provided or decisions made on or after January 1, 1997.
    - d. Former officials who left government service before January 1, 1997, are subject to the restrictions of the Procurement Integrity Act as it existed prior to its amendment.
  - 3 Coverage. Applies to “persons,” “agency officials,” and former officials” as defined in the PIA.
  - 4 Department of Defense Guidance Regarding Procurement Integrity Law. Updated Guidance on the Application of the Procurement Integrity Act (PIA) and Regulations, dated July 12, 2011.  
[http://ogc.osd.mil/defense\\_ethics/ethics\\_counselors/topics/post\\_govt\\_employ.html](http://ogc.osd.mil/defense_ethics/ethics_counselors/topics/post_govt_employ.html)
- B. Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information.
1. Restrictions on Disclosure of Information. 41 U.S.C. § 2102(a)(3). The following persons are forbidden from knowingly disclosing contractor bid or proposal information or source selection information before the award of a contract:
    - a. Present or former federal officials;
    - b. Persons (such as contractor employees) who are currently advising the Federal Government with respect to a procurement;

- c. Persons (such as contractor employees) who have advised the Federal Government with respect to a procurement, but are no longer doing so; and
  - d. Persons who have or had access to such information by virtue of their office, employment, or relationship.
- 2. Restrictions on Obtaining Information. 41 U.S.C. § 2101(b). Persons (other than as provided by law) are forbidden from obtaining contractor bid or proposal information or source selection information before the award of a contract.
- 3. Contractor Bid or Proposal Information. 41 U.S.C. § 2101(2). Defined as any of the following:
  - a. Cost or pricing data;
  - b. Indirect costs or labor rates;
  - c. Proprietary information marked in accordance with applicable law or regulation; and
  - d. Information marked by the contractor as such in accordance with applicable law or regulation. If the contracting officer disagrees, he or she must give the contractor notice and an opportunity to respond prior to release of marked information. FAR 3.104-4(d). See Chrysler Corp. v. Brown, 441 U.S. 281 (1979); CNA Finance Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), cert. den. 485 U.S. 917 (1988).
- 4. Source Selection Information. 41 U.S.C. § 2101(7). Defined as any of the following:
  - a. Bid prices before bid opening;
  - b. Proposed costs or prices in negotiated procurement;
  - c. Source selection plans;
  - d. Technical evaluation plans;
  - e. Technical evaluations of proposals;
  - f. Cost or price evaluations of proposals;

- g. Competitive range determinations;
- h. Rankings of bids, proposals, or competitors;
- i. Reports and evaluations of source selection panels, boards, or advisory councils; and
- j. Other information marked as source selection information if release would jeopardize the integrity of the competition.

C. Reporting Non-Federal Employment Contacts.

1. Mandatory Reporting Requirement. 41 U.S.C. § 2103(a). An agency official who is **participating personally and substantially** in an acquisition over the simplified acquisition threshold must report employment contacts with bidders or offerors. Reporting may be required even if the contact is through an agent or intermediary. FAR 3.104-5(a).
  - a. Report must be in writing. 41 U.S.C. § 2103(a)(1).
  - b. Report must be made to supervisor and designated agency ethics official. 41 U.S.C. § 2103(a)(1).
    - (1) Designated agency ethics official in accordance with 5 C.F.R. § 2638.201.
    - (2) Deputy agency ethics officials in accordance with 5 C.F.R. § 2638.204 if authorized to give ethics advisory opinions.
    - (3) Alternate designated agency ethics officials in accordance with 5 C.F.R. § 2638.202(b). See FAR 3.104-3 as defined at 3.104-1.
  - c. Additional Requirements. The agency official **must**:
    - (1) Promptly reject employment, 41 U.S.C. § 2103(a)(2)(A); or
    - (2) Disqualify him/herself from the procurement until authorized to resume participation in accordance with 18 U.S.C. § 208. 41 U.S.C. § 2103(a)(2)(B).

- (a) Disqualification notice. Employees who disqualify themselves must submit a disqualification notice to the head of the contracting activity (HCA) or designee, with copies to the contracting officer, source selection authority, and immediate supervisor. FAR 3.104-5(b).
  - (b) Note: 18 U.S.C. § 208 requires employee disqualification from participation in a particular matter if the employee has certain financial interests in addition to those which arise from employment contacts. Also, an official who refuses to cease employment discussions is subject to administrative actions in accordance with 5 C.F.R. § 2635.604(d) (annual leave, leave without pay, or other appropriate administrative action) if the disqualification interferes substantially with the official's ability to perform his or her assigned duties. FAR 3.104-8. See Smith v. Dep't of Interior, 6 M.S.P.R. 84 (1981) (employee who violated conflict of interest regulations by acting in official capacity in matters affecting his financial interests is subject to removal).
- 2. Both officials and bidders or offerors who engage in prohibited employment contacts are subject to criminal and civil penalties and administrative actions.
- 3. Participating personally and substantially means active and significant involvement in:
  - a. Drafting, reviewing, or approving a statement of work;
  - b. Preparing or developing the solicitation;
  - c. Evaluating bids or proposals, or selecting a source;
  - d. Negotiating price or terms and conditions of the contract; or
  - e. Reviewing and approving the award of the contract. FAR 3.104-1.
- 4. The following activities are generally considered **not** to constitute personal and substantial participation:
  - a. Certain agency-level boards, panels, or advisory committees that make recommendations regarding approaches for satisfying broad agency-level missions or objectives;
  - b. General, technical, engineering, or scientific effort of broad applicability and not directly associated with a particular procurement;

- c. Clerical functions in support of a particular procurement; and
  
- d. Below listed activities for OMB Circular A-76 cost comparisons:
  - (1) Participating in management studies;
  - (2) Preparing in-house cost estimates;
  - (3) Preparing “most efficient organization” (MEO) analyses; and
  - (4) Furnishing data or technical support **to be used by others** in the development of performance standards, statements of work, or specifications. FAR 3.104-1.

(Note that 18 U.S.C. § 208 may preclude participation even if the FAR would appear to allow it. Both have to be considered before making a determination. See 48 C.F.R. § 3.104-3(c)(4) (FAR 3.104-3(c)(4)).

D. Post-Government Employment Restrictions.

- 1. A one-year ban prohibits certain persons from accepting compensation from the awardee. “Compensation” means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Indirect compensation is compensation paid to another entity specifically for services rendered by the individual. FAR 3.104-1. The ban applies to both competitively awarded and non-competitively awarded procurements. FAR 3.104-3(d).
  
- 2. The one-year ban applies to persons who serve in any of the following seven positions on a contract **in excess of \$10 million**:
  - a. Procuring Contracting Officer (PCO);
  - b. Source Selection Authority (SSA);
  - c. Members of the Source Selection Evaluation Board (SSEB);
  - d. Chief of a financial or technical evaluation team;
  - e. Program Manager;
  - f. Deputy Program Manager; and

- g. Administrative Contracting Officer (ACO).
3. The one-year ban also applies to anyone who “personally makes” any of the following seven types of decisions:
- a. The decision to award a contract **in excess of \$10 million;**
  - b. The decision to award a subcontract **in excess of \$10 million;**
  - c. The decision to award a modification of a contract or subcontract **in excess of \$10 million;**
  - d. The decision to award a task order or delivery order **in excess of \$10 million;**
  - e. The decision to establish overhead or other rates valued **in excess of \$10 million;**
  - f. The decision to approve issuing a payment or payments **in excess of \$10 million;** and
  - g. The decision to pay or settle a claim **in excess of \$10 million.**
4. The Ban Period.
- a. If the former official was in a specified position (source selection type) on the date of contractor selection, but not on the date of award, the ban begins on the date of selection.
  - b. If the former official was in a specified position (source selection type) on the date of award, the ban begins on the date of award.
  - c. If the former official was in specified position (program manager, deputy program manager, administrative contracting officer), the ban begins on the last date of service in that position.
  - d. If the former official personally made certain decisions (award, establish overhead rates, approve payment, settle claim), the ban begins on date of decision. FAR 3.104-4(d)(2).
5. In “excess of \$10 million” means:
- a. The value or estimated value of the contract including options;



- b. The total estimated value of all orders under an indefinite-delivery, indefinite-quantity contract, or a requirements contract;
  - c. Any multiple award schedule contract, unless the contracting officer documents a lower estimate;
  - d. The value of a delivery order, task order, or order under a basic ordering agreement;
  - e. The amount paid, or to be paid, in a settlement of a claim; or
  - f. The estimated monetary value of negotiated overhead or other rates when applied to the government portion of the applicable allocation base. See FAR 3.104-3.
- 6. The one-year ban does not prohibit an employee from working for any division or affiliate that does not produce the same or similar product or services.
  - 7. Ethics Advisory Opinion. Agency officials and former agency officials may request an advisory opinion as to whether he or she would be precluded from accepting compensation from a particular contractor. FAR 3.104-6(a).

E. Penalties and Sanctions.

- 1. Criminal Penalties. Violating the prohibition on disclosing or obtaining procurement information may result in confinement for up to five years and a fine if done in exchange for something of value, or to obtain or give a competitive advantage. 41 U.S.C. § 2105(a).
- 2. Civil Penalties.
  - a. The Attorney General may take civil action for wrongfully disclosing or obtaining procurement information, failing to report employment contacts, or accepting prohibited employment. 41 U.S.C. § 2105(b).
  - b. Civil penalty is up to \$50,000 (individuals) and up to \$500,000 (organizations) plus twice the amount of compensation received or offered.
- 3. If violations occur, the agency shall consider cancellation of the procurement, rescission of the contract, suspension or debarment, adverse personnel action, and recovery of amounts expended by the agency under the contract. A new contract clause advises contractors of the potential for cancellation or rescission of a contract, recovery of any penalty prescribed by law, and recovery of any amount expended under the contract. 48 C.F.R. § 52.203-8. Another clause advises the contractor that the Government may reduce contract payments by the amount of profit or fee for violations. 48 C.F.R. § 52.203-10.

4. A contracting officer may disqualify a bidder from competition whose actions fall short of a statutory violation, but call into question the integrity of the contracting process. See Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd on recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435; Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992) (contracting officer has discretion to disqualify from competition a bidder who obtained proprietary information through industrial espionage not amounting to a violation of the Procurement Integrity Act); see also NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed.Cir. 1986)(contracting officer has authority to disqualify a bidder based solely on appearance of impropriety when done to protect the integrity of the contracting process).
  5. Limitation on Protests. 41 U.S.C. § 2106. No person may file a protest, and GAO may not consider a protest, alleging a PIA violation unless the protester first reported the alleged violation to the agency within 14 days of its discovery of the possible violation. FAR 33.102(f).
  6. Contracting Officer's Duty to Take Action on Possible Violations.
    - a. Determine impact of violation on award or source selection.
    - b. If no impact, forward information to individual designated by agency. Proceed with procurement, subject to contrary instructions.
    - c. If impact on procurement, forward information to the HCA or designee. Take further action in accordance with HCA's instructions. FAR 3.104-7.
- F. Private Employment Restrictions. 41 U.S.C. § 423 repealed 10 U.S.C. §§ 2397 and 281, and 37 U.S.C. § 801. DD Form 1787, a form completed by private employers about former employees and sent to DoD is no longer required. (41 U.S.C. § 423 was replaced by 41 U.S.C. §§ 2101-07).

## **VIII. GIFTS FROM PROSPECTIVE EMPLOYERS AND DISQUALIFICATION WHEN SEEKING EMPLOYMENT**

Travel, meals, and reimbursements for job interviews. Government employees may accept travel expenses to attend job interviews if such expenses are customarily paid to all similarly-situated job applicants. 5 C.F.R. §§ 2635.602(b) and 2635.204(e)(3). Personnel who file financial disclosure reports (OGE Form 278 and OGE Form 450) must report such payments on their financial disclosure report.

## IX. TERMINAL LEAVE

- A. May work while on terminal leave.
- B. Financial disclosure form filers (OGE Form 450/278) must obtain agency designee approval if employer will be prohibited source.
  - 1. 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).
- C. Including a current government employee's resume in a solicitation by a contractor to an agency may be permissible where the employee had no responsibility for the subject procurement, never had responsibility for the contractor, did not have any role in preparing the contractor's proposal, does not work for the procuring agency, and has brought to the attention of his superior and the agency ethics official his intentions regarding use of the resume. OGE opinion 98 x 5.)  
[https://www.oge.gov/Web/OGE.nsf/All+Advisories/BF75AE9C37B3EB7685257E96005FB56/\\$FILE/c1079da4fada454e9f2038a61aaaf01b3.pdf?open](https://www.oge.gov/Web/OGE.nsf/All+Advisories/BF75AE9C37B3EB7685257E96005FB56/$FILE/c1079da4fada454e9f2038a61aaaf01b3.pdf?open)
- D. Cannot hold a civil office during terminal leave.
  - 1. Civil office statute: 10 U.S.C. § 973.
  - 2. Active Duty Military Officers may not hold Civil Office
    - a. Federal/State/Local
    - b. Exercise Sovereign Power
    - c. USA/DA/City Attorney/County Clerk
    - d. Note that DoD Directive 1344.10, section 4.2.4.1, states as follows:  
"Any enlisted member on active duty may seek, hold, and exercise the functions of a nonpartisan civil office as a notary public or member of a school board, neighborhood planning commission, or similar local agency, provided that the office is held in a non-military capacity and there is no interference with the performance of military duties."
- E. A military officer may not accept "civil office" with a state or local government, nor may an officer perform the duties of such civil office while on terminal leave. 10 U.S.C. § 973(b). A "civil office" is a position in which some portion of a state's sovereign power is exercised. For example, a county clerk position is considered a "civil office." In the Matter of Major Robert C. Crisp, USAF, 56 Comp. Gen. 855 (1977). By regulation, DoD Directive 1344.10, this prohibition applies to enlisted personnel, but does not apply to civilian personnel.

- F. If not a “civil office”
  - 1. May receive pay for Federal position and military pay and allowances during terminal leave. 5 U.S.C. § 5534a; DoD Directive 1344.10.
  
- G. Cannot act as an agent for another before any federal agency. 18 U.S.C. §§ 203/205. Military officers working on terminal leave (like all federal employees) are prohibited by 18 U.S.C. §§ 203 and 205 from representing their new employer to the Government. This makes problematic the increasingly common practice of contractor personnel physically working in government offices or meeting with government personnel in the contractor’s office. Being present in government offices on behalf of a contractor, or meeting government officials in a contractor’s workplace is inherently a representation. Of course, military officers on terminal leave may begin work with the contractor, but only “behind the scenes” at a contractor office or otherwise away from the government workplace or from Government officials. Enlisted members are not subject to 18 U.S.C. §§ 203 or 205.

## **X. DUAL COMPENSATION LAWS**

- A. Section 651 of the NDAA for FY 2000 (P.L. 106-65) repealed 5 U.S.C. § 5532 in its entirety.
  
- B. No reduction in retired or retainer pay for retired members of the Armed Forces who are employed in federal civilian positions.

## **XI. SIX-MONTH COOLING OFF PERIOD**

- A. No civilian employment within DoD for six (6) months after leaving military service. 5 U.S.C. § 3326.
  
- B. Applies to all retired military members
  
- C. Waivers available from Secretary of hiring component
  
- D. Limitation lifted during national emergency. This exception was deleted by Congress in the National Defense Authorization Act for Fiscal Year 2017, section 1111, December 23, 2016. (S. 2943-451)

## **XII. REPRESENTATIONAL PROHIBITIONS**

- A. 18 U.S.C. § 207 and its implementing regulations bar certain acts by former employees which may reasonably give the appearance of making unfair use of their prior employment and affiliations.

1. A former employee involved in a particular matter while working for the Government must not “switch sides” after leaving government service to represent another person on that matter.
  2. 18 U.S.C. § 207 does not bar a former employee from working for any public or private employer after government service. The statute is not designed to discourage government employees from moving to and from private positions. Rather, such a “flow of skills” promotes efficiency and communication between the Government and the private sector and is essential to the success of many government programs. The statute bars only certain acts detrimental to public confidence.
- B. 18 U.S.C. § 207 applies to all former officers and civilian employees whether or not retired, but **does not apply to enlisted personnel** because they are not included in the definition of “officer or employee” in 18 U.S.C. § 202. Note: Employees on terminal leave must also heed the representation restrictions of 18 U.S.C. §§ 203/205, which apply to current government employees.
- C. 18 U.S.C. § 207(a)(1) imposes a **lifetime prohibition** on the former employee against communicating or appearing before any agency of the Government, with the intent to influence, regarding a particular matter, on behalf of anyone other than the Government, when:
1. The Government is a party, or has a direct and substantial interest in the matter;
  2. The former officer or employee participated personally and substantially in the matter while in his official capacity; and
  3. At the time of the participation, specific parties other than the Government were involved. 5 C.F.R. § 2641.201(a).
  4. Note that when the term “lifetime” is used, it refers to the lifetime of the particular matter. To the extent that the particular matter is of limited duration, so is the coverage of the statute. Further, it is important to distinguish among particular matters. The statute does not apply to a broad category of programs when the specific elements may be treated as severable.
  5. An appearance may include a mere physical presence. 5 C.F.R. § 2641.201(d)(2) and (e)(4).
  6. Communication is defined at 5 C.F.R. § 2641.201(d)(1) (not necessary that any employee of the United States actually recognize the former employee as the source of the information).

7. Behind the scenes assistance is defined at 5 C.F.R. § 2641.201(d)(3) (assistance does not involve a communication to or an appearance before an employee of the United States).
  8. Intent to influence does not include: making a routine request not involving a potential controversy such as requesting publicly available documents; making factual statements in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action, such as conveying factual information regarding matters that are not potentially controversial during the regular course of performing a contract; signing a tax return of another as a preparer; signing an assurance that the former employee will be the principal investigator for the direction and conduct of the research; filing a Securities and Exchange Form 10-K; making a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract or grant, during a routine Government site visit to premises owned or occupied by a person other than the United States where the work is performed or would be performed, in the ordinary course of evaluation, administration, or performance of an actual or proposed contract or grant; or purely social contacts. 5 C.F.R. § 2641.201(e)(2).
  9. For a discussion as to when a particular matter begins, note 5 C.F.R. § 2641.201(h)(4).
  10. For determining if the particular matter involving specific parties is the same matter, note 5 C.F.R. § 2641.201(h)(5).
  11. Personally (means direct) and substantially (means of significance to the matter) 5 C.F.R. § 2641.201(i)(2) and (3).
  12. Speaking before the Department —note that under the post-employment regulation, former personnel subject to § 207(a)(1) may speak before Federal personnel at a public gathering or conference, seminar, or similar forum on behalf of another when: the event is not sponsored or co-sponsored by the former employee’s agency; an independent agency in the Executive, Legislative or Judicial branch; Federal court, or court-martial; the event is attended by a large number of attendees; and a significant portion of the attendees are not employees of the United States. 5 C.F.R. § 2641.201(f)(3) (Note: a former employee may engage in exchanges with any other speaker or with any member of the audience.)
- D. 18 U.S.C. § 207(a)(2) prohibits, for **two years** after leaving federal service, a former employee from communicating or appearing before any agency of the Government, with the intent to influence, regarding a particular matter, on behalf of anyone other than the Government, when:
1. The Government is a party, or has a direct and substantial interest in the matter;

2. The former officer or employee knew or should have known that the matter was pending under his official responsibility during the one year period prior to leaving federal service; and
  3. At the time of the participation, specific parties other than the Government were involved. 5 C.F.R. § 2641.202(a).
- E. 18 U.S.C. § 207(b) prohibits former officers and employees, for one year after leaving federal service, from knowingly representing, aiding or advising an employer or any entity regarding ongoing trade or treaty negotiations based on information that they had access to and that is exempt from disclosure under the Freedom of Information Act. This restriction begins upon separating or retiring from government service and, unlike the restrictions of provisions of 18 U.S.C. § 207(a)(1) or (2) discussed above, **prohibits former officials from providing “behind-the-scenes” assistance on the basis of the covered information to any person or entity.** This restriction applies only if the former official was personally and substantially involved in ongoing trade or treaty negotiations within the last year of his government service. It is not necessary that the former official have had contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation. The treaty negotiations covered by this section are those that result in international agreements that require the advice and consent of the Senate. 18 U.S.C. § 207(b)(2)(B). The trade negotiations covered are those that the President undertakes under section 1102 of the Omnibus Trade and Competitiveness Act of 1988. 18 U.S.C. § 207(b)(2)(A). A negotiation becomes “ongoing” at the point when both: (1) the determination has been made by competent authority that the outcome of the negotiation will be a treaty or trade agreement, and (2) discussions with a foreign government have begun on a treaty. 5 C.F.R. § 2641.203(a).
- F. 18 U.S.C. § 207(c) prohibits, for **one year** after service in a “senior position” (military personnel 0-7 and above, and civilian personnel whose rate of basic pay equals or exceeds 86.5 percent of the annual rate of basic pay for level II of the Executive Schedule (EL II) (\$166,340 in 2019) terminates, from communicating to or appearing before the employee’s former agency, with the intent to influence, regarding a particular matter, on behalf of anyone other than the Government, when:
1. The communication or appearance involves the department or agency the officer or employee served within the one year period prior to his termination from a senior position;
  2. The communication or appearance is on behalf of any other person (other than the Government). 5 C.F.R. § 2641.204(a).

3. 18 U.S.C. § 207(h) permits DoD to be divided into separate components for purposes of the restrictions imposed by § 207(c). DoD separate components are listed in Appendix B to 5 C.F.R. § 2641. At present, the DoD separate components are: Air Force; Army; Navy; Defense Information Systems Agency; Defense Intelligence Agency; Defense Logistics Agency; National Geospatial-Intelligence Agency; Defense Threat Reduction Agency; National Security Agency; and the National Reconnaissance Office. Note: Civilian Political Appointees confirmed by the Senate are not eligible to benefit from the separate component designations. 5 C.F.R. § 2641.302(b).
4. Generals and Admirals who retire from agencies other than their respective military services are considered to have been detailed to those agencies and they are prohibited by § 207(c) from communicating back to both their agency and military service. (See 18 U.S.C. § 207(h)).

Thus, a Navy Admiral in a Navy billet is prohibited from communicating, as an official action, with Navy officials. However, the officer may communicate with representatives of other services and OSD provided that the officials are not Navy officials and OSD is not the agency that the Admiral was detailed.

5. 18 U.S.C. § 207(d), specifically bans the Secretary of Defense (a “very senior employee”) from communicating or appearing, for two years, before: (a) any officer or employee of any DoD department or agency and (b) all employees listed by position on the Executive Schedule in all agencies of the Executive Branch. (18 U.S.C. § 207(d)); 5 C.F.R. § 2641.205(a).
  6. Speaking before the Department during the one-year “cooling off”—note that under the post-employment regulation, former personnel subject to § 207(c) may speak before personnel from their former department at a public gathering or conference, seminar, or similar forum when: the event is not sponsored or co-sponsored by the former senior employees’ former agency; the event is attended by a large number of attendees; and a significant portion of the attendees are not employees of the former senior employees’ former agency. 5 C.F.R. § 2641.204(g)(4). (Note: a former employee may engage in exchanges with any other speaker or with any member of the audience.)
- G. 18 U.S.C. § 207 **does not** prohibit an employee from working for any entity, but it does restrict how a former employee may work for the entity.



With the exception of §§ 207(b) and (f), the statute does not bar behind the scenes involvement. However, there is a January 19, 2001, opinion from the Department of Justice suggesting that a former employee who is the sole proprietor of a business “working behind the scenes” may constitute “communication with the intent to influence” government decisions. (<https://www.justice.gov/file/19276/download>).

- H. 18 U.S.C. § 207(f) prohibits former senior employees (Admirals, Generals, and personnel whose rate of basic pay equals or exceeds 86.5 percent of the annual rate of basic pay for level II of the Executive Schedule (EL II) (\$166,340 in 2019)) for a period of one year after leaving their senior employee position from:
1. Representing foreign entities before any official of the Government with the intent to influence that official regarding his or her official duties, or
  2. Aiding or advising a foreign entity with the intent to influence a government official regarding his or her official duties. This type of behind the scenes participation is not permitted. A “foreign entity” includes foreign governments, foreign political parties, and groups exercising de facto political jurisdiction over a country. Foreign commercial corporations are generally not considered “foreign entities” unless they exercise the functions of a sovereign. 5 C.F.R. § 2641.206(a).

NOTE: The Office of Government Ethics issued DAEOgram DO-04-031 on October 5, 2004, attaching an Office of Legal Counsel opinion dated June 22, 2004, concerning the question of whether 18 U.S.C. § 207(f) covers post-employment contacts with members of Congress  
[https://www.oge.gov/Web/OGE.nsf/Resources/DO-04-031:+Office+of+Legal+Counsel+Opinion+on+18+U.S.C.+%C2%A7+207\(f\)?OpenDocument&Click=](https://www.oge.gov/Web/OGE.nsf/Resources/DO-04-031:+Office+of+Legal+Counsel+Opinion+on+18+U.S.C.+%C2%A7+207(f)?OpenDocument&Click=)  
The OLC opinion concludes that section 207(f) does cover representational contacts with members of Congress.

- I. State and Local Governments and Institutions, Hospitals, and Organizations.
1. The restriction in 18 U.S.C. §§ 207(c) and (d) does not apply to appearances, communications, and representations by a former senior employee or very senior employee when carrying out official duties as an employee of a state or local government, an employee of certain accredited degree-granting institutions of higher education, or an employee of a nonprofit, tax-exempt hospital or a medical research institution if the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization. 18 U.S.C. § 207(j)(2); 5 C.F.R. § 2641.301(c).

- J. Special Knowledge. This exception provides that the restriction in sections 207(c) and (d) does not apply to a former senior employee or very senior employee who makes a statement, which is based on his own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received. 18 U.S.C. § 207(j)(4); 5 C.F.R. § 2641.301(d).
- K. Scientific or Technological Information. Section 207 provides an exception from its provisions for communications made solely for the purpose of furnishing scientific or technological information. The exception does not apply to trade and treaty negotiations and on restrictions on former senior employees representing aiding and advising foreign entities. 18 U.S.C. § 207(j)(5); 5 C.F.R. § 2641.301(e). Procedures for using this exception include obtaining a certificate of exception after consulting with the Office of Government Ethics and publication in the Federal Register. *Id.* At DoD, the procedures are set forth in 9-300 of DoD Directive 5500.07-R, which does not require publication in the Federal Register.
- L. Testimony. A former employee may give testimony under oath or make a statement required to be made under penalty of perjury. Former personnel may give expert opinion testimony, however, only if given pursuant to a court order or if not otherwise subject to the lifetime bar (18 U.S.C. § 207(a)) as it relates to the subject matter of the testimony. 18 U.S.C. § 207(j)(6); 5 C.F.R. § 2641.301(f).
- M. Contract advice by former details. Personnel from a private organization assigned to an agency under the Information Technology Exchange Program, 5 U.S.C. § 3701, cannot, within one year after the end of that assignment, knowingly represent or aid, counsel or assist in representing any other person (except the United States) in connection with any contract with that agency.
- N. Executive Order 13490 (January 21, 2009) and the Obama Ethics Pledge replaced by Executive Order 13770 , the Trump Pledge

WHO: Applies to Full time non-career Presidential Appointees, non-career Senior Executive Service (SES) appointees, and non-career appointees excepted from the competitive service by reason of being of a confidential or policymaking character (e.g., Schedule C, politically appointed term SES or equivalent)

WHAT: Two lobbying activity restrictions.

For five (5) years after terminating Federal service at an agency, you cannot engage in lobbying activities with respect to that agency.

- “Lobbying Activities” are lobbying contacts and any efforts in support of such contacts, including preparation or planning activities, research, and other background work that is intended, at the time of its preparation, for use in contacts, and coordination with the lobbying activities of others. This ban is limited to

representations made to “covered officials” within your former agency, and not, in the case of DoD, the entire agency.

□ “Covered Officials”

Any appointee whose base pay is at or above 86.5% of the rate of Executive Schedule Level II (\$166,340 in 2019).

For Presidentially Appointed, Senate-confirmed officials regardless of pay, this restriction applies to the entire Department of Defense.

For all other officials, (at DoD, non-career appointees or Schedule C appointees unless they do not file a public financial disclosure report) and for Flag/General officers, the ban applies only to your former DoD component; it does not restrict communications to other designated DoD components or other Executive Branch agencies.

For example, as a former covered official at OSD (but not Senate confirmed) official, you are prohibited from representing your new employer back to OSD, which includes all organizations not designated components, including the COCOMS and many Defense agencies, for five (5) years after leaving DoD. You could, however, communicate and represent your new employer back to a Military Department (e.g. Department of the Navy), the National Security Agency, or any other designated component.

Once you leave Federal service, you may not engage in lobbying activities with respect to any “covered officials” throughout the Executive Branch for the remainder of the Administration.

### **XIII. FOREIGN GOVERNMENT EMPLOYMENT (U.S. CONSTITUTION)**

- A. Since retired military personnel are subject to recall, they are prohibited by the Emoluments Clause of the Constitution (Art. 1, § 9, Clause 8) from being employed by foreign governments without the consent of Congress. Congress has given consent.

[http://ogc.osd.mil/defense\\_ethics/ethics\\_counselors/resources/dod\\_guidance.html](http://ogc.osd.mil/defense_ethics/ethics_counselors/resources/dod_guidance.html)

1. 37 U.S.C. § 908 allows foreign government employment with approval of the Service Secretary and Secretary of State. Note that these waivers often take three or four months to be approved, so plan accordingly.

- a. U.S. Army Human Resources Command  
The Adjutant General Directorate  
ATTN: AHRC-PDR

Post-Government Service Employment Restrictions  
Ethics Counselor’s Deskbook  
Revised 2019

1600 Spearhead Division Avenue  
Department #420

Fort Knox, KY 40122-5402  
Telephone 502-613-8957/8983

b. Guidance for Air Force Personnel on this subject is *found* in Air Force Instruction 36-2913, *Request for Approval of Foreign Employment of AF Personnel*.

AFPC Directorate of Airmen and Family Care  
Airmen and Family Readiness Division  
550 C Street West  
Joint Base San Antonio-Randolph, Texas 78150-4713  
Telephone: COM 210-565-2273 or DSN 665-2273  
Mail application to [afpc.retiree@us.af.mil](mailto:afpc.retiree@us.af.mil)  
Questions: [afpc.retiree@us.af.mil](mailto:afpc.retiree@us.af.mil)

c. For the Navy, submit written request to The Chief of Naval Personnel, Office of Legal Counsel (Pers-OOL), Naval Support Facility Arlington, 701 South Courthouse Road, Room 4T035, Arlington, VA 22204. Telephone number is 703-604-0443.

d. For the Marines, a retired Marine Corps member should write to:  
Headquarters United States Marine Corps  
Manpower & Reserve Affairs  
Manpower Management Division  
Separation and Retirement Branch  
Retired Services and Pay (MMSR-6)  
3280 Russell Road  
Quantico, VA 22134

2. This Constitutional requirement applies to employment by corporations owned or controlled by foreign governments, but does not apply to independent foreign companies.

3. When seeking employment outside of the DoD contractor community, a military retiree should always ask, “Is this company owned or controlled by a foreign government?” See “Applicability of the Emoluments Clause to Non-Government Members of ACUS,” 17 Op. O.L.C. 114 (October 28, 1993).

B. Retired officers who represent a foreign government or foreign entity may be required to register as a foreign agent. 22 U.S.C. § 611; 28 CFR § 5.2. The Registration Unit, Criminal Division, Department of Justice, Washington, D.C. 20530, (202) 233-0776, can provide further information.

C. Note that a military member may be able to work for a “newly democratic nation” but must comply with 10 U.S.C. § 1060. Otherwise, note the potential of losing citizenship

if a retired member decides to work for a foreign government not under § 1060. 8 U.S.C. § 1481(a)(3)(B). The DoD Financial Management Regulation also addresses employment by a foreign government, in Vol. 7B, Ch 5. Vol. 7B, Ch. 6, addresses loss of citizenship after retirement if working for a foreign government. Suspension of pay due to employment by a foreign government is addressed in Vol. 7B, Ch. 13.  
[http://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/Volume\\_07b.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/Volume_07b.pdf)

#### **XIV. MISCELLANEOUS PROVISIONS**

- A. Use of Title. Retired military members (not on active duty) may use military titles in connection with commercial enterprises as long as their retired status is clearly indicated, no appearance of DoD endorsement is created, and DoD is not otherwise discredited by the use. JER 2-304.
- B. Wearing the Uniform. Retirees may only wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social, or ceremonial occasions. AR 670-1, para. 29-4; Air Force Instruction 36-2903, Dress and Personal Appearance of Air Force Personnel, June 8, 1998, Chapter 6 and Table 6.1; and Navy Uniform Regulations, Chapter Six, Section 10: Reserve/Retired.
- C. OGE Form 278s. Termination Public Financial Disclosure Reports must be filed within 30 days of leaving a covered 278 position (date of retirement for Flag and General Officers).
- D. Non-public Information. All former officers and employees must protect non-public information such as trade secrets, classified information, and procurement sensitive information after leaving federal service. 18 U.S.C. §§ 794 and 1905.
- E. Gifts from Foreign Governments. Military retirees and their immediate families may not retain gifts of more than \$390 in value from foreign governments. 5 U.S.C. § 7342.
- F. JER 11-301 requires post employment and disqualification issues to be included in annual ethics training.

JER 8-400 requires that all public financial disclosure filers certify annually that they are aware of the post-government service restrictions and the PIA post-government service restriction. (automatic in the FDM system)

JER 9-402 requires that ethics officials provide post-government service employment guidance during out processing.

- G. OPM Notice. The Office of Personnel Management requires that Departments 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. The post-government employment handouts on the SOCO web site customized to your agency, along with the ethics official's name, address and phone number, should be given to your personnel office so that it can include this information in its notice.

## **XV. The National Defense Authorization Act for Fiscal Year 2008, Section 847 and AGEAR**

**The National Defense Authorization Act of 2008**, Public Law 110-181, section 847, requires that “covered Department of Defense officials” must request, and the ethics officials must provide, a post-government employment opinion. For purposes of section 847, a “covered DoD official” is a current or former DoD official who, within two years after leaving DoD service, expects to receive compensation from a defense contractor, and who, **within the two year period prior to his or her departure from DoD** participated personally and substantially in an acquisition in excess of \$10M while serving in an Executive Schedule position; in an Senior Executive Service position; or in a general or flag officer position compensated at the rate of pay for grade 0-7 or above; or who served as a program manager, deputy program manager, procuring contracting officer, source selection authority, member of the source selection evaluation board, or a chief of a financial or technical evaluation team for a contract in excess of \$10M. These opinions must be rendered within 30 days after receiving a complete request **DOD** must maintain a central database of the Section 847 post-government service requests and opinions for not less than five years. The Inspector General shall conduct periodic reviews to ensure opinions are provided and retained.

The central database is the After Government Employment Advisory Repository (AGEAR). DoD employees meeting the 847 criteria, and seeking a post-government employment opinion, must enter information (no CAC required) into DD Form 2945 at: <https://www.fdm.army.mil/AGEAR>. Ethics counselors access AGEAR at: <https://www.fdm.army.mil/AGEAREO>.

**All 847 opinions must be done through AGEAR.**

## **XVI Summary of Section 1045 of the National Defense Authorization Act of 2018.**

### **BACKGROUND:**

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.

## Who is affected and for how long?

Section 1045:

- Prohibits **military officers in grades O-9 and O-10 and “civilian equivalents”** departing service after December 12, 2017, from engaging in “lobbying activities” with respect to DoD for **two years** after date of retirement or separation.

These most senior “civilian equivalents” are Tier 3 (and above) SES (career and non-career) and DISES, and all Presidential Appointees confirmed by the Senate.

- Prohibits **military officers in grades O-7 and O-8 and “civilian equivalents”** departing service after December 12, 2017, from engaging in “lobbying activities” with respect to DoD during the **one year period** after date of retirement or separation.

These less senior “civilian equivalents” are Tier 1 and 2 SES (career and non-career) and DISES, SL, ST, and DISL.

- Applies in addition to all other restrictions governing post-Government service activity by senior officials under criminal statutes, procurement integrity laws, regulations, and executive orders, including the Trump Ethics Pledge as applicable.

- Leaves unchanged other post-Government restrictions applicable to non-senior officials.

- Does not restrict departing personnel not subject to the 18 U.S.C. 207(c) one-year “cooling off” period, including civilians whose rate of base pay is below 86.5% of the rate for Executive Schedule Level II or Reserve officers not otherwise triggering the criminal ban.

## What activities are restricted?

Section 1045 bars engaging in *lobbying activities with certain DoD officials* (see “covered executive branch officials” Key Definitions) or *with respect to DoD matters* to certain non-DoD Federal officials during the applicable prohibition period.

## What is the “bottom line”?

This legislation limits the ability of former senior civilian employees and general or flag officers to work in positions requiring communications with certain DoD officials, or other Federal officials regarding DoD matters, while under the restriction. *This includes behind-the-scenes activity supporting lobbying contacts during the applicable cooling off period.*

## Key Definitions for purposes of Section 1045

**Lobbying Activities** means *lobbying contacts* and efforts directed at *covered executive branch officials* in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, as well as coordination with the lobbying activities of others.

*lobbying contacts* include:

- Written or oral communications
- With covered executive or legislative branch officials
- On behalf of a client
- For financial or other compensation
- with limited exceptions



*Or*

- Engaging in behind-the-scenes efforts in support of such lobbying contact

***covered executive branch officials*** include:

- Any officer or employee in the Executive Office of the President
- Any officer or employee serving in a position in levels I-V of the Executive Schedule (e.g., Presidentially Appointed, Senate-confirmed officials)
- Any member of the uniformed services whose pay grade is at or above O-7 (Flag or General Officers)
- A non-career official in a confidential, policy-making position, i.e., non-career SES or Schedule C appointee

Restricted ***lobbying activities*** include engaging in oral, written, or electronic communications with regard to the formulation, modification, or adoption of Federal legislation, rules, regulations, Executive orders, or any other program, policy or position of the United States Government. Also covered are contacts about the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license; but not technical communications made pursuant to those Federal arrangements). Note that communications required by the terms of an existing contract with DoD are not prohibited.

The prohibition on lobbying activities ***with respect to the DoD*** means the identified senior officials are prohibited from:

- Engaging in or supporting lobbying contacts with **covered executive branch officials** with respect to the DoD. This includes contact with covered officials ***in any Department about DoD matters***, e.g. discussing DoD issues with an executive branch agency covered official at the National Security Council.
- Engaging in or supporting lobbying contacts with **covered officials serving within DoD**. For purposes of this prohibition, there are no separate “DoD components.” Each Military Department and Defense Agency is considered within DoD and within the restriction for all identified senior officials.

## **XVII SAMPLE DOCUMENTS**

- a. DISQUALIFICATION MEMORANDUM.
- b. STOCK ACT NOTICE AND DISQUALIFICATION SAMPLE FOR PUBLIC FILERS
- c. POST EMPLOYMENT QUESTIONNAIRE
- d. TEMPLATE FOR POST GOVERNMENT EMPLOYMENT ADVICE.
- e. POST GOVERNMENT EMPLOYMENT ADVICESAMPLES.

## MEMORANDUM

[insert date]

MEMORANDUM FOR [insert supervisor title]

SUBJECT: Disqualification Statement (Seeking Employment)

I anticipate commencing employment discussions with the companies listed below. In accordance with section 208 of title 18 of the United States Code, a criminal statute, and section 2635.604 of title 5 of the Code of Federal Regulations, I am disqualified from participating personally and substantially as a Government officer or employee in any particular matter that would have a direct and predictable effect on the financial interests of them, their parent companies, subsidiaries, affiliates, and joint ventures (covered parties).

I am taking the following steps to ensure that I do not participate in any particular matter affecting the covered parties:

- (1) I am instructing my [*military/administrative*] assistants to screen all matters directed to my attention that involve any persons or organizations outside the Federal Government, and to determine whether such matters involve the covered parties. I have directed my military assistants to consult an ethics counselor if there is any uncertainty as to whether I am disqualified from participating.
- (2) If my [*military/administrative*] assistant determines that a matter directly or indirectly involves a covered party, the matter will be referred to the [*Name and Title of person with authority to act on behalf of Employee*] for action or assignment, without my knowledge or involvement.
- (3) I will advise my immediate subordinates of this disqualification, and also instruct them to direct all inquiries regarding matters directly or indirectly involving the covered parties to [*Name and Title of person with authority to act on behalf of Employee*], without my knowledge or involvement.

Covered Parties:

[insert name of company(ies)]

This disqualification remains in effect until further notice. In the event of changed circumstances, such as rejecting the possibility of employment with one of the covered parties or the passage of a 2 month period during which I have received no indication of interest in employment discussions from one of the covered parties, I will consult an ethics counselor, update this memorandum and notify everyone concerned.

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[insert name]

cc: JAG or OGC  
(Room)  
[Screener's Name]  
[Name and Title of person with authority to act on behalf of Employee]  
[Additional supervisors or subordinates, as appropriate]

# STOCK ACT NOTICE AND DISQUALIFICATION SAMPLE FOR PUBLIC FILERS

MEMORANDUM FOR [insert supervisor title]

SUBJECT: Disqualification Statement (Seeking Employment)

In my current position, I am required to file a Public Financial Disclosure Report (OGE Form 278). Therefore, in accordance with 18 U.S.C. § 208 (a criminal statute), 5 C.F.R. §§ 2635.604 and 606, and § 17 of the Stop Trading on Congressional Knowledge Act of 2012 (“STOCK Act”), I am notifying you that I am seeking post-government employment with the following non-Federal entities:

[insert name of entity(ies)]

I am disqualifying myself from participating personally and substantially in any particular matter that would have a direct and predictable effect on the financial interests of the listed entities. I am also taking the following steps to ensure that I do not participate in any particular matter affecting these parties:

- (1) I am instructing my [military/administrative] assistant to screen all matters directed to my attention that involve any persons or organizations outside the Federal Government, and to determine whether such matters involve one of the entities listed above. I have directed my [military/administrative] assistant to consult an ethics counselor if there is any uncertainty as to whether I am disqualified from participating.
- (2) If my [military/administrative] assistant determines that a matter directly or indirectly involves an entity listed above, the matter will be referred to the [Name and Title of person with authority to act on behalf of Employee] for action or assignment, without my knowledge or involvement.
- (3) I will advise my immediate subordinates of this disqualification, and also instruct them to direct all inquiries regarding matters involving a listed entity to [Name and Title of person with authority to act on behalf of Employee], without my knowledge or involvement.

This disqualification remains in effect until further notice. In the event circumstances change, such as if I reject the possibility of employment with one of the listed entities, or if I receive no response two months after submitting my resume, I will consult an ethics counselor, update this memorandum, and notify all relevant parties.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed Name

cc: JAG or OGC

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## POST-GOVERNMENT SERVICE ETHICS QUESTIONNAIRE

DD Form 2945. ).

<http://www.dtic.mil/whs/directives/forms/eforms/dd2945.pdf>

or

[http://ogc.osd.mil/defense\\_ethics/handouts/handouts.html](http://ogc.osd.mil/defense_ethics/handouts/handouts.html)

## Template Post-Government Employment Letter

Dear **Client**:

### **Describe attorney client relationship to begin:**

This responds to your request for a written opinion regarding the ethics restrictions that apply to you after your departure from government service. In providing this advice, I am acting on behalf of the United States and not as your personal representative. Neither the information you have provided nor this letter creates an attorney-client relationship. Additionally, my advice below is based on the information you have provided about your roles and responsibilities while in service at the Department of Defense. To the extent that this memorandum does not accurately reflect relevant facts, or to the extent that the facts change, this advice may need to be revisited.

**Explain who they are (what title they held in the last year), and what their responsibilities were in that role.**

**Explain what they anticipate to be their role in their new duties.**

### **Address the Criminal representation bans:**

There are statutory restrictions that affect your employment activities after your government service. 18 U.S.C. § 207, a *criminal* statute that applies to all former government employees, has four parts that potentially pertain to you and your post-government activities. Generally, these are “representational” restrictions, meaning that they limit your ability to represent another individual, organization, or company back to the Federal Government, not just the Department of Defense (to avoid the appearance of the so-called “revolving door”). Importantly, these representational restrictions do not limit your ability to accept employment with any domestic organization or company, and generally allow you to work “behind the scenes” for your new employer on matters that you worked on while you were a government employee as long as you do not communicate with or appear before an employee of the United States in violation of these statutes.

### ***Lifetime Ban (18 U.S.C. § 207(a)(1)):***

You may not knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States, on behalf of another person or entity ***in connection with a particular matter involving a specific party or parties, in which you***

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*participated personally and substantially while you were a government employee* and in which the United States is a party or has a direct and substantial interest. A “particular matter involving specific parties” includes a specific, discrete proceeding affecting the legal rights of the parties or an isolatable transaction between identified parties such as a specific government contract, grant, license, product approval, enforcement action, administrative adjudication, or court case. Generally, one of the parties to the matter must be a person or entity outside of the Government. Furthermore, a particular matter involving specific parties is not, with some narrow exceptions, a broad policy matter or internal agency program.

“Personal and substantial participation” is defined as follows: “personal” means directly, either individually or in combination with other persons or through direct and active supervision of the participation of any person that you supervised; “substantial” means that your involvement was of significance to the matter; and “participation” may be substantial even though it is not determinative of the outcome of a particular matter, however, 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 the 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. Reviewing budgetary procedures or scheduling meetings is not substantial. Participating in the substantive merits of a matter may be substantial even though your role in the matter was minor in relation to the matter as a whole. Good examples of particular matters involving specific parties that you were personally and substantially involved in under this section of the law was the up side down contract you worked on for the Source Selection Board or when you signed off on the right side up contract.

This ban lasts for the “lifetime” of the particular matter (e.g., until contract performance has been completed and the contract matter is closed). Furthermore, please be advised that while it is generally true that participation or involvement in DoD policy development does not qualify as a “particular matter involving specific parties,” to the extent that a policy is narrowly focused on the interests of a discrete and identifiable group of parties or organizations outside the Federal Government, the lifetime ban may apply (e.g., if you helped set standards or developed a DoD policy that affected a narrow, niche segment of government contractors). Again, if you have any question about an action or initiative that you worked on and whether it qualifies as a particular matter involving specific parties, do not hesitate to contact my office for advice and clarification either before you leave or at any time afterwards.

Furthermore, as this is a criminal prohibition, in the event that a future employer asks you to represent its interests back to the Government on a matter in which there is some question as to whether you participated personally and substantially, I recommend that you consult legal counsel for your new employer. He or she will be in the best position to evaluate the efficacy of

and risk associated with your representing the company's interests back to the Government on a matter in which you may have participated personally and substantially while in DoD.

Here you could illustrate some types of lifetime matters such as a particular grant or MOU customizing this letter to the individual.

If neither the two-year restriction on matters pending under your supervision nor the one-year cooling off apply, then state so here, citing the statutes but not quoting them:

***Two-Year Ban (18 U.S.C. § 207(a)(2)):***

For two years after the termination of your employment with the United States, you 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 United States is a party or has a direct and substantial interest, ***and which you know or reasonably should know was actually pending under your official responsibility within your last year of Government service***. "Under your official responsibility" includes any 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 actions, assigned by statute, regulation, executive order, job description, or delegation of authority. For this provision, it is irrelevant whether you participated in the matter personally and substantially; the key is whether the matter was pending under your official responsibility. Thus, this provision would apply both to matters assigned to you, but on which you took no action, and matters assigned to your subordinates. To the extent that particular matters involving specific parties were undertaken by DoD employees who were under your supervision during your last year of federal employment, the two-year representational ban under the law will apply to you. Again, this provision does not bar you from working on such matters for your new employer, in-house, "behind the scenes." You advise that you worked primarily on policy matters within the last year, and are not aware of participation by your subordinates in any particular matters involving specific parties that are currently pending under your supervision during your last year here.

***One-Year Cooling Off (18 U.S.C. § 207(c)):***

As a senior official you are subject to this restriction. ***The law states that you are prohibited, for a period of one year after your service in your "senior" position terminates, from communicating with or appearing before, on behalf of another with the intent to influence, officers and employees of the Department of Defense on any matter on which official action is sought.*** This one-year "cooling off" period is designed to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former



senior position. It is irrelevant for purposes of 18 U.S.C. § 207(c) that you did not work on the matter while in Government service. Importantly, this restriction limits your appearances before and communications with personnel of your military department, the Army. However, you can appear before Air Force, Navy, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Logistics Agency, National Geospatial Agency, National Reconnaissance Agency, Defense Threat Reduction Agency, the National Security Agency, and the Office of the Secretary of Defense provided that you do not appear before members of your department, e.g. the Army. Furthermore, this ban does not bar your communications with personnel of any non-DoD Federal agency. The cooling-off provision does not prohibit you from providing “behind the scenes” assistance to your new employer or other entity. In interpreting these restrictions, the Office of Government Ethics (OGE) advises that the prohibition against representational activities before your former agency includes written or oral communications aimed at influencing the Government, but does not prohibit you from giving assistance concerning such matters to your new employer. See 5 C.F.R. § 2637.201(b)(6). OGE also advises that these restrictions do not apply to an appearance or communication to request publicly available documents or purely factual information, or to provide such information. Furthermore, the one-year cooling-off restriction does not prohibit purely social contacts with your former colleagues or appearing before the Government representing yourself. If you are covered by the Obama Pledge, your “cooling off” restriction is extended to two years from your departure, rather than one. (Civilian Presidential appointees subject to Senate confirmation may not take advantage of the separate components 18 U.S.C. §207(h)(2)) This advice is detailed in the post-government employment handout that you have already received.

If the client had procurement responsibilities:

***The Procurement Integrity Restriction (41 U.S.C. §§ 2101-07):***

The Office of Federal Procurement Policy Act, formerly known as the Procurement Integrity Act (PIA), now codified at 41 U.S.C. §§ 2101-07, prohibits former officials of Federal agencies from accepting compensation from the concerned contractor for one year if the former official served in one of several key acquisition roles<sup>1</sup> *or* performed designated acquisition services<sup>2</sup> on a procurement in excess of \$10M that the contractor was awarded either competitively or noncompetitively. Based on the answers to the questions in your Post-Government Employment Questionnaire dated March 21, and submitted for an opinion on July

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1 Designated key acquisition roles are: contracting officer; source selection authority; technical or financial evaluation team chief; program manager; deputy program manager; and administrative contracting officer.

2 Designated acquisition services are: awarded a contract or subcontract, a modification, task order, or delivery order in excess of \$10M; established overhead rates in excess of \$10M; or approved issuance of a contract payment in excess of \$10M within the last year.

10, and on your post-Government employment briefing, you participated on two contracts that exceeded \$10 M. The last activity you performed on either contract was in the last year. Therefore, the employment restrictions under this law would prohibit you from working with up side down.

I remind you that after leaving government service, you remain subject to the terms of the PIA, which prohibit you as a former government official from knowingly disclosing to any person not authorized to receive it, contractor bid or proposal information, trade secret, or source selection information that you had access to while in government service.

Section 847 of the National Defense Authorization Act for Fiscal Year 2008 is related to the former PIA. Under this law, certain current or former senior DoD officials must request and receive a written opinion regarding the applicability of post-government restrictions to their prospective employment before receiving pay from their new employer if the following conditions are met: you participated personally and substantially in an acquisition with a value in excess of \$10M while serving 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 team. Since you were involved in a \$10M procurement, this statute applies to you. This letter satisfies the 847 requirements. (or alternatively, Since you were not involved in a \$10M procurement, this statute does not apply to you. Nevertheless, this letter satisfies the 847 requirements.)

If a reminder about the representation restriction regarding 207(f) is needed/desired:

***One-Year Ban on Assistance to Foreign Governments (18 U.S.C. § 207(f)):***

Section 207 of title 18 also contains a one-year restriction on aiding, advising, or representing a foreign government or foreign political party with the intent to influence the U.S. Government. Unlike the other representational bans, this one does *not* permit “behind the scenes” assistance to a foreign government or political party *and* the representation prohibition applies to all branches of the Federal Government. This restriction, like § 207(c), only applies to senior employees as defined as those whose rate of basic pay is equal to or greater than 86.5% of the rate of basic pay for level II of the Executive Schedule, which in 2019 is \$166,340. You were a senior official for purposes of this provision of law. Thus, for a period of one year after terminating your government service, you may not knowingly represent a foreign government or foreign political party before an officer or employee of the Federal Government, or aid or advise such a foreign entity with the intent to influence a decision of such officer or employee.

## **Section 1045 of the FY 2018 NDAA (Public Law 115-91)**

Additionally, you are subject to the “anti-lobbying” restriction in Section 1045 of the Fiscal Year 2018 National Defense Authorization Act (“Section 1045”). As a general officer in the grade of O-9, this law imposes a two-year restriction on engaging in **lobbying activities** with certain DoD officials or, with respect to DoD matters, to certain non-DoD Federal officials for two years after retiring from the Air Force. (could be one-year if Tier 1 or 2 of SES or O-7 or O-8) This legislation may limit your ability to work in positions requiring communications with certain DoD officials, or other Federal officials regarding DoD matters, while under the restriction. *This ban differs from the criminal provisions discussed above in that it includes behind-the-scenes activity supporting lobbying contacts and applies across all DoD components during the applicable two-year cooling off period. It also differs in that it applies only with respect to communications to or with “covered officials.”*<sup>1</sup>

**“Lobbying Activities.”** Restricted lobbying activities include engaging in oral, written, or electronic communications with regard to the formulation, modification, or adoption of Federal legislation, rules, regulations, Executive Orders, or any other program, policy or position of the United States Government. Also covered are contacts about the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license; but not technical communications made pursuant to those Federal arrangements). Technical communications required by the terms of an existing contract with DoD are included as “compelled communications” that not prohibited. **Although communications with covered officials that are required under an existing contract Lockheed Martin may have with the Air Force or other branches and offices in DoD are not prohibited by Section 1045, you must remember that during the first year after retiring from the Air Force, the criminal statute discussed above, 18 U.S.C 207(c), will nonetheless prevent you from appearing before any personnel in the Air Force or certain DoD agencies, including combatant commands, on any matter, including any existing C-130J contract.**

For purposes of Section 1045, the term “communicates” includes “behind the scenes” assistance to an outside entity when such assistance is intended, at the time rendered, to be used to lobby covered Executive Branch officials. DoD has interpreted “behind the scenes” assistance in furtherance of prohibited “lobbying activities.” under Section 1045 to include drafting an *unsolicited* proposed communication to a covered official in any Executive Branch agency on a DoD matter, advising on an appearance before DoD with the intent to influence, or consulting on other strategies intended to influence a covered Executive Branch official’s official discretionary decision or action on a particular matter. Merely advising an outside entity on general marketing and business development strategies related to the entity’s products or services, assisting an outside entity in drafting a DoD *solicited* Request for Proposal (RFP), or providing “behind the scenes”

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<sup>1</sup> *covered executive branch officials* include any officer or employee in the Executive Office of the President, any Presidentially Appointed, Senate-confirmed officials, any member of the uniformed services in pay grade O-7 or above (Flag or General Officers), and a non-career official in a confidential, policy-making position, i.e., non-career SES or Schedule C appointee

assistance on an existing contract or grant would not be the type of behind the scenes assistance prohibited under Section 1045.

Additionally, the definitions in the Lobbying Disclosure Act contain several exceptions which may be pertinent in allowing activities associated with your prospective employment.<sup>2</sup> A prospective employer may be able to identify “lobbying contacts” because many firms must track and potentially report individual employees and expenses associated with those actions.

**If the Emoluments Clause provision is needed because the client will be retired military:**

As to the Emoluments Clause to the Constitution, article I, section 9, clause 8, as interpreted in Comptroller General opinions and by the Department of Justice Office of Legal Counsel, the Emoluments Clause prohibits receipt of consulting fees, gifts, travel expenses, honoraria, or salary by all retired military personnel, officer and enlisted, regular and reserve, from a foreign government *unless Congressional consent is first obtained*. Consent is provided by Congress under 37 U.S.C. § 908, which requires advance approval from the relevant service secretary *and* the Secretary of State before accepting employment, consulting fees, gifts, travel expenses, honoraria, or salary from a foreign government. So if you are ever in a position where you would receive an emolument from a foreign government or from an entity that might be controlled by a foreign government, be sure and seek advance approval.

Please remember that you are responsible for ensuring compliance with the post-government employment rules. Because these statutes carry criminal sanctions, if you have any doubts about the propriety of a particular course of action, you should obtain advice before acting to ensure that you do not unwittingly violate one of these statutes. Please contact me or any ethics counselor in this office at ( ) - if you have further questions.

Sincerely,

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<sup>2</sup> For example the term “**lobbying contact**” **does not include** a communication that is--...

(v) a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official;...

(viii) information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information;

(ix) required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, grant, loan, permit, or license;

(x) made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications;

March 8, 2008

Office of Command Counsel

Colonel Almost Retired, Jr.  
Deputy Director, Aviation Facilities Directorate  
Office of the Assistant Chief of Staff for Facility Management  
400 Army Pentagon  
Washington, DC 20310-0400

Dear Colonel Almost Retired:

This responds to your request for advice regarding job-hunting and post-Government employment restrictions, and is based on the following facts that you provided.

You plan to retire as a colonel by January 1, 2003, perhaps earlier. It is likely that you will take terminal leave. You have been assigned to the Aviation Facilities Directorate, Office of the Assistant Chief of Staff for Facility Management since July 19, 1994, most of the time as the Deputy Director. As such, you have been responsible for the development, integration and promulgation of policies and doctrine pertaining to the planning, programming, budgeting and operation of all Army aviation facilities. Your responsibilities have included aspects of the Aviation Facility Status Report (AFSR); in addition, you have been and are a user of the information generated by the AFSR.

You have been seeking employment with Archie Technical Integrators (ATI). As we discussed, once you send a resume or otherwise make or receive some contact concerning future employment, you are seeking employment. This means that, by law (18 U.S.C. § 208) and regulation (5 C.F.R. § 2635.604), you are disqualified from participating in any official matter that would have a direct and predictable effect on the financial interests of ATI. In your case, you are also required by the *Joint Ethics Regulation* (JER), DOD 5500.07-R, paragraph 2-204c, to issue a written notice of your disqualification, which you did on November 1, 2002.

You should also be aware that you may begin your new employment while on terminal leave. However, because you file a financial disclosure report, you are required by JER 2-206 to obtain the prior approval of your supervisor if this employment is with a prohibited source. [**Add for GOs and SESs:** Your employment agreement, position and income that occurred prior to your retirement date must be reported on your termination Public Financial Disclosure Report

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(OGE 278).] Finally, if you are employed during your terminal leave, you are prohibited by 18 U.S.C. § 205 from representing your new employer, or anyone else for that matter, before any department, agency or employee of the Federal Government.

In my opinion, based on the information that you provided, the procurement integrity law, 41 U.S.C. § 2101, does not require any additional notices with respect to your employment contacts with ATI. In addition, the procurement integrity law does not restrict you from receiving compensation from ATI, or any other Department of Defense contractor for that matter.

However, the procurement integrity law does apply to you to the extent that you have had access to any source selection or contractor bid or proposal information, and it continues to protect that information. In addition, 18 U.S.C. §§ 793, 794 and 1905 protect and prohibit the use or disclosure of trade secrets, confidential business information, and classified information. Finally, you have a continuing obligation to the Government not to disclose or misuse any other information that you acquired as part of your official duties and which is not generally available to the public.

A criminal statute, 18 U.S.C. § 207, will restrict your representational activities. It prevents an individual who participated in, or was responsible for, a particular matter while employed by the Government from later "switching sides" and representing someone else in the same matter. [***Add for GOs and SESs (level exceeding 86.5 per cent of the rate for level II of the Executive Schedule (EL II))***]: It also provides additional restrictions for former general officers and senior employees.]

a. Section 207(a)(1) imposes a lifetime bar that prohibits you from knowingly making, with the intent to influence, any communication to or even an appearance before an employee of the United States on behalf of someone else in connection with a particular matter involving a specific party in which you participated personally and substantially as a Government officer and in which the United States has a direct and substantial interest. This does not prohibit "behind-the-scenes" assistance.

"Particular matter" includes any proceeding, application, contract, controversy, investigation, accusation, arrest, or other particular matter that involves a specific party.

"Participate personally and substantially" means to participate directly and significantly by decision, approval, disapproval, recommendation, advice, or investigation. Personal participation includes the participation of a subordinate when actually directed by you.

b. Section 207(a)(2) is nearly identical to the above lifetime restriction except that it (1) lasts for only two years after leaving Government service (rather than life) and (2) applies only to those matters in which you did not participate personally and substantially, but which

were pending under your official responsibility during the one-year period before terminating Government employment. "Official responsibility" is defined as direct administrative or operating authority to approve, disapprove, or otherwise direct government action.

***[Add for GOs and SESs (levels where basic pay exceeds 86.5 per cent of the rate for level II of the Executive Schedule (EL II)):***

[c. Because you are a general officer, section 207(c)(1) prohibits you for one year after your retirement from contacting any officer or employee of the Department of the Army on behalf of someone else with the intent to influence any official matter.

[d. Further, also because you are a general officer, section 207(f) prohibits you for one year after your retirement from representing or aiding or advising a foreign government or political entity (but not a non-government corporation) to influence a decision of any officer, employee or agency of the United States.]

Your prospective duties with ATI as a Senior Technician would include working on the contract if awarded to them that results from Request for Proposals (RFP) DATT-96-R-0193. It will be an umbrella contract to provide technical support to all parts of the AFSR, including the integration of its parts. The expectation is that you would interact and deal with Army officials on behalf of AFSR concerning contract performance.

a. You advised me that you did not participate at all in the procurement process for any portion of this umbrella technical support requirement, to include the statement of work, specifications, purchase request documents, acquisition strategy discussions, or solicitation preparation and issuance. In that case, in my opinion, you have not participated personally and substantially in the particular matter involving specific parties, *i.e.*, the RFP and the resulting contract.

b. You also advised me that your Directorate had functional responsibility for the fielding of Part I of the AFSR (until May 20, 1996) and for the integration of the various parts of the AFSR (until June 20, 1996). However, this functional responsibility did not include participation in any way in the procurement process for the RFP requirement by those working for you. Those working for you did not help put together the RFP. Accordingly, in my opinion, the particular matter involving specific parties (*i.e.* the RFP and the resulting contract) was not under your official responsibility during your last year of Federal service.

Accordingly, in my opinion, neither 18 U.S.C. § 207(a)(1) nor 18 U.S.C. § 207(a)(2) prevents you from representing ATI before the Army and attempting to influence official action with respect to the contract resulting from the RFP. However, you must wait until you are actually retired. If you are on terminal leave, 18 U.S.C. § 205 prohibits any officer or employee from

representing ATI or any other non-Federal entity back to any part of the Federal Government with the intent to influence official actions.

As a final point, my opinion as an agency ethics official concerning 18 U.S.C. § 207 does not have the same weight as an opinion authorized by statute, such as the procurement integrity law (41 U.S.C. § 2101). The *Standards of Ethical Conduct for Employees of the Executive Branch* makes it clear that, although my opinion should be persuasive concerning statutes like 18 U.S.C. § 207, my opinion on this statute does not bind the Department of Justice.

I hope that this information is helpful to you. This letter, issued under the authority of 41 U.S.C. § 2104(c) and 5 C.F.R. §§ 2635.107 and 602(a)(2), is an advisory opinion of an agency ethics official based on the information that you provided.

Sincerely,

Ethics Attorney



January 15, 2012

General  
70 Road  
NY, NY 16

Dear Mr.:

This replies to your request for an opinion regarding the legal propriety of undertaking certain post-employment activities. My advice with respect to these matters is advisory only. Neither the information you provided to receive this advice letter, nor the provision of this letter, creates an attorney-client relationship between you and an attorney rendering such advice.

In your Questionnaire dated January 11, 2012, you stated that you are the Director of the DO. In that role, you approved projects with a value of up to \$25 million. You reported your recommendations directly to the Head of the Contracting Activity. You stated in your Questionnaire that you approved contracts in amounts exceeding \$10 million, and your last participation was the award date.

The law, at 41 U.S.C. 2101-2107, formerly known as the Procurement Integrity Act, prohibits Department of Defense (DoD) personnel from accepting compensation from certain employers. By awarding a contract over \$10 million, you are subject to this law. For a period of one year after the award date, you may not accept compensation from the vendors involved in those contracts. Other post employment laws apply regarding these contracts and regarding particular matters you worked on involving specific parties.

Certain current or former DoD officials who, within two years of leaving DoD, expect to receive compensation from a defense contractor must request and receive a written opinion regarding the applicability of post-employment restrictions to activities that official may undertake on behalf of a defense contractor before receiving pay. This requirement is in Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)(Section 847). It applies if you are a current or former DoD official who participated personally and substantially in an acquisition with a value in excess of \$10M while serving in: (1) an Executive

Post-Government Service Employment Restrictions  
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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 team.

Since you have been involved personally and substantially in an acquisition with a value in excess of \$10 million which serving as the Colonel, \_\_\_\_\_, you are subject to Section 847, and this letter satisfies the requirements of that section.

In addition, other laws and regulations may apply to your job search and the type of work you may perform for a private employer. They are discussed below.

A criminal statute, section 208 of title 18, United States Code, prohibits a Government employee from participating “personally and substantially” in any “particular Government matter” in which a private entity has a financial interest, if the employee is negotiating employment with the private entity or has an arrangement for future employment with the private entity. This restriction applies to matters in which the employee participates “personally and substantially” through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise. A “particular matter” may be a judicial or administrative proceeding, an application, request for ruling or other determination, contract, claim, controversy, charge or any other particular matter. To participate “personally” means to do so directly and includes directing a subordinate to take action. “Substantial” means that an employee’s involvement was of significance to the matter.

To avoid the broad reach of this conflict of interest statute, while employed by the Federal Government, you must disqualify yourself from taking any Government action with respect to a prospective private employer with whom you are seeking employment or have an arrangement for future employment. Generally, disqualification does not apply if your prospective employer is the Department of Defense or another agency of the Federal Government.

You are considered to be seeking employment if you engage in negotiations with particular prospective employers or send them a resume, until such time as you reject an offer, the prospective employers reject your application, or 60 days pass without a response to your resume. Disqualification is accomplished through not participating in the matter. You should notify, in writing, your supervisor, ethics counselor, immediate subordinates, and prospective employer of your disqualification.

As an exception to the general rule prohibiting the acceptance of gifts from outside sources, you may accept travel benefits, including meals, lodging, and transportation, provided by a prospective employer, even a DoD contractor, provided the benefits are tendered in

connection with bona fide employment negotiations. The only caveat is that you must provide your disqualification notice before accepting these benefits.

Several other statutory restrictions may limit the type or scope of activities in which you may engage after separating. For example, for a period of one year after leaving your position, you may not make any communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of the Department in which you served within one year prior to leaving your position, in connection with any matter on which official action is sought by such individual. (18 U.S.C. 207(c)). You may, however, during that “one year cooling off” communicate with the following DoD entities that you were neither an employee or detailee: Army, Air Force, Navy, DISA, DIA, DLA, NGA, NRO, DTRA and NSA.

You may not, in accordance with 18 U.S.C. 207 (a), communicate with any part of the Executive or Judicial branches of the Government, on behalf of any other person or entity, with the intent to influence the Government on any matter in which you were personally and substantially involved while still in Government service. Further, in accordance with 18 U.S.C. 207(a)(2), for two years after leaving Government service, you may not represent someone else to the Government regarding particular matters that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

Nor may you, for example, engage in a financial transaction using non-public information or allow the improper use of non-public information to further your own private interests or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure. Inside information includes information that is not generally available to the public and obtained by reason of your official duties or position. Specifically, non-public information is "inside information," trade secrets, classified information, and procurement sensitive information. While you can capitalize on your professional skills and knowledge, you cannot use inside information to do so.

These restrictions are complex. They are explained in detail in other materials I have provided to you. If you have any doubts about the propriety of a particular course of action, you should obtain advice before acting to ensure that you do not unwittingly violate one of these statutes. Please contact me at (703) - or by email at you have further questions.

Sincerely,

Deputy Designated Agency Ethics Official

Post-Government Service Employment Restrictions  
Ethics Counselor’s Deskbook  
Revised 2019

Encl:  
Post-employment restrictions Handout  
Procurement Integrity Act Restrictions Handout