

REFERENCE GUIDE TO
POST-GOVERNMENT SERVICE
EMPLOYMENT ACTIVITIES
OF

DEPARTMENT OF THE NAVY
PERSONNEL



Department of the Navy
Office of the Judge Advocate General
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THE JUDGE ADVOCATE GENERAL OF THE NAVY

Preface

The Reference Guide to Post-Government Service Employment Activities of Department of the Navy Personnel is published to assist you in your transition from service in the Department of the Navy. This publication has been revised several times to reflect changes in the law. Because of several recent changes, we have again completely updated this pamphlet.

I encourage you to plan for and execute carefully your transition from service in the Department of the Navy to service elsewhere. Part of your preparation should include a review of the laws that will govern your conduct before and after you leave Government service. This pamphlet is designed to provide an overview of the primary issues and concerns and should be read in its entirety.

After reading this pamphlet, you may feel that you need more specific legal information and advice. In such a case, I urge you to consult with and refer specific questions to your local ethics counselor, the Office of the Judge Advocate General (Code 13), or the Judge Advocate Division (JAR), Headquarters U.S. Marine Corps, as appropriate. The advisory opinions given by these ethics officials will provide you with helpful guidance as you make your transition to your new career.

Fair winds and following seas!

JOHN D. HUTSON
Rear Admiral, JAGC, U.S. Navy
Judge Advocate General

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I. INTRODUCTION

A. Various laws restrict the employment activities of individuals who leave Government service. While most of these statutes apply equally to both civilian and military personnel, some apply to military personnel only and others apply to personnel only above certain pay grades. These restrictions are based upon the need to:

1. prevent activity which conflicts with the interests of the United States;
2. promote economy in the Federal Government;
3. expand employment opportunities within the Federal system; and
4. preserve the public's confidence in Government integrity.

B. You are responsible for determining which post-Government service employment activities you may legally pursue. Ethics counselors, however, will advise and assist you. Ethics counselors are the staff judge advocates of general court-martial convening authorities (e.g., flag and general officers in command), commanding officers of Naval Legal Service Offices and Trial Service Offices, counsel at systems and other major commands, and other designated counsel and judge advocates. Consult your local counsel, judge advocate, Naval Legal Service Office or Trial Service Office to determine who is the ethics counselor responsible for providing advice to you.

C. While ethics counselors will advise personnel on the propriety of proposed activities, four limitations must be recognized.

1. In many cases, ethics counselors cannot render authoritative opinions because other Government agencies are responsible for interpreting certain laws. For example, construing criminal statutes is a function of the Attorney General and the courts. Consequently, ethics counselor's opinions in these areas, including the opinions expressed in this pamphlet, are advisory only.

2. Questions submitted to ethics counselors should, insofar as possible, involve concrete situations. The facts of each case should be disclosed fully, because legal analysis is usually dependent on the facts presented. Different facts produce different outcomes.

3. Furthermore, the field of law regarding post-Government service employment changes frequently. While we have endeavored to make this

pamphlet as timely as possible, always ask your ethics counselor for advice on the existence and meaning of new legislation or regulations.

4. An ethics counselor is an attorney for the Government. While an ethics counselor will endeavor to answer your questions and provide opinions on the applicability of the law to factual situations, an ethics counselor is not your lawyer. Statements made or documents provided to ethics counselors are not confidential or privileged. You do not enter into an attorney-client relationship when you consult an ethics counselor. If you do not wish to disclose certain matters to the Government, you may wish to retain a private attorney.

D. Some editorial comments are warranted.

1. Unless indicated otherwise, the term "employee" as used in this pamphlet includes both military and civilian personnel.

2. This guidance corresponds with DOD 5500.7-R of August 30, 1993, Joint Ethics Regulation.

3. All references to "U.S.C." are to the United States Code.

4. Use of the terms "he," "his," "him," or "himself" include she, hers, her, or herself.

II. SEARCHING FOR A JOB

A. Introductory comments. All Federal employees must comply with both statutory and regulatory limitations governing the search for outside employment. In addition to some general restrictions, there are also specific restrictions that apply to employees who have performed or are continuing to perform procurement functions. Both the general restrictions, and those regulating procurement personnel only, are discussed in more detail in the following paragraphs.

B. Prohibition on participating in Government matters involving a prospective employer

1. **Criminal prohibition.** Before an employee begins "negotiating" or "seeking employment" with a private concern, the employee is required to disqualify himself from taking any governmental action which could impact the prospective employer. A criminal statute, 18 U.S.C. § 208, prohibits Federal employees from participating "personally and substantially" in any particular Government matter in which any private entity, with which an employee is negotiating or has an arrangement for future employment, has a financial interest. The maximum penalty for a violation of this statute is a fine of \$50,000 and imprisonment for 5 years.¹

a. These restrictions apply to those matters in which an employee participates "personally and substantially" through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise. The circumstances of participation might have been a judicial or administrative proceeding, an application, request for a ruling, or other determination, contract, claim, controversy, charge, accusation, arrest, or any other "particular matter." To participate "personally" means to do so directly and includes the participation of a subordinate when actually directed by a senior in the matter. "Substantially" means that an employee's involvement was of significance to the matter.

(1) **Example.** While performing quality assurance inspections of products produced by Company X, an employee violates the law when he negotiates for prospective employment with Company X. A violation occurs even if the employee recommended the Government not accept any products from Company X during the period the employee was engaged in employment negotiations with this company.

b. An employee can avoid violating this statute by disqualifying himself

from participating in any Government matters in which the prospective employer has a financial interest. Disqualification is accomplished by not participating in the particular matter.² DOD 5500.7-R, Joint Ethics Regulation, section 2-204, requires that disqualification be accomplished, in every instance, by written notice to the supervisor. Written disqualification ensures that DON responsibilities do not go unfulfilled. We also recommend that reporting seniors issue a confirming memorandum, with copies to the employee's immediate subordinates and ethics counselor, setting forth the procedures to shield the employee from the conflicting interests. A sample document is at the end of this section.

c. Federal courts have held that the term "negotiating" is to be broadly construed.³ The implementing regulation defines "negotiations" as:

discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position.⁴

d. For a violation of 18 U.S.C. § 208 to occur, a formal offer of employment need not be made by either the employee or prospective employer.⁵ Submitting a job application or engaging in a job interview may constitute prohibited conduct.⁶ Therefore, an employee should disqualify himself from official action whenever there is any contact with any company concerning the possibility of a future job, unless the sole contact is initiated by the company and the employee immediately rejects it. A situation often arises where contact is made, employment negotiations ensue, and the employee later decides not to accept the job. In such a case, the employee should disqualify himself initially. After rejecting the job, the employee should file another written notice with his reporting senior, providing copies to his immediate subordinates and ethics counselor, stating that he is no longer disqualified from acting in an official capacity with respect to the private entity concerned because the job has been rejected.

2. Regulatory prohibitions. In addition to the criminal prohibitions, all DON personnel, whether military or civilian, are subject to the standards of conduct regulation.⁷ The prohibitions on searching for employment in the standards of conduct are broader than those in 18 U.S.C. § 208, the criminal conflicts of interest statute. The standards of conduct require that before an employee begins seeking employment the employee must disqualify himself from taking any governmental action involving a prospective employer.⁸

a. An employee has begun seeking employment⁹ if he has, directly or indirectly, done any of the following:

(1) If the employee has engaged in "negotiations." (This term is defined above in the discussion of 18 U.S.C. § 208.) This provision encompasses all of the prohibitions in 18 U.S.C. § 208.

(2) If the employee has made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. Submission of a resume or other proposal to an entity or person who is directly affected by the performance or nonperformance of the employee's duties constitutes seeking employment. Seeking employment, however, does not encompass (a) merely requesting a job application; (b) submitting resumes or other employment proposals to an entity or person that is not affected by the performance or nonperformance of the employee's duties; or (c) submitting resumes or other employment proposals to an entity or person affected by the performance or nonperformance of the employee's duties only as part of an industry or discrete class. In such circumstances, an employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions.

(3) If the employee made a response other than rejection to an unsolicited communication from any prospective employer regarding possible employment. A response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment proposal.

b. An employee is no longer seeking employment¹⁰ when:

(1) the employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

(2) two months have expired after the employee's unsolicited communication and the prospective employer has not responded or indicated interest in such employment.

c. An employee can avoid violating this restriction by disqualifying himself from participating in any Government matters in which the prospective employer has a financial interest. The disqualification procedures are the same as those set forth in paragraph IIB1b above.

d. The standards of conduct not only prohibit actual violations of the rules, but also proscribe any acts or decisions which could reasonably be expected to

create the appearance of:

- (1) using public office for private gain;
- (2) giving preferential treatment to any person or entity;
- (3) impeding Government efficiency or economy;
- (4) losing impartiality;
- (5) knowingly making unauthorized commitments or promises of any kind purporting to bind the Government;
- (6) engaging in outside employment or activities, including seeking or negotiating for employment, that may conflict with official duties and responsibilities;
- (7) using nonpublic Government information or allowing the improper use of such information to further any private interest; or
- (8) adversely affecting the confidence of the public in the integrity of the Government.¹¹

Put simply, it is not enough to protect against actual or obvious violations; DON personnel are also required to refrain from any acts or decisions that might result in, or create the appearance, to a reasonable person with knowledge of relevant facts, of a violation.¹² Applying these principles to the employment search setting, an employee should not, while still on active duty, or employed by DON:

- (1) permit the prospect of employment to affect the performance or nonperformance of official duties;
- (2) communicate nonpublic or privileged information to a prospective employer; or
- (3) take any action that would affect the public's confidence in the integrity of the Government even if it is not an actual violation of the law.

3. Waivers and authorizations. In limited circumstances, a waiver or authorization may be obtained to allow an employee to take an official action that involves a prospective employer. Contact an ethics counselor whenever you seek to obtain a waiver or authorization.

a. Waiver of the criminal and regulatory prohibition. An employee may participate in a particular matter involving an employer that he is negotiating with for employment after he has first obtained a written waiver issued under 18 U.S.C. § 208(b)(1). Before a waiver is requested, alternative resolutions, such as disqualification or reassignment, should be considered. After review by the Designated Agency Ethics Official and consultation with the Office of Government Ethics, the Government official responsible for appointing the employee to his position is authorized to issue the waiver. A waiver may be issued when the official determines in writing that the employee's interest is not so substantial as to affect the integrity of the employee's actions. Additionally, under § 208(b)(3), the Assistant for Administration, Office of the Under Secretary of the Navy, may issue a waiver to a special Government employee on a Federal advisory committee when the employee's service outweighs any potential conflicts of interest created by a financial interest. The employee seeking a waiver must advise his supervisor of the nature and circumstances of the conflicting interest, coordinate with an ethics counselor, and obtain written permission to participate before taking the action affecting the prospective employer.

b. Authorization. In certain circumstances, an authorization from a designated agency official may be obtained to permit participation in the official matter by an employee who intends to engage in conduct that constitutes seeking employment, but does not constitute negotiations under § 208. If the conduct constitutes "negotiations," then a waiver, instead of an authorization, must be obtained.

4. Examples

a. An employee is auditing the accounts of a DON contractor. While at the contractor's headquarters, the head of the contractor's accounting division tells the employee that his division is thinking about hiring another accountant and asks whether the employee might be interested in leaving DON. The DON employee says she is interested in knowing what kind of work would be involved. They discuss the duties of the position and her qualifications. They do not discuss salary. The head of the division explains that he has not yet received authorization to fill the particular position and offers to get back to her when he obtains the necessary approval for additional staffing. The employee and the contractor's official have engaged in negotiations regarding future employment. The employee must disqualify herself from taking any action that involves that contractor. If she continues to take official action regarding the contractor, she would violate both the criminal and regulatory prohibitions discussed above. To be able to take official action that involves the contractor

while engaged in negotiations with it, she would need to first obtain a waiver under § 208, vice an authorization.

b. An aviator assigned to NAVAIR and evaluating new landing gear has mailed his resume to 50 defense contractors involved in manufacturing Naval aviation equipment. He has begun seeking employment with contractors involved in the manufacture of landing gear. He has not begun seeking employment with any of the remaining contractors. This is so because the remaining contractors are not directly affected by the performance or nonperformance of the aviator's duties or would be affected only because they are part of the aviation industry.

c. A special agent of the Naval Criminal Investigative Service has been working as a member of a team investigating six defense contractors in a possible contract fraud scheme. The special agent sends his resume to a contractor that is a target of the investigation. The special agent has begun seeking employment with that contractor and will be seeking employment for 2 months from the date the resume was mailed since the contractor is directly affected by performance of the agent's duties. If, however, he withdraws the resume or is notified within the 2-month period that his resume has been rejected, he will no longer be seeking employment with the contractor as of the date he makes such withdrawal or receives such notification.

C. Procurement Integrity Act -- restrictions on seeking non-Federal employment for employees involved in procurement

1. **Background.** The Procurement Integrity Act, 41 U.S.C. § 423, imposes job searching restrictions on Federal employees who have been involved in agency procurements. The Act was significantly amended by the FY-96 Defense Authorization Act¹³ and is implemented in part 3.104 of the Federal Acquisition Regulation (FAR).¹⁴ The Act contains notification and disqualification requirements for employees who contact or are contacted by bidders or offerors regarding non-Federal employment, and prohibits disclosure of certain information relating to ongoing procurements. The Act also contains a provision, discussed in Chapter IV, which bars certain employees who were involved in large procurements from employment with certain private employers for a period of 1 year. Employees or organizations that violate the Procurement Integrity Act are subject to criminal and civil penalties as outlined in paragraph 4, below.

2. **Actions required of employees who are contacted regarding non-Federal employment.**¹⁵ The Act requires an employee who is "personally and

substantially" participating in an agency procurement (i.e., a competitively awarded contract) in excess of the simplified acquisition threshold (currently \$100,000), and who contacts, or is contacted by, a bidder or offeror in that procurement regarding possible non-Federal employment, to report the contact promptly in writing to the official's supervisor and to the agency Designated Agency Ethics Official (the General Counsel of the Navy) or designee (ethics counselor) and either to reject the possibility of non-Federal employment; or to disqualify himself from further participation in the procurement in accordance with the procedures set forth in paragraph d, below. Disqualification lasts until such time as the agency authorizes the official to resume participation in such procurement because the person is no longer a bidder or offeror in that Federal agency procurement, or all discussions with the bidder or offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

a. "Participated personally and substantially," as defined in FAR 3.104-3, means active and significant involvement in activities directly related to the procurement, to include:

- (1) drafting, reviewing, or approving the specification or statement of work for the procurement;
- (2) preparing or developing the solicitation;
- (3) evaluating bids or proposals, or selecting a source;
- (4) negotiating price or terms and conditions of the contract; and
- (5) reviewing and approving the award of the contract.

b. To participate "personally" means to participate directly, and includes the direct and active supervision of a subordinate's participation. To participate "substantially" means that the employee's involvement is of significance to the matter.

c. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral acts may be insubstantial, the single act of approving or participating in a critical step may be substantial. However, the review of procurement documents solely to determine compliance with

regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement. Generally, an individual will not be considered to have participated personally and substantially in a procurement solely by participating in:

(1) agency level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency level missions or objectives;

(2) the performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement;

(3) clerical functions supporting the conduct of a particular procurement;
or

(4) procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of "most efficient organization" analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

d. **Disqualification.** FAR 3.104-6 sets forth disqualification procedures. An employee required to disqualify himself from a procurement shall submit, prior to initiation or engaging in employment discussions, a written notice of disqualification from further participation in the procurement to the Head of the Contracting Activity (HCA) or designee. Concurrent copies must be submitted to the contracting officer, the Source Selection Authority, and the agency official's immediate supervisor. At a minimum, the notice shall:

(1) identify the procurement;

(2) describe the nature of the employee's involvement in the procurement and specify the approximate dates or time period of participation; and

(3) identify the bidder or offeror and describe its interest in the procurement.

The agency must disqualify the employee and may not force the employee to terminate employment discussions.

3. Prohibition on divulging or obtaining protected procurement information prior to the award of a Federal procurement.¹⁶ The Procurement Integrity Act prohibits present and former U.S. officials, including members of the Armed Forces, from disclosing contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract. The Act also prohibits other individuals from obtaining such information before the award of a Federal agency procurement contract.

a. The Act defines the terms "contractor bid or proposal information" to include any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:¹⁷

(1) cost or pricing data (as defined by 10 U.S.C. § 2306a(h) with respect to procurements subject to that section, and 41 U.S.C. § 254b(h), with respect to procurements subject to that section);

(2) indirect costs and direct labor rates;

(3) proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation; or

(4) information marked by the contractor as "contractor bid or proposal information," in accordance with applicable law or regulation.

b. Further, the Act defines "source selection information" as any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:¹⁸

(1) bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening;

(2) proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices;

(3) source selection plans;

(4) technical evaluation plans;

(5) technical evaluations of proposals;

(6) cost or price evaluations of proposals;

(7) competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract;

(8) rankings of bids, proposals, or competitors;

(9) the reports and evaluations of source selection panels, boards, or advisory councils; or

(10) other information marked as "source selection information" based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

4. **Penalties.**¹⁹ Individuals who violate the Procurement Integrity Act are subject to civil fines of up to \$50,000 plus twice any compensation the employee received or was offered for the prohibited conduct. In addition, individuals who divulge procurement information in violation of the Act may face prosecution and imprisonment up to 5 years. Organizations are subject to civil fines of \$500,000 plus twice any compensation received or offered for the prohibited conduct. In addition, contractors are subject to other administrative actions such as cancellation of the procurement, rescission of the contract, and debarment proceedings.

D. Job search expenses. Hunting for a job can be costly and your prospective employer may offer to defray some of the expenses. Under the Joint Ethics Regulation, an employee may accept travel benefits, including meals, lodging, and transportation, if customarily provided by a prospective employer in connection with bona fide employment discussions, even if tendered by a DOD contractor.²⁰ If the prospective employer has an interest that could be affected by the performance or nonperformance of your duties, you may accept payment for such expenses only if you first comply with the disqualification requirements discussed in paragraph IIB1b above.

E. Working during terminal leave. If there is no bar to your employment with a specific defense contractor, generally speaking, you may begin working for, and receive compensation from, a defense contractor while you are on terminal

leave.²¹ In addition, by statute, you may, while on terminal leave, receive compensation from a Federal civilian position in addition to the pay and allowances from the unexpired portion of your terminal leave.²² However, because you remain on active duty while on terminal leave, the following limitations apply:

a. If you file a financial disclosure report (either an OGE form 450 or SF 278), and you plan to work for a Navy contractor or other "prohibited source" while on terminal leave you must obtain written permission from your "agency designee" before you begin employment.²³ Your agency designee is your first supervisor in the chain of command who is a commissioned military officer or civilian above the grade of GS/GM-11. Except in remote locations, the agency designee may act only after consultation with his ethics counselor. The agency designee for any flag or general officer in command and any civilian Presidential appointee confirmed by the Senate, is that person's ethics counselor.²⁴

b. Section 205 of title 18 United States Code, is a criminal statute that prohibits a military officer (not enlisted personnel) or Federal civilian employee from representing any entity other than the United States before any Federal court or agency. Similarly, 18 U.S.C. § 203 prohibits officers and civilian employees from "directly or indirectly" receiving compensation for representational services rendered "either personally or by another" before the U.S. Government. These provisions apply while a military officer remains on terminal leave. They no longer apply to a military officer after his retirement.²⁵

c. 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.²⁶ 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."²⁷ By regulation, DOD Directive 1344.10, this prohibition applies to enlisted personnel, but does not apply to civilian personnel.

F. Endnotes

1. 18 U.S.C. § 216.
2. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.604(b) (1999).
3. United States v. Hedges, 912 F.2d 1397 (11th Cir. 1990); United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).
4. 5 C.F.R. § 2635.603(b)(1)(i) (1999).
5. See Hedges, 912 F.2d 1397; Schaltenbrand, 930 F.2d 1554.
6. See Hedges, 912 F.2d 1397; Schaltenbrand, 930 F.2d 1554.
7. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 (1999). It is incorporated into Chapter 2 of the Joint Ethics Regulation, DOD 5500.7-R of August 30, 1993.
8. 5 C.F.R. § 2635.604(a) (1999).
9. See *id.* § 2635.603(b).
10. *Id.*
11. See *id.* § 2635.101.
12. *Id.* § 2635.101(b).
13. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4304, 110 Stat. 186, 659-65 (Procurement Integrity Act provisions codified at 41 U.S.C. § 423).
14. 48 C.F.R. §§ 3.104-3.104-11 (1999).
15. 41 U.S.C. § 423(c).
16. 41 U.S.C. § 423(a)-(b).

17. 41 U.S.C. § 423(f)(1).
18. 41 U.S.C. § 423(f)(2).
19. 41 U.S.C. § 423(e).
20. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.204(e)(3) (1999).
21. Former 37 U.S.C. § 801(a) prohibited Regular Navy and Marine Corps officers from beginning to work for certain companies while on terminal leave. This section was repealed as part of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716.
22. 5 U.S.C. § 5534a.
23. DOD 5500.7-R of Aug. 1993, Joint Ethics Regulation, §§ 2-206, 3-306.
24. *Id.* § 1-202.
25. 18 U.S.C. § 206.
26. DOD 5500.7-R of Aug. 1993, Joint Ethics Regulation, § 9-901(b); 10 U.S.C. § 973(b).
27. In the Matter of Major Robert C. Crisp, USAF, 56 Comp. Gen. 855 (1977).

**G. Sample document--Notice of employment contact and 18 U.S.C. § 208
disqualification**

Date

From: You
To: Your Supervisor and agency DAEO or designee
Subj: NOTICE OF NEGOTIATING OF PROSPECTIVE EMPLOYMENT WITH
(NAME OF PRIVATE ENTITY)
Ref: (a) 18 U.S.C. § 208

1. This is to inform you, in accordance with reference (a), that on (date) I (have contacted) (have been contacted by), and am negotiating prospective employment with (name of private entity). The substance of this contact was (a brief description of the substance of the contact). Since I have not rejected this employment opportunity, I am disqualified from taking any Government action relative to the interests of (name of private entity) or its subsidiaries and affiliates. I shall refer any matters involving (name of private entity) to you for appropriate action.

Your Signature
Title

Copy to:
Immediate Subordinates
Ethics Counselor
Prospective Employer

Date

From: Supervisor
To: You

Subj: DISQUALIFICATION CONFIRMATION

1. Because you are negotiating prospective employment with (name of private entity), which does business with the Department of Defense, you are disqualified from taking any Government action in connection with matters involving (name of private entity) and its subsidiaries and affiliates.

2. As a result of this disqualification, you and, by copy of this endorsement, your immediate subordinates are directed to refer to me all official matters involving (name of private entity) that would normally come to you for action.

Supervisor's Signature
Title

Copy to:
Immediate Subordinates
Ethics Counselor
Prospective Employer
Agency DAEO or Designee

H. Sample document--Procurement Integrity Act disqualification

Date

From: You

To: Head of the Contracting Activity (or designee)

Subj: NOTICE OF NEGOTIATING OF PROSPECTIVE EMPLOYMENT
WITH (NAME OF PRIVATE ENTITY) AND DISQUALIFICATION

Ref: (a) 41 U.S.C. § 423

1. This is to inform you, in accordance with reference (a), that on (date) I (have contacted) (have been contacted by), and am negotiating for prospective employment with (name of private entity). The substance of this contact was (a brief description of the substance of the contact). I am the (describe nature of involvement with contract) with respect to a contract in which (name of private entity) is a bidder or offeror. I have been involved in this contract from (dates).

2. Under reference (a), I am disqualified from taking any Government action relative to the interests of (name of private entity) or its subsidiaries and affiliates. I shall refer any matters involving (name of private entity) to you for appropriate action.

Your Signature

Title

Copy to:

Contracting Officer

Source Selection Authority

Immediate Supervisor

Immediate Subordinates

Ethics Counselor

Prospective Employer

Agency DAEO or Designee

III. FEDERAL EMPLOYMENT RESTRICTIONS ON RETIRED AND FORMER MILITARY PERSONNEL

A. Dual compensation laws. Prior to 1 October, 1999, 5 U.S.C. § 5532 operated to reduce the retired or retainer pay of retired and former members of the Armed Forces. This law contained complicated provisions involving several reductions and an overall limit on Federal compensation. Section 651 of the National Defense Authorization Act for Fiscal Year 2000 repealed 5 U.S.C. § 5532 in its entirety.¹ Accordingly, there are no reductions in retired or retainer pay for former or retired member of the Armed Forces who are employed in Federal civilian positions.

B. Employment in DOD

1. To avoid appearances of favoritism or preferential treatment, 5 U.S.C. § 3326 prohibits the appointment of a retired member of the Armed Forces to a civil service position (including a nonappropriated fund activity) in DOD or a component thereof for 180 days after retirement unless:
 - a. the appointment is approved by the Secretary concerned or his designee;
 - b. the retiree is appointed to a position for which the basic rate of pay has been increased under 5 U.S.C. § 5303 (authorizing special pay for positions where recruitment efforts are significantly handicapped); or
 - c. a state of national emergency exists.
2. In addition, prior to Secretarial approval of any such appointment, actions must be taken to ensure that:
 - a. full consideration, in accordance with placement and promotion procedures of the department concerned, was given to eligible career employees;
 - b. when selection is by other than certification from an established civil service register, the vacancy has been publicized to give interested candidates an opportunity to apply;
 - c. qualification requirements for the position have not been written in a manner designed to give advantage to the former member; and
 - d. the position has not been held open pending the retirement of the former member.²

3. The above statute has been implemented in the Department of Defense by DODDIR 1402.1 of January 21, 1982, Employment of Retired Members of the Armed Forces. Under this directive, the Secretary may not approve such an appointment unless the appointment is to a position for which:

a. equally well-qualified personnel are not available among those required to be considered under applicable in-service placement and promotion procedures;

b. employee candidates are not available among those required to be considered in priority placement programs or among those on applicable reemployment priority lists or under the OPM Displaced Employee Program; and

c. intensive external recruitment efforts have failed to produce any better qualified candidates.

4. In the Navy, the hiring activity or servicing personnel office prepare the waiver requests. The approval authority for waivers for positions GS-8 or higher rests within the Office of the Assistant Secretary of the Navy for Manpower and Reserve Affairs (Director, Program Development and Direction Division, Deputy Assistant Secretary of the Navy, Civilian Personnel Policy/Equal Employment Opportunity). For positions GS-7 and below, requests may be approved by regional personnel offices. Nonappropriated fund activities have authority to approve their own requests.

C. Endnotes

1. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 651, 113 Stat. 664 (1999).

2. 5 U.S.C. § 3326(c).

IV. PRIVATE EMPLOYMENT RESTRICTIONS

A. Introduction. The body of law that restricts the employment of former government officials with private concerns has been significantly simplified in recent years. In early 1996, Congress repealed 10 U.S.C. § 2397, which barred

the receipt of compensation from specific defense contractors by certain former DOD personnel for 2 years after separation. In addition, Congress also repealed the "anti-selling" restrictions.¹ This chapter discusses the remaining provisions. The Procurement Integrity Act bars certain agency officers who were involved in large procurements from working for certain DOD contractors for one year. Section 207, title 18, United States Code prohibits all Government employees (except enlisted personnel) from engaging in certain advocacy roles.

B. Procurement Integrity Act

1. Applicability. In 1996, Congress significantly amended the Procurement Integrity Act. The revised Procurement Integrity Act applies to employees who retire on or after January 1, 1997, and performed, on or after January 1, 1997, one of the acts that trigger the restrictions. Thus, the Procurement Integrity Act does not restrict the employment options of an employee who retired after January 1, 1997, if they did not perform procurement functions after that date. The provisions of the old Procurement Integrity Act continue to apply to employees who retired prior to January 1, 1997.² Personnel who retired prior to that date should consult an ethics counselor or review prior editions of this publication.

2. Employment restrictions

a. Under the revised Procurement Integrity Act and implementing regulations, a former Federal official is barred from accepting compensation from a contractor as an employee, officer, director, or consultant, for 1 year after he:

(1) served, at the time of selection or contract award, as procuring contracting officer (PCO), source selection authority (or source selection evaluation board member), or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10 million;

(2) served as the program manager, deputy program manager, or administrative contracting officer (ACO) for a contract in excess of \$10 million involving that contractor; or

(3) personally made a decision to award a contract, subcontract, modification, or task or delivery order in excess of \$10 million to that contractor; establish overhead or other rates applicable to a contract or contracts for that contractor in excess of \$10 million; approve issuance of a contract or payments in excess of \$10 million to that contractor; or pay or settle a claim in

excess of \$10 million for that contractor.

b. "In excess of \$10 million" means:

(1) the value, or estimated value, at the time of award, of the contract, including all options;

(2) the total estimated value at the time of award of all orders under an indefinite-delivery, indefinite quantity, or requirements contract;

(3) any multiple award schedule contract unless the contracting officer documents a lower estimate;

(4) the value of a delivery order, task order, or an order under a Basic Ordering Agreement;

(5) the amount paid or to be paid in settlement of a claim; or

(6) the estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

c. As an exception to the above rule, a former Federal official may accept compensation from a division or affiliate of the prohibited contractor if the division or affiliate does not produce the same products or services as the entity of the contractor that is responsible for the contract in issue.

3. Penalties. An individual who violates the above employment restriction may be fined up to \$50,000 plus twice the compensation received or offered for the prohibited conduct. Organizations that employ an individual in violation of the above restrictions may be fined up to \$500,000 plus twice the compensation received or offered.³

4. Examples

a. A retired Marine Corps colonel served as a program manager on a particular ordnance procurement five years before he retired. He wishes to work for the company that was awarded the contract in a job unrelated to the old contract. He may do so, since his service as program manager terminated more than 1 year ago.

b. A warrant officer recently served as a member of a source selection evaluation board on a contract worth \$8 million. Company X was a bidder in the procurement. Under the Procurement Integrity Act, the warrant officer may

work for X Company because the contract was worth less than \$10 million. However, the warrant officer should ensure that no action is taken in violation of 18 U.S.C. § 207, discussed below.

c. A Navy captain recently served as a program manager for a certain aircraft procurement which involved Company X. The captain wishes to work for Company Y, which is an automobile parts subsidiary of Company X. Since the subsidiary does not manufacture aviation products, the captain may accept employment.

5. Advice from ethics counselors⁴

a. An official or former official of a Federal agency who does not know whether he is precluded from accepting employment under the Act may request advice from an ethics counselor. Provided full disclosure of all relevant facts is made, a current or former official's good faith reliance on an ethics counselor's opinion will protect him against claims that he knowingly violated the Act. A request for an opinion should be in writing, dated and signed, and must include:

(1) all information reasonably available to the official or former official that is relevant to the inquiry (at a minimum, the request shall include information about relevant procurements in which the individual was involved, including contract or solicitation numbers, dates of solicitation or award, and a description of the goods or services procured or to be procured);

(2) information about the individual's participation in procurement decisions, including the dates or time periods of the participation, and the nature of the individual's duties, responsibilities, or actions; and

(3) information about the contractor who would be a party to the proposed conduct, including a description of the products or services produced by the contractor, or its division or affiliate from whom the individual proposes to accept compensation.

b. An ethics counselor may request additional information from the official, from other procurement officials, or the official's supervisor. The ethics counselor is required to issue an opinion within 30 days or as soon thereafter as practicable (thus, the written opinion is colloquially known as a "30-day letter"). When the requester knows or should know that the opinion is based on fraudulent or misleading information, reliance on the opinion will not be deemed to be in good faith.

C. Communications and appearances with the intent to influence the Government

1. Background

a. Since its enactment in 1962, 18 U.S.C. § 207 has been one of the primary sources of post-Government service employment restrictions applicable to officers and employees of the Executive Branch. It was designed to curb the "switching of sides" that occurs when a Government officer leaves Government service and then chooses to represent another person or entity on, or engage in, certain matters of interest to the Government. Although the statute does not prohibit the acceptance of any job in the private sector, it does restrict the scope of activities that can be undertaken on behalf of a private employer. The specific nature of the various prohibitions depends upon whether the former officer or employee left DON service prior to January 1, 1991, the degree of involvement in the particular matter while in Government service, and whether the former officer or employee was one of a specified group of high-ranking officials known as "senior employees."

b. Section 207 does not apply to former enlisted members.⁵ It does apply to former Regular officers and civilian employees. The restrictions applicable to all former civilian employees and military officers, discussed in paragraph 2 below, also apply to some Reserve officers and special Government employees.⁶ Specifically, the 1-year restrictions discussed in paragraph 3 below apply only to (1) a Reserve flag officer after he has served 60 days or more on voluntary active duty, active duty for training, involuntary active duty, or any combination of such duty during his last 365 days of service, or (2) a high-ranking special Government employee (*i.e.*, one appointed to an Executive Schedule position or receiving pay equal to, or greater than, level V of the Executive Schedule) after he was retained, designated, appointed, or employed to perform duties, with or without compensation, for 60 days or more during his last year of Government service.⁷ A Reserve flag officer or high-ranking special Government employee should consult an ethics counselor for further guidance.

c. Since 1962, 18 U.S.C. § 207 has been amended several times by Congress. One significant amendment became effective on July 1, 1979,⁸ and another on January 1, 1991.⁹ Personnel who retired or separated from Government service before January 1, 1991, are subject to the restrictions in effect at the time that they left Government service. For further information on the pre-1991 versions of this statute, consult your ethics counselor or review the prior editions of this Reference Guide.

2. Restrictions applicable to all former civilian employees and military officers who leave Government service on or after January 1, 1991. Three restrictions apply to all former officers, employees, and senior employees.

a. Lifetime restriction. Subsection 207(a)(1) prohibits former officers and employees from knowingly making, with the intent to influence, any communication to, or appearance before, any officer or employee of any department, agency, court, or court-martial, of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties in which they participated personally and substantially while in Government service. This prohibition lasts for the life of the former officer or employee and commences upon termination of Government service. The focus of this prohibition is on the former officer or employee who participated in a matter while employed by the Government and who later "switches sides" by representing another person on the same matter before the United States. This section of the statute does not, however, restrict a former official from providing "behind-the-scenes" or "in-house" assistance to a private employer. This prohibition also does not apply to communications to, or appearance before, Members of Congress or their legislative staffs.

(1) A violation of this prohibition occurs when the following four criteria are met:

(a) the former employee must have worked on a particular matter while in Government service;

(b) the scope of the former employee's work must have amounted to "personal and substantial" participation in that matter;

(c) a specific party to the particular matter must have been identified at the time of that Government work; and

(d) the former employee must, with the intent to influence, communicate with, or appear before, an officer or employee of the Federal Government on behalf of another person or entity regarding that same particular matter.

(2) These criteria are discussed in the following paragraphs:

(a) A "particular matter" covered by this proscription includes any specific contract, application, request for a ruling or other determination, rulemaking, claim, controversy, investigation, charge, accusation, arrest, or judicial or other proceeding.¹⁰ Not included are the formulation of general

policy, or other actions of general applicability in which the former officer or employee was involved unless the outcome may have a direct and predictable effect on a particular person. Thus, in most instances, a former officer or employee may represent a private employer in connection with a matter involving a specific application of policies that he helped formulate. The prohibition does not arise unless the former employee is working on the same particular matter that he worked on while in Government service. Factors to be considered in determining whether two particular matters are the same include the extent to which the matters involve the same basic facts, the same or related issues, the same or related parties, the same confidential information, the continuing existence of an important Federal interest, as well as the time elapsed between the two matters.

(b) The prohibition does not arise unless the former official's participation in the matter was "personal and substantial."¹¹ Personal and substantial participation can be exercised "through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action."¹² Personal participation refers to both the former employee's actions and those of a subordinate when actually directed by the former employee. Substantial participation means involvement that is, or reasonably appears to be, significant to the matter. Mere official responsibility over a matter, knowledge of it, or perfunctory involvement on an administrative or peripheral issue does not amount to substantial participation. Participating in a single critical step, however, may be "substantial." Although participation generally requires some form of action, a former officer's inaction may be regarded as substantial participation if such inaction could cause a result to be different.

(c) The prohibition does not arise unless a specific party to the particular matter is identified at the time of the Government work.¹³ A specific party is an identified non-Government entity. For example, a draft request for contract proposals will become a particular matter involving a specific party or parties once potential contractors are identified. For § 207(a)(1) to apply, however, the former official's employer does not need to have been identified as a party to the matter prior to his departure from Government service. So long as some specific party (or parties) was identified, the statute applies.

(d) The Office of Government Ethics has provided the following guidance on the nature of the communications and appearances prohibited by this section:

A former employee is not prohibited by this restriction from providing "behind-the-scenes" assistance in connection with

the representation of another person. Moreover, the restriction prohibits only those communications and appearances that are made "with the intent to influence." A "communication" can be made orally, in writing, or through electronic transmission. An "appearance" extends to a former employee's mere physical presence at a proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An "intent to influence" the United States may be found if the communication or appearance is made for the purpose of seeking a discretionary Government ruling, benefit, approval, or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular Government action to be taken. Accordingly, the prohibition does not apply to an appearance or communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.¹⁴

b. Two-year restriction. The second restriction is identical to the lifetime restriction discussed above except that it is of shorter duration, and applies only if an officer or employee had official responsibility over the matter and did not participate personally and substantially in that matter. For 2 years after terminating Government service, 18 U.S.C. § 207(a)(2) prohibits former officers or employees from making, with the intent to influence, any communication to, or appearance before, Government officials in connection with a particular matter involving a specific party or parties that came under their official responsibility during their last year of Government service. The term "official responsibility" is defined as "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."¹⁵ "Administrative authority" means authority for planning, organizing, or controlling matters rather than authority to review or make decisions on ancillary aspects of a matter.¹⁶ The scope of an officer's official responsibility is ordinarily determined by those areas assigned by statute, regulation, Executive Order, job description, or delegation of authority.¹⁷ The Office of Government Ethics has determined that all particular matters under consideration in an agency are under the official responsibility of the agency head, and each is under that of any intermediate supervisor having responsibility for an official who actually participates in the matter within the scope of his duties.¹⁸ "Actually pending" means that the matter was in fact referred to, or under consideration by, persons within the former official's area of

responsibility, not that the matter merely could have been referred.¹⁹ This prohibition does not restrict in-house assistance to an employer. Former employees are not subject to this restriction, unless at the time of the proposed representation of another they know or reasonably should know that the matter had been under their official responsibility during their last year of Government service.

c. Trade or treaty negotiations. For 1 year after terminating Government service, 18 U.S.C. § 207(b) prohibits former officers and employees 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.²⁰ The trade negotiations covered are those that the President undertakes under section 1102 of the Omnibus Trade and Competitiveness Act of 1988.²¹ 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 text.

3. Restrictions applicable to former senior employees who leave Government service on or after January 1, 1991. In addition to the restrictions described above, "former senior employees" are subject to two additional restrictions. To facilitate discussion, the term "former senior employee" includes all former general and flag officers (pay grade O-7 or above) and civilian employees who were employed in a position for which the rate of pay is specified in or fixed in accordance with the Executive Schedule, or in a position for which the rate of pay is equal to or greater than the rate of pay payable for level V of the Executive Schedule.²²

a. One-year restriction on communicating with former department, agency, or component. For 1 year after serving in such a position, former senior employees are prohibited by virtue of § 207(c) from knowingly making, with the intent to influence, any communication to, or appearance before, an employee of

the department, agency or designated component in which they served during their last year of Government service, if that communication or appearance is made on behalf of any other person seeking official action on a matter.

(1) Purpose. This 1-year "cooling off" period is to allow for a period of adjustment to new roles for the former senior employee and the agency he served, and to diminish any appearances that Government decisions might be affected by the improper use by an individual of his former senior position.

(2) Scope of restriction. This 1-year restriction is measured from the date an employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously. Like the restrictions of § 207(a)(1) and § 207(a)(2) discussed above, this restriction prohibits communications to, and appearances before, the Government but does not prohibit "behind-the-scenes" assistance. This prohibition differs from the restrictions discussed above in several important respects:

(a) the former senior employee need not have had any prior involvement in, or responsibility over, the matter;

(b) the matters covered are broader and need not involve specific parties; and

(c) it is limited to contact with the department or agency in which the former senior employee served during his last year of Government service and does not extend Government-wide.

There are specific exceptions to this 1-year bar, which are discussed below.

(3) Separate DOD components. For purposes of § 207(c), the Department of the Defense is divided into a parent department and various components. At this time, the designated DOD components are the Departments of the Navy, Army, and Air Force, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, National Imagery and Mapping Agency, Defense Special Weapons Agency, and National Security Agency.²³ Subject to the rule for detailees, below, a former employee of any of these components is not barred from making communications to the other designated components.

(a) Employment with OSD. The implementing regulation²⁴ provides:

An eligible former senior employee who served in a "parent" department or agency is not barred by 18 U.S.C. 207(c) from

making communications or appearances before any employee of any designated component of that parent, but is barred as to employees of the parent and of other components that have not been designated.

For example, a former senior civilian employee who only served in OSD during his last years of Government service, is barred from making communications to OSD, but not to the Army, Air Force, Navy or any other designated component. However, under the detailees provision discussed below, a uniformed officer who was detailed to OSD during his or her last year is barred from making communications to OSD as well as his uniformed service component, but may communicate with other designated components.

(b) Employment with a component. The regulation further provides:

An eligible former senior employee who served in a designated component of a parent department or agency is barred from communicating to or making an appearance before any employee of that component, but is not barred as to any employee of the parent or of any other component.

A flag officer who did not serve with OSD during his final year of service, is not barred by § 207(c) from making communications to OSD.

(c) Detailees. Under 18 U.S.C. § 207(g), an officer or employee who is detailed from one department to another, shall, during the period so detailed, be deemed to be an officer or employee of both departments. Thus, a senior naval officer assigned to OSD during his final year of government service will be barred by § 207(c) from making communications to both the Department of the Navy and OSD.

b. One-year restriction on representing a foreign entity. For 1 year after serving in such a position, a former senior employee is prohibited by virtue of § 207(f) from knowingly representing, aiding, or advising a foreign entity with the intent of influencing an officer or employee of the U.S. Government in carrying out his official duties. This 1-year restriction is measured from the date an employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously. For the purpose of this subsection, a "foreign entity" includes the government of a foreign country and any person or group of persons exercising sovereign political jurisdiction over any country or any part of a country.²⁵ The term also includes foreign political parties and any organization or group of individuals engaged in, or seeking to engage in, the establishment, administration, or control of a foreign

country or government.²⁶ A foreign commercial corporation will not generally be considered a "foreign entity" for purposes of § 207(f) unless it exercises the function of a sovereign. A former senior employee "represents" a foreign entity when he acts as an agent or attorney for, or otherwise communicates or makes appearances on behalf of, that entity to or before any employee of a Government department or agency. A former senior employee "aids" or "advises" a foreign entity when he assists the entity other than by making the communication or appearance. Such "behind-the-scenes" assistance to a foreign entity could, for example, include drafting a proposed communication to an agency, advising on an appearance before a department, or consulting on other strategies designed to persuade departmental or agency officials to take a certain action. A former senior employee's representation, aid, or advice is only prohibited if made or rendered with the intent to influence an official discretionary decision of a current departmental or agency employee.

4. **Exceptions.** The restrictions of § 207 contain several exceptions. If an exception applies, a former member or employee is permitted to communicate with the Government, but only to the extent of the applicable exception.

a. Exception for scientific or technological information²⁷

(1) **In General.** Section 207 provides an exception from its provisions for communications made solely for the purpose of furnishing scientific or technological information. Such communications do not constitute an intent to influence. This exemption applies to **all** of the limitations on communications discussed above except 18 U.S.C. § 207(b), i.e., restrictions on trade and treaty negotiations, and 18 U.S.C. § 207(f), i.e., restrictions on former senior employees representing, aiding, and advising foreign entities. The exemption is at 18 U.S.C. § 207(j)(5). The current law provides two methods to fit within the exemption. Both are designed to allow the free exchange of scientific and technological information, and are available to all former personnel regardless of whether they are subject to the provisions of prior or current law.

(2) **Certificate of exception.** A former officer or employee may be exempted from the above provision by the head of an agency. In order to obtain an exemption under this method, the head of the agency concerned, in consultation with the Director, Office of Government Ethics, must execute and publish in the Federal Register a certification of exception stating that:

(a) the individual concerned has outstanding qualifications in a scientific, technological, or other technical discipline;

(b) the individual concerned is acting with respect to a particular

matter that requires such qualifications; and

(c) the national interest would be served by the individual's participation.

As a general rule, this method of exception has been limited to those former personnel whose services are needed on a continuing and comprehensive basis.²⁸

(3) Individual agency procedures. A second method of obtaining this exception is available to former DON personnel who either have no need, or are unable to qualify for, the certificate of exception discussed in the preceding paragraph. To qualify for this exemption, employees may provide scientific or technological information under procedures acceptable to the agency concerned. Each agency has the primary responsibility for developing its own procedures. Procedures vary among different agencies to conform to the particular characteristics and needs of each. It is important, therefore, for former personnel using this method of exception to comply fully with the regulations issued by the agency with which he desires to communicate.

b. Official Government duties. The restrictions in 18 U.S.C. § 207 do not apply to communications made on behalf of the United States in performing official Government duties or performing duties as an elected official of a State or local government.²⁹ Under this restriction, for example, a retired commanding officer or reporting senior may modify evaluations and fitness reports on former subordinates in accordance with applicable regulations without violating this section.

c. Former senior employees exceptions. Three specific exceptions apply to § 207(c). These exceptions do not apply to § 207(f) or the other subsections discussed above.

(1) Special knowledge. This exception provides that the restriction in § 207(c) does not apply to a former 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.³⁰

(2) State and local governments and institutions, hospitals and organizations. The restriction in § 207(c) does not apply to appearances, communications, or representation by a former senior employee who is 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.³¹

(3) Political parties and campaign committees. Section 207(c) does not apply to communications made solely on behalf of a candidate in his capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or political party.³²

d. Testimony. A former employee may give testimony under oath or make statements 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)) discussed above as it relates to the subject matter of the testimony.³³

e. Representing or assisting international organizations. The restrictions do not prohibit representing, aiding, or advising an international organization in which the Government participates, if the Secretary of State certifies in advance that such activity is in the Government's interest.³⁴

D. Use of inside information

1. A former employee should remember that the Procurement Integrity Act prohibition against divulging certain procurement information discussed in Chapter II applies to former Government employees as well as current Government employees.

E. Endnotes

1. The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, repealed 37 U.S.C. § 801, the three-year civil selling restriction, and suspended, through 1996, 18 U.S.C. § 281, the criminal selling restriction. The National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996), completely repealed 18 U.S.C. § 281.

2. Federal Acquisition Regulation, 48 C.F.R. § 3.104-2.

3. 41 U.S.C. § 423(e)(2).

4. Federal Acquisition Regulation, 48 C.F.R. § 3.104-7.

5. 18 U.S.C. § 202(a).
6. *Id.*
7. *Id.*; 18 U.S.C. § 207(c)(2), (f).
8. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 501, 92 Stat. 1824, 1864-67, *as amended by* Ethics in Government Act of 1978, amendment, Pub. L. No. 96-28, § 2, 93 Stat. 76, 76-77 (1979).
9. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, *as amended by* Ethics Reform Act of 1989: Technical Amendments, Pub. L. No. 101-280, 104 Stat. 149 (1990).
10. 18 U.S.C. § 207(i)(3).
11. Regulations Concerning Post Employment Conflict of Interest, 5 C.F.R. § 2637.201 (1999).
12. 18 U.S.C. § 207(i)(2).
13. 5 C.F.R. § 2637.201(c)(4) (1999).
14. Director, U.S. Office of Government Ethics Memorandum of Feb. 17, 2000, Revised Post-Government Restrictions of 18 U.S.C. § 207.
15. 18 U.S.C. § 202(b).
16. 5 C.F.R. § 2637.202(b)(2) (1999).
17. *Id.*
18. Memorandum, *supra* note 14.
19. 5 C.F.R. § 2637.203(c).
20. 18 U.S.C. § 207(b)(2)(B).
21. *Id.* § 207(b)(2)(A).

22. *Id.* § 207(c)(2).
23. Agency Components for Purposes of 18 U.S.C. § 207(c), 5 C.F.R. § 2641 App. B (1999).
24. Post-Employment Conflict of Interest Restrictions, 5 C.F.R. § 2641.201(e)(1) (1999).
25. 18 U.S.C. § 207(f)(2).
26. *Id.*
27. *Id.* § 207(j)(5).
28. Regulations Concerning Post Employment Conflict of Interest, 5 C.F.R. § 2637.206 (1999).
29. 18 U.S.C. § 207(j)(1).
30. *Id.* § 207(j)(4).
31. *Id.* § 207(j)(2).
32. *Id.* § 207(j)(7).
33. *Id.* § 207(j)(6). *See* SECNAVINST 5820.8A, August 27, 1991, Release of Official Information for Litigation Purposes and Testimony by Department of the Navy Personnel, for further guidance regarding giving expert testimony.
34. *Id.* § 207(j)(3).

V. FOREIGN EMPLOYMENT RESTRICTIONS

A. Employment with foreign governments and foreign principals. The primary restriction on the foreign employment of retired personnel is found in article I, section 9, clause 8, of the United States Constitution. This provision prohibits any person holding any office of profit or trust under the Federal Government from accepting any present, emolument, office, or title of any kind from any king, prince, or foreign state without the consent of Congress.

1. Applicability. This provision prohibits employment of all retired military personnel, officer and enlisted, Regular and Reserve,¹ as well as Fleet Reservists, by a foreign government unless congressional consent is first granted.²

a. Employment by institutions controlled by foreign governments. Employment by educational or commercial institutions owned, operated, or controlled by a foreign government is also prohibited.³ For example, a retired officer hired by an American company under contract to provide training services to a foreign government was held to be employed by a foreign government when the government had the authority, pursuant to the contract, to discharge the officer and to supervise and direct his activities.⁴ Employment by corporations which have a unity of interest and ownership with a foreign government is also included within the scope of this restriction.⁵ If a corporation maintains a separate identity and is not a mere agent or instrumentality of the foreign government, then employment is permissible without obtaining congressional consent.⁶

2. Penalty. While this Constitutional proscription has no penalty for violation, the Comptroller General has ruled that it could be given "substantial effect" by withholding the member's retired pay in an amount equal to the foreign salary illegally received. However, once the questioned employment is approved, withholding of retired pay will be discontinued except to the extent necessary to recoup any retired pay paid during the unauthorized employment.⁷

3. Obtaining Congressional consent. Where Congressional consent is obtained, no violation of the Constitution occurs. Congress has provided statutory consent, subject to approval by the Secretary of State and the Secretary of the Navy, for two types of employment by a foreign government.

a. Civil employment. Congress has consented to the acceptance of civil employment with a foreign government by retired members of the uniformed services and members of Reserve components of the armed forces.⁸

b. Military employment. By separate statute, Congress has consented to retired members of the armed forces to accepting employment by, or holding an office or position in, the military forces of a newly democratic nation.⁹ Unlike the civil employment provision, this statute does not extend consent to non-retired Reservists. The Secretary of State and the Secretary of the Navy jointly determine whether a nation is newly democratic for purposes of this statute.

c. Procedures. Under both statutes, approval is required by the Secretary of State and the Secretary of the Navy. Foreign employment should not be accepted until approval is obtained since approval is prospective only.¹⁰ A retired Navy member who wishes to accept such employment should submit a written request for approval to the Bureau of Naval Personnel, Office of Legal Counsel (Pers-06), Washington, DC 20370-5006. A retired Marine Corps member should write the Commandant of the Marine Corps, Headquarters, U.S. Marine Corps (Code JAR), Washington, DC 20380-0001. Each request should contain a full description of the contemplated employment and the nature and extent of the involvement of the foreign government. Members not included in the grant of congressional consent (*i.e.*, Regular members on the active list) who wish to accept employment with a foreign government may seek the necessary Congressional consent by initiating private legislation through their Federal representative.

4. Foreign Agents Registration Act. A former member desiring employment by a foreign government or any foreign business interest must also consider whether such employment would require registration as an agent of a foreign principal under the Foreign Agents Registration Act of 1938.¹¹ This Act requires anyone engaging in activities as an agent of a foreign principal to file a registration statement with the Attorney General. If such registration is required, there is some question whether a retired officer can become so employed without violating the criminal statute¹² that prohibits a "public official" of the United States from acting as an agent. The question of whether this prohibition applies to a retired officer depends upon whether such officer is considered to be a "public official." In an opinion of November 4, 1966, signed by the Assistant Attorney General, Internal Security Division, Department of Justice, it was stated that the 1966 version of the statute was apparently not intended to apply to a member of the uniformed services not on active duty, whether in a retired or Reserve status. Even though "officer or employee" in the 1966 statute was substituted for the term "public official" by the 1984 amendment, the opinion of the Justice Department regarding applicability of the new statute to retired officers has not changed. In a letter of January 19, 1988, the Chief, Registration Unit, Internal Security Division said the statute "was only intended to apply to active duty personnel."

B. Representing a foreign government or political party. 18 U.S.C. § 207(f) prohibits "senior employees" (including flag and general officers) from representing, aiding, or advising any foreign government or foreign political party before any department or agency of the United States within one year after serving in such a position. This prohibition is discussed in more detail in paragraph IVC3b above.

C. Citizenship

1. Loss of United States citizenship by retired officers and enlisted personnel generally results in the loss of retired pay.¹³ Retired pay is contingent on one maintaining his military status.¹⁴ The Comptroller General has held that loss of citizenship is "inconsistent" with a continuation of that status.¹⁵

2. The law of citizenship can be complex, and persons faced with citizenship issues should seek guidance from the Department of State or legal counsel. Citizenship can be lost by a variety of means. For example, one loses citizenship by voluntarily, with the intent to relinquish United States nationality, obtaining naturalization in a foreign state, or by taking an oath, making an affirmation or other formal declaration of allegiance to a foreign state, or, under certain circumstances, serving in the armed forces of a foreign country or in another post of a foreign government.¹⁶ Such issues may arise when an individual seeks dual citizenship. As a general rule, merely residing in a foreign country does not cause one to lose United States citizenship.¹⁷

D. Endnotes

1. This restriction also applies to drilling Reservists since they hold an "Office of Profit or Trust" with the United States. The prohibition continues after the time a Reservist completes the requisite number of years to be eligible for retired pay and is transferred to inactive status, since a Reserve in this status continues to be subject to recall. 10 U.S.C. § 12735(c). There is some authority to suggest that once a Reservist begins to draw retired pay at age 60, he no longer holds an office under the United States. See To the Honorable Lawrence L. Lamade, General Counsel, Department of the Navy, Comp. Gen. B-236084 (Jul. 31, 1989).

2. To C.C. Gordon, United States Coast Guard, 44 Comp. Gen. 130 (1964); To the Secretary of the Navy, 44 Comp. Gen. 227 (1964).

3. To the Secretary of the Navy, Comp. Gen. B-152844 (Dec. 12, 1963); JAG

Itr JAG:134:WEN:sb of Jan. 23, 1962.

4. Matter of: Major Stephen M. Hartnett, USMC (Retired)--Reconsideration--Suspension of Retired Pay--Employment by Foreign Government, 69 Comp. Gen. 175 (1990). See also Matter of Retired Marine Corps Officers, Comp. Gen. B-217096 (Mar. 11, 1985)(retired judge advocates who were members of a professional corporation which was retained by a component of the Saudi Arabian Government were considered to have received emoluments from a foreign state).

5. Matter of: Major Gilbert S. Sanders, U.S.A.F. (Retired) (Deceased)--Employment by a Foreign Government, Comp. Gen. B-231498 (June 21, 1989).

6. Matter of: Lieutenant Colonel Marvin S. Shaffer, USAF, Retired, 62 Comp. Gen. 432 (1983).

7. Matter of: Major Marvin L. Friedman, USAF, Retired, 61 Comp. Gen. 306 (1982); See Joseph P. Creekmore, *Acceptance of Foreign Employment by Retired Military Personnel*, 43 MIL. L. REV. 111 (1969).

8. 37 U.S.C. § 908.

9. 10 U.S.C. § 1060.

10. In the Matter of Retired Uniformed Services Members Receiving Compensation from Foreign Governments, 58 Comp. Gen. 487 (1979); Matter of: Major Martin L. Kammerer, USAF, Retired, Comp. Gen. B-193562 (Dec. 4, 1979); Matter of: Major Stephen M. Hartnett, USMC (Retired)--Reconsideration--Suspension of Retired Pay--Employment by Foreign Government, 69 Comp. Gen. 175 (1990).

11. 22 U.S.C. §§ 611-621.

12. 18 U.S.C. § 219(a).

13. See generally, DOD 7000.14-R, DOD Financial Management Regulation, Volume 7B, Chapter 6 (1999).

14. To Commander R.A. Wilson, Department of the Navy, 38 Comp. Gen. 523 (1959).

15. To the Secretary of Defense, 41 Comp. Gen. 715 (1962); To the Secretary of the Navy, 44 Comp. Gen. 227 (1964). On the other hand, a retired alien enlisted member, even if he lives in a foreign country, generally does not lose his right to retired pay. DOD 7000.14-R, DOD Financial Management Regulation, Volume 7B, Section 060103.

16. 8 U.S.C. § 1481.

17. Schneider v. Rusk, 377 U.S. 163 (1964).

VI. CONCLUSION

The foregoing is a restatement of the laws that restrict the employment activities of officers, enlisted members, and civilian employees who leave DON service. Other statutes regulate the activities of officers serving on active duty, including retired officers recalled to active duty. No attempt has been made to catalogue or discuss related criminal statutes, such as those relating to bribery, graft, and corruption of public officials applicable to the activities of persons generally, including military personnel, active, inactive, and retired. It is impractical to attempt to list every statutory provision relating to this subject, and this pamphlet should not be considered a substitute for advice from an ethics counselor. This compilation is a general guide for the use of personnel contemplating employment after DON service. For any case not covered by this pamphlet or in unusual situations, the Office of the Judge Advocate General, 1322 Patterson Avenue SE, Suite 3000, Code 13, Washington Navy Yard DC 20374-5066; the Office of the General Counsel, Assistant General Counsel (Ethics), Presidential Towers, 7th Floor, 2511 Jefferson Davis Highway, Arlington, VA 22209, or the Commandant of the Marine Corps, Headquarters, U.S. Marine Corps (Code JAR), Washington, DC 20380-0001, will assist you in determining the propriety of any activities in which you propose to engage upon retirement or separation. Additionally, you should consult with your local ethics counselor for an initial assessment of your post-Government service employment plans should you have questions about the propriety of such activities.