



DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
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WASHINGTON, DC 20310-0104

SAGC-EF

29 July 2015

MEMORANDUM FOR Ethics Officials Using the After Government Employment Advice Repository (AGEAR) System

SUBJECT: Updated Business Rules for Using the AGEAR System

1. References:

a. National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, Section 847.

b. Memorandum, Deputy Secretary of Defense, 19 September 2011, Subject: Mandatory DoD-Wide Use of After Government Employment Advice Repository (AGEAR) and Designation of Secretary of the Army as DoD Executive Agent for Operation of AGEAR.

c. Code of Federal Regulations (CFR), Title 48, Chapter 2, Subpart 203.171; Department of Defense Federal Acquisition Regulation Supplement Subpart 203.171.

2. Purpose. As the Department of Defense (DoD) Executive Agent for AGEAR, Army OGC is providing updated "business rules" to replace the March 2014 rules and assist ethics counselors (ECs) in properly processing requests for Section 847 opinions in AGEAR.

3. Background.

a. Section 847 requires a "covered DoD official"¹ who, within two years after leaving DoD service, expects to receive compensation from a DoD contractor, to, before

¹ Section 847 defines a "covered DoD official" as an official or former official of the DoD that:

(1) Participated personally and substantially in an acquisition as defined in section 4(16) of the Office of Federal Procurement Policy Act with a value in excess of \$10,000,000 and serves or served--

(A) In an Executive Schedule position under subchapter II of chapter 53 of title 5, United States Code;

(B) In a position in the Senior Executive Service under subchapter VIII of chapter 53 of title 5, United States Code; or

(C) In a general or flag officer position compensated at a rate of pay for grade 0-7 or above under section 201 of title 37, United States Code; or

(2) Serves or served as a program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of \$10,000,000.

SAGC-EF

SUBJECT: Updated Business Rules for Use of the After Government Employment Advice Repository (AGEAR) System

accepting such compensation, request a written opinion regarding the applicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor. Ethics officials are required to issue a written opinion to the requester not later than 30 days after receiving the request. The statute and implementing regulation² also prohibit DoD contractors from knowingly providing compensation to a “covered DoD official” within two years after the official leaves DoD service unless the contractor first determines that the official has received or requested, at least 30 days before receiving compensation from the contractor, a written opinion from the appropriate EC regarding the applicability of post-employment employment (PGE) restrictions to activities the official expects to undertake on behalf of the contractor.

b. Reading Section 847 and DFAR 203.171 together indicates a request must meet the following criteria to qualify for processing in AGEAR: 1) the requestor must be a “covered DoD official” as defined by References a and c; and 2) the requestor must describe the activities that the former official is expected to undertake on behalf of the contractor within the two year period after leaving DoD service. This generally means the requestor must have an actual offer of employment or consulting for compensation tied to performing specific duties for that contractor. The offer may be contingent upon ethics and procurement rules compliance.

c. As the DoD Executive Agent for AGEAR, Army OGC has developed the following “business rules” to assist ECs in properly processing requests for Section 847 opinions in AGEAR. Adherence to these rules will help ECs establish appropriate audit trails that will assist Army OGC and the DoD Inspector General in determining whether ECs are complying with Section 847. This, in turn, should aid future audits and assessments.

4. Business Rules. In processing requests for Section 847 opinions in AGEAR, ECs should:

a. Reject requests that do not meet Section 847 criteria. ECs should not use AGEAR to process requests for routine (non-Section 847) PGE opinions, or to retain routine PGE requests and opinions, including letters addressing the inapplicability of Section 847 to the requestor. ECs should only accept complete requests that establish eligibility for a Section 847 opinion in AGEAR for processing in AGEAR. If a request form submitted in AGEAR is, on its face, incomplete or otherwise indicates the request does not meet Section 847 criteria, then the responsible AGEAR Manager or EC should promptly reject the request. If, once a request is accepted and forwarded to the EC, additional information is obtained indicating that the requestor does not meet the criteria for a Section 847 opinion; the EC should reject the request from AGEAR and process it

² Defense Supplement to the Federal Acquisition Regulation (DFAR), Subpart 203.171.

SAGC-EF

SUBJECT: Updated Business Rules for Use of the After Government Employment Advice Repository (AGEAR) System

as a routine request for PGE advice outside of AGEAR. Procedures for rejecting a request follow:

(1) To reject a request, the EC must log into AGEAR and click on the "View" button next to the requestor's name. After the request is opened, click on the "Request Detail" tab at the top of the request. Then, click on the "Reject" button. When rejecting a request, AGEAR requires the EC to provide an explanation for the rejection. It is not necessary to upload supporting documentation. As a best practice, the EC should download and save the completed request questionnaire elsewhere before clicking the "Reject" button so that it can be used in issuing a routine PGE opinion outside of AGEAR.

(2) After clicking the "Reject" button, a dialogue box will appear. Insert a written explanation (e.g., "Requestor is not a covered official" or "Requestor does not have an offer of employment or compensation from a specific DoD contractor"), then click on the "Save" button. Once the "Save" button has been clicked, the status of the request will change to "Rejected." The "Reject" button is always available to the EC regardless of the status of the request. No further action in AGEAR is necessary. The EO should inform the requestor of the rejection, and discuss other available options for routine PGE advice.

b. Use the "Request More Info" button when requesting additional information from the requestor. If, after reviewing a request that initially appears to meet the eligibility criteria for a Section 847 opinion, the EO determines that additional information is required, the EC should promptly contact the requestor and request the missing information, e.g., copy of resume, description of current or anticipated duties, and any other supporting information needed to write the opinion. (Additional information is typically required because AGEAR does not permit requestors to attach documents to their requests, primarily due to information technology system security concerns.) The EC must document the request by clicking the "Request More Info" button in AGEAR, and entering a comment in the dialogue box. This will create an audit trail to document that the EC has not yet received a complete request with sufficient information to permit issuance of the Section 847 opinion to the requestor, thereby demonstrating to any reviewing authority that the EC is not responsible for any delay.

c. Use the "Prepare Opinion" button once sufficient information has been provided for the EC to draft the opinion. Upon receipt of any necessary additional information and clarifications, the EO should *immediately* review them to determine if sufficient information has been received to write an opinion. If so, the EC *must* immediately click the "Prepare Opinion" button to begin the 30-day clock. EOs may *not* delay this action to avoid triggering the statutory 30-day clock. The EC has 30 days from receipt of a completed request and all additional information required to prepare and issue the opinion. After clicking the "Prepare Opinion" button, AGEAR will display instructions and a date field. IAW the instructions, the EC will click the check box below

SAGC-EF

SUBJECT: Updated Business Rules for Use of the After Government Employment Advice Repository (AGEAR) System

the date field and enter the date when all necessary information from the requester was received. The EC may then click the start button to begin preparing the opinion. The EC can either download the opinion template IAW the instructions and use it to complete the final opinion, or complete the opinion outside of AGEAR and attach it to the request in AGEAR. Once the EC completes the opinion letter, the EC must immediately close the request in AGEAR and provide the opinion letter to the requestor.

d. Close requests in AGEAR once the opinion has been issued.

(1) To ensure the statutory 30-day clock is stopped in AGEAR and demonstrate to reviewers that the opinion was issued timely, ECs must take action to close the request in AGEAR once the opinion is issued.

(2) Procedures to Close a Request in AGEAR. To close a request, the EO must click on the "Attachments" tab at the top of the request in AGEAR. The EC then clicks on the "Add Attachment" button. Next, the EC must identify the attachment as the written opinion by clicking on "Opinion" from the four types of attachments that are displayed on the screen. Only by selecting the "Opinion" button will AGEAR allow the EC to close the request in AGEAR. The EC clicks on the "Upload" button to attach the opinion to the request in AGEAR. Finally, the EC clicks on the "Send Opinion and Close" button at the top of the request. This allows the EC to send the opinion to the requestor and close the request in AGEAR simultaneously. After the opinion has been sent, the status of the request will change to "Closed" in AGEAR.

(3) As a best practice, the EC should also upload the transmittal document and, where available, proof of receipt by the requestor (e.g., e-mail exchange, cover letter, etc.) into AGEAR in addition to the opinion. This provides evidence that the opinion was actually provided to and received by the requestor during subsequent investigation or legal action for violation of PGE restrictions.

e. Purging AGEAR records after five-years.

(1) Section 847 mandates that AGEAR requests, opinions, and supporting materials "shall be retained for not less than five years beginning on the date on which the written opinion was provided." Given the Privacy Act and records management objective to retain materials retrievable by an individual's name or other personal identifier for no longer than the minimum period required, the AGEAR program office (Army OGC) will regularly purge AGEAR records more than five years old.

(2) Only the AGEAR program office can delete AGEAR records. Each legal office using AGEAR must notify Army OGC if it wants any of its AGEAR records retained for more than five years. This would include records subject to ongoing investigation, personnel action, prosecution, civil litigation, or similar matters that would

SAGC-EF

SUBJECT: Updated Business Rules for Use of the After Government Employment Advice Repository (AGEAR) System

warrant a record's retention. If Army OGC does not receive a request to retain the records, it will purge the AGEAR record after five years. Submit requests to retain records any time prior to seven days before the five-year anniversary of the date of the opinion.

(3) This establishes an ongoing requirement for legal offices in the field to communicate requests to retain AGEAR records approaching their five year expiration to the DoD SOCO and AGEAR Management Office as soon as the requirement is identified. The requesting office should ensure it receives confirmation of receipt of the request from the AGEAR Management Office.

5. Additional Information.

a. AGEAR Managers must check AGEAR for requests submitted to their agency. Army OGC is not responsible for forwarding requests assigned to non-Army AGEAR Managers.

b. FAQs are available to assist EOs in determining whether a request falls within Section 847 and is required to be processed and retained in AGEAR. Click the "Help" link at the very bottom of the Login screen to access the FAQs.

c. When viewing a request under the "Request Detail" tab in AGEAR, links along the right side of the screen allow ECs to skip directly to specific sections of the questionnaire. For example, if the EO needs to locate the requestor's responses concerning whether they have participated in acquisitions/contracts in excess of \$10 million, the EO can click on the "DoD Procurement Information" link to go directly to that information.

d. DD 2945 was revised in July 2013 and this version has been uploaded into AGEAR. In Section IV, Question 19 requires reporting of positions held and major duties performed during the last five (5) years of DoD service. This allows identification of potentially relevant historical particular matters or interactions with a future employer. Note that under clarifying guidance issued April 16, 2014, for purposes of Section 847 a "covered DoD official" is a current or former DoD official who, within the *two year period prior to his or her departure* from DoD served in a triggering position or engaged in one of the triggering activities³.

e. Section 847 opinions issued outside of AGEAR must be uploaded into AGEAR. This includes both Section 847 requests and opinions that were created after the statute's enactment but before AGEAR became mandatory on January 1, 2012, as well as any post-January 1, 2012 Section 847 requests and opinions not previously processed through AGEAR. These are collectively referred to in AGEAR as "Historical Requests." When the EC logs into AGEAR, a button that says "Add Completed

³ See note 1, *supra*.

SAGC-EF

SUBJECT: Updated Business Rules for Use of the After Government Employment Advice Repository (AGEAR) System

Opinion” can be seen. The EC can click this button, complete the required information, upload the opinion and any corresponding DD 2945, questionnaire, and/or other relevant attachments, and then enter an “Opinion Sent and Closed Date.”

f. When uploading a “Historical Request,” the EC may discover that the original drafter of the Section 847 opinion is not listed within AGEAR. If this occurs, we recommend that the EC take the following steps to provide an auditable trail for future program reviews:

(1) Upload the historical opinion using his/her own name under the Ethics Official Information;

(2) Under the Attachments tab, attach a document using the “Other” option, briefly explaining why the author of the Section 847 opinion was not listed in the system, e.g., the individual is no longer an EC for the relevant agency.

(3) Copy and paste that document’s text into the free-text “Description” field.

g. Requests submitted under incorrect DoD agency component. If the requestor selected the wrong DoD agency, the AGEAR Manager receiving the request must forward the request to the correct DoD agency using AGEAR. To do this, click the “Request Detail” tab, and then click the “Forward” button. On the “Forward Request to” page, click the “AGEAR Manager of another Agency”, and select the correct DoD agency from the dropdown menu.

6. Contact. Please contact me at (703) 695-4296 or susan.d.tigner.civ@mail.mil if you have questions regarding the above guidance. For assistance in operating the AGEAR system, please contact the AGEAR Program Office at (703) 695-4296 or usarmy.pentagon.hqda-ogc.mbx.agear-manager@mail.mil.

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