

DLA Office of General Counsel

SENIOR EMPLOYEE POST-GOVERNMENT EMPLOYMENT RESTRICTIONS

Purpose: This document summarizes the Government ethics rules which may impose certain restrictions on your employment after departure from the Defense Logistics Agency (DLA).

Application: For civilian personnel whose rate of base pay is at or above 86.5% of the rate for Executive Schedule Level II (\$164,004 in 2018); Flag and General Officers; and all Presidential Appointees confirmed with advice and consent of the Senate (PAS) officials.

Legal Notice: This information merely identifies statutes and regulations that restrict or otherwise affect activities of DoD personnel after they leave Government service. Because restrictions are dependent on specific facts, and because this information is a summary of the rules, DLA personnel should contact the Office of General Counsel at **(571) 767-6089/6060** or by e-mail at claes.lewenhaupt@dla.mil to discuss their particular situation. DLA personnel served by other MSC ethics offices should consult with their ethics officials. You may also consult with your personal attorney.

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

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

A. 1 Year Cooling-Off Period: Agency Representational Ban

SIMPLIFIED RULE: For *1 year* after leaving a senior position, you may not represent someone else, with the intent to influence, before your former agency regarding any official action.

RULE: For a period of 1 year after leaving a senior position, former *senior officials* may not make any communication or appearance on behalf of any other person, with intent to influence, before any officer or employee of the *agency* or agencies in which the individual served within 1 year prior to leaving the senior position, in connection with any matter on which official action is sought by such individual. 18 U.S.C. § 207(c).

Definitions:

- *Senior officials*: Flag and general officers; civilian personnel whose basic rate of pay is at or above 86.5% of the basic rate for Executive Schedule Level II (at or above \$164,004 in 2018, which will be adjusted annually as pay rates change); and all Presidential Appointees confirmed with the advice and consent of the Senate (PAS) officials.
- *Agency*:
 - For PAS, agency includes all of DoD, including each Military Department and DoD Agency.
 - For all other senior officials, including general and flag officers and non-PAS (political and career) civilian personnel whose basic rate of pay is at or above 86.5% of the basic rate for Executive Schedule Level II, agency is any of the following components in which you served one year before leaving your senior position: the Military Departments, DISA, DIA, DLA, NGA, NRO, DTRA and NSA; or if you were not assigned to any of the above listed agencies during the one year period, your *agency* includes all of DoD with the exception of the aforementioned components. If you were assigned to any of those components, as well as to other, non-listed components during the one year period, your agency is all of DoD, with the exception of listed components to which you were not assigned. For flag and general officers, *agency* also always includes the officer's Military Department.

Example: An Army general who retires after spending his last 2-year tour of duty at DLA will have a 1-year cooling-off period with regard to DLA and the Army, but not with regard to the Air Force, Navy, DISA, DIA, DLA, NGA, NRO, DTRA and NSA. Similarly, if that same Army general retired after a 2-year tour at DIA, his cooling-off period would only apply to the Army and DIA.

For Secretary of Defense Only: A 2-year ban also includes communications or appearances before all employees in positions on the Executive Schedule in all agencies of the executive branch. 18 U.S.C. § 207(d).

B. Section 1045 of the NDAA for FY 2018 – NEW RESTRICTION

SIMPLIFIED RULE: 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.*

RULE: 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.

- **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.

See DoDI 1000.32, Prohibition of Lobbying Activity by Former DoD Senior Officials

C. Personal Participation: Lifetime Representational Ban

SIMPLIFIED RULE: After you leave Government service, you may not represent someone else to the Government regarding *particular matters* that you worked on while in Government service.

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

Definitions:

- ***Particular Matter:*** Matters that involve deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons. These matters may include a contract, claim, application, judicial, or other proceeding, request for a ruling or other determination, controversy, investigation, or charge. A *particular matter* could even include legislation or policy-making that is narrowly focused on the interests of a discrete and identifiable group of parties or organizations, *e.g.*, DoD policy affecting only military aircraft manufacturers.
- ***Specific Parties:*** For this statute, particular matters must also involve *specific*

parties. This means that identifiable parties exist. For example, a procurement may be a *particular matter*, but it might not become one involving “specific parties” until the first bid is received.

- *Personal* participation means that you are directly participating in the matter or that one or more of your subordinates, whom you are directing, is participating.
- *Substantial* participation means your participation must be of significance to the matter, which may be based on the amount and importance of your effort. One act, such as approving a critical step, may be substantial. Likewise, if you have to review and approve a certain step, and work would stop if you did not approve, then your participation is substantial, even though it may have seemed like a paperwork exercise to you. On the other hand, an entire series of peripheral acts might not be substantial.

If you merely have knowledge of the matter, routine or superficial involvement, or involvement on a peripheral or administrative issue, you are *not substantially* involved. If you are not involved in the substantive merits, you may not be substantially involved, even though you put a lot of time into the matter. If you are merely responsible for reviewing the matter for compliance with administrative or budgetary considerations, you are also not substantially involved.

This ban remains for the lifetime of the *particular matter*.

D. Official Responsibility: 2 Year Representational Ban

SIMPLIFIED RULE: For 2 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.

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

Definition: *Official responsibility* means direct administrative or operating authority to approve, disapprove, or otherwise direct, Government actions. It includes a supervisor at any level having responsibility for the actions of a subordinate employee who actually participates in a matter.

Although you may have been disqualified from personally acting on a particular matter during your last year in the Government, this section of the statute will still apply to you if the particular matter was still under your official responsibility during that period.

Example: Because you owned stock in IBM, you were disqualified from reviewing a particular contract with IBM, which was reviewed by one of your subordinates during your last year in the Government. Under this statute, because the particular matter was under your responsibility during your last year of service, you are prohibited from representing others regarding that contract.

E. Trade or Treaty Assistance: 1 Year Representational Ban

SIMPLIFIED RULE: For *1 year* after leaving Government service, you may not aid, advise, or represent someone else regarding trade or treaty negotiations that you worked on during your last year of Government service.

RULE: For a period of 1 year after leaving Government service, former employees or officers may not knowingly represent, aid, or advise someone else on the basis of *covered information*, concerning any ongoing *trade or treaty negotiation* in which the employee participated personally and substantially in his or her last year of Government service. 18 U.S.C. § 207(b).

Definitions:

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

F. Assistance to Foreign Government: 1 Year Advice Ban

SIMPLIFIED RULE: For *1 year* after leaving a senior position, you may ***not aid, advise, or represent*** a foreign government or foreign political party with intent to influence the U.S. Government.

RULE: For a period of 1 year after leaving a senior position, former *senior officials* may not knowingly aid, advise, or represent a foreign government or foreign political party, with the intent to influence any officer or employee of any Federal department, agency, or Member of Congress. Unlike most 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. 18 U.S.C. § 207(f).

G. Exceptions to Representational Bans

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

Common exceptions include:

- Acting on behalf of yourself, not another
- Acting on behalf of the U.S. Government.

- Aiding, advising, and representing certain international organizations with prior Secretary of State certification.
- Making statements based on special knowledge, if unpaid.
- Senior officials are not prohibited from representing state or local governments, hospitals, medical research organizations, or degree-granting institutions of higher learning, when making representations on those institutions' behalf.
- The lifetime and senior official representational bans do not apply to communications that furnish scientific or technological information with prior, published certification by the Secretary of Defense. There are special rules regarding testimony under oath.

H. Penalties and Injunctions

A violation may subject you to imprisonment for not more than 5 years, a criminal or civil fine, and a court order prohibiting you from engaging in the conduct in the future.

II. PROHIBITED COMPENSATION

RULE: After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service. (Examples: Lobbying, consulting, and law firms). 18 U.S.C. § 203. This is separate and distinct from the procurement related compensation restrictions. This rule does not apply to former military enlisted personnel.

III. RESTRICTIONS FOR RETIRED MILITARY PERSONNEL AND RESERVISTS

A. Foreign Employment

SIMPLIFIED RULE: Unless you receive prior authorization from your Service Secretary and the Secretary of State, you may forfeit your military pay during the time you perform services for a foreign government.

RULE: The Emoluments Clause of the U.S. Constitution prohibits retired military personnel and reservists from receiving pay from *Foreign Governments* without Congressional authorization. This may extend to receipt of pay from a U.S. contractor or subcontractor for providing services to a Foreign Government and profit sharing at any commercial firm or business. In 37 U.S.C. § 908, Congress authorizes the Secretary of State and Secretary of the appropriate Military Department to approve such receipt of pay. Each Military Service has implementing procedures for the approval process. The penalty for violating the Emoluments Clause is suspension of retired military pay during the period of the violation.

Foreign Governments may include educational and commercial entities that are substantially owned or controlled by foreign governments.

B. Employment During Terminal Leave

RULES:

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

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

3. Remember that while on terminal leave, you are still an active-duty service member, and the restrictions that apply to you while on active duty still apply. For example:

- Restrictions on political activities.
- Outside employment: If you are currently required to obtain permission prior to engaging in outside employment, that requirement will most likely carry over to you during terminal leave. Check with your supervisor.

4. Restriction on representing others to the Federal Government: During terminal leave, you may not receive compensation for the representation of anyone before an agency or court of the Federal Government on a matter in which the United States is a party or has a substantial interest. This prohibition applies whether you provide representation yourself or you share in compensation from someone else's representation. 18 U.S.C. § 203. You also may not represent anyone before an agency or court of the Federal Government, with or without compensation, on a matter in which the United States is a party or has a substantial interest. 18 U.S.C. § 205. For military officers working on terminal leave, this means you may not interact or appear on behalf of your post-military employer before Federal employees – whether or not in a Federal workplace. Being present in Government offices on behalf of a contractor inherently is a representation. Military officers on terminal leave may work for the contractor, but only "behind the scenes" at a contractor office or otherwise away from the Federal workplace. Enlisted members are not subject to 18 U.S.C. §§ 203 or 205.

5. Prohibition on working for a foreign principal: Over and above the restriction of receiving compensation from a foreign government, there is also a specific prohibition of a public official from being or acting as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938 (expanding the restriction beyond foreign governments to include persons and corporations (18 U.S.C. § 219)).

IV. REQUIREMENT TO REQUEST AN OPINION

If you will be receiving compensation from a defense contractor within two years of leaving DoD, you are required to request a written opinion regarding the applicability of the post-employment restrictions to the activities you undertake on behalf of the defense contractor. This requirement applies to any employee who participated personally and substantially in an

acquisition with a value in excess of \$10M **and** who serves or served in: (1) an Executive Schedule position; (2) a Senior Executive Service position; (3) a general or flag officer position; or (4) in the position of program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation. You must obtain this written opinion prior to accepting compensation from the contractor. Section 847, FY 2008 NDAA,

VI. ADMINISTRATIVE REMINDERS

A. Financial Disclosure Report: DoD personnel who have been filing a Public Financial Disclosure Report must file a final report not later than the 30 days after termination. If, within that period, you accept another U.S. Government position subject to the filing requirement, no final report is required. You should give your new ethics official a copy of your last report. If you file more than 30 days late, you are subject to a \$200 late filing fee. In addition, if you knowingly and willfully fail to file this report, we must refer your name to the Attorney General, who may sue you in U.S. District Court and subject you to substantial civil penalties.

B. Use of Nonpublic Information: Even though you have left Government service, you still may not use nonpublic information to further your own private interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.

C. If you Accepted a Buy-Out: If you accepted a buy-out or separation payment, you have re-employment restrictions. Please contact your personnel office if you are unsure of those measures.

D. Questions? Please call if you have questions, even after you leave Government service, please call the DLA Office of General Counsel: (571) 767-6089. We would much rather talk to you before you take action, than read adverse reports about you (from the IG or in the media) after you have taken the action.

Thank you for your service to our country!

¹ 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.

