



U.S Department of Defense Standards of Conduct Office

NON-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 Department of Defense (DoD).

APPLICATION: For Military Personnel E-1 through O-6 and Civilian Personnel whose rate of base pay is less than 86.5% of the rate for Executive Schedule Level II (less than \$160,111.50 in 2016) who receive their ethics guidance from the Standards of Conduct Office (SOCO) and who are planning to leave Government service.

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, DoD personnel should contact SOCO at (703) 695-3422 or by e-mail at OSD.SOCO@MAIL.MIL to discuss their particular situation. DoD personnel served by other 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. 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*.

B. 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.

C. 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.

D. Private Sector Information Technology Exchange Program Assignee

SIMPLIFIED RULE: For *1 year* after ending your service as an information technology exchange program assignee, you may not represent, aid, counsel or assist in representing in connection with any contract with DoD.

RULE: For 1 year after the termination of your assignment from a private sector organization to DoD under the Information Technology Exchange Program, 5 U.S.C. chapter 37, no former assignee shall knowingly represent, or aid, counsel or assist in representing any other person in connection with any contract with that agency. 18 U.S.C. § 207(l). This rule does not apply to former military enlisted personnel.

E. Exceptions to Representational Bans

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

Common exceptions include:

- Acting on behalf of yourself
- Acting on behalf of the U.S. Government.
- Aiding, advising, and representing certain international organizations with prior Secretary of State certification.
- Making statements based on special knowledge, if unpaid.
- The lifetime representational ban does 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.

F. 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. DoD Employment

RULE: To avoid the appearance of favoritism, 5 U.S.C. § 3326 prohibits the appointment of retired military personnel to civil service positions (including a non-appropriated fund activity) in any DoD component for 6 months after retirement.

The Secretary concerned may waive this prohibition. However, DoD Instruction 1402.1 requires the Secretary concerned to conduct intensive external recruitment before granting the waiver. This restriction has been temporarily waived during the current national emergency following the attacks of 9/11.

C. 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 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.

V. LOBBYING BAN FOR OUTGOING POLITICAL APPOINTEES

Paragraph 5 of the Obama Pledge governs post-government employment lobbying activities for all departing political appointees. It states that once you leave Federal service, you may not lobby, *as a registered lobbyist*, back to any flag/general officer or political appointee in the Executive Branch for the duration of the Obama Administration. As a former Executive Branch employee subject to the Pledge, you may, however, register as a lobbyist and make lobbying contacts with the Legislative Branch.

The Pledge lobbying ban draws on the definitions found in the Lobbying Disclosure Act (LDA). For example, the LDA defines *lobbyist* as any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period. *See* 2 U.S.C. § 1602(10). A *registered lobbyist* is a person listed in required filings with the U.S. House of Representatives or U.S. Senate as a lobbyist for a particular client because of the person's actual or anticipated lobbying activities and contacts.

Furthermore, Paragraph 5 of the Pledge prohibits *lobbying contacts*. A *lobbying contact* is defined broadly, and includes oral or written communications made on behalf of a client with regard to Federal legislation (such as legislative proposals), Executive Branch programs and policies (such as rulemaking or contracts), and the nomination/confirmation of persons for Senate-confirmed positions. *See* 2 U.S.C. § 1602(8)(A). However, the definition also enumerates certain exceptions, which should be reviewed to determine if your activities implicate the Pledge restriction. *See* 2 U.S.C. § 1602(8)(B) (for example, communications "required by subpoena, civil investigative demand, or otherwise compelled by statute, regulations, or other action of the Congress or an agency" are not considered "lobbying contacts;" neither is representing an entity where a group of governments are acting together, e.g., the World Bank).

For more LDA guidance about what is lobbying and what requires registration, contact the Secretary of the U.S. Senate or the Clerk of the U.S. House of Representatives. *See* http://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm and <http://lobbyingdisclosure.house.gov/> (respectively).

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 DoD Standards of Conduct Office: (703) 695-3422. Fax: (703) 695-4970. E-mail: OSD.SOCO@MAIL.MIL. 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 your country.

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