



THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

JUL - 8 2011

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The enclosed report is provided in accordance with section 833 of the National Defense Authorization Act for FY 2010, Public Law 111-84. Section 833 directed the Panel on Contracting Integrity to review policies relating to post-employment restrictions on former DoD personnel to determine whether such policies adequately protect the public interest, without unreasonably limiting future employment options for former DoD personnel.

The report includes an in-depth analysis of the seven matters to be considered as well as the Panel's findings and recommendations regarding these matters. A summary of the findings and recommendations are contained on pages 41-43 of the report.

A similar letter has been sent to the House Armed Services Committee.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ashton B. Carter".

Ashton B. Carter

Enclosure:
As stated

cc:
The Honorable John McCain
Ranking Member



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The Honorable Howard P. "Buck" McKeon
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

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Enclosure:
As stated

cc:
The Honorable Adam Smith
Ranking Member

DoD Panel on Contracting Integrity

Recommendations Regarding Section 833 of the
National Defense Authorization Act for FY 2010 [Public
Law 111-84]

“Review of Post-Employment Restrictions Applicable To the DoD”

May 9, 2011



United States Department of Defense
Office of the Under Secretary of Defense for Acquisition,
Technology and Logistics (AT&L)

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**DoD Panel on Contracting Integrity
Review Of Post-Employment Restrictions Applicable to The Department of Defense
[Sec. 833 of Public Law 111-84; NDAA for FY 2010]**

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[Sec. 833 of Public Law 111-84; NDAA for FY 2010]

I. SCOPE OF CONGRESSIONALLY-MANDATED REVIEW.

Section 833 of the National Defense Authorization Act [NDAA] for Fiscal Year (FY) 2010¹ requires the Department of Defense [DoD] Panel on Contracting Integrity [the “Panel”] to review policies relating to the post-employment restrictions that apply to former DoD personnel. The purpose of the Panel’s review is “to determine whether such policies adequately protect the public interest without unreasonably limiting the future employment options of former Department of Defense personnel.”²

Congress has directed the Panel to complete its report by October 28, 2010³. Within 30 days of the report’s completion, the Panel is to provide to the Committees on Armed Services of the Senate and the House of Representatives its report containing the findings of the review and the recommendations of the Panel to the Secretary of Defense, including recommended legislative or regulatory changes, resulting from the review.⁴

In performing the review, the Panel is to consider the extent to which current post-employment restrictions –

(1) Appropriately protect the public interest by preventing personal conflicts of interests and preventing former Department of Defense officials from exercising undue or inappropriate influence on the Department of Defense;⁵

(2) Appropriately require disclosure of personnel accepting employment with contractors of the Department of Defense involving matters related to their official duties;⁶

(3) Use appropriate thresholds, in terms of salary or duties, for the establishment of such restrictions;⁷

(4) Are sufficiently straightforward and have been explained to personnel of the Department of Defense so that such personnel are able to avoid potential violations of post-employment restrictions and conflicts of interest in interactions with former personnel of the Department;⁸

(5) Appropriately apply to all personnel performing duties in acquisition related activities, such as personnel involved in—

a. the establishment of requirements;

¹ Public Law 111-84; Oct 28, 2009; 123 STAT at 2416. Full text appears at Section VIII, Attachment A to this paper.

² *Id.*, at 833 (a)

³ *Id.*, at 833 (c) The report is to be completed no later than one year after the date of the enactment of the NDAA for FY 2010 and that occurred on October 28, 2009.

⁴ *Id.*, at 833 (d)

⁵ *Id.*, at 833 (b)(1)

⁶ *Id.*, at 833 (b)(2)

⁷ *Id.*, at 833 (b)(3)

⁸ *Id.*, at 833 (b)(4)

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- b. testing and evaluation; and
- c. the development of doctrine;⁹

(6) Ensure that the Department of Defense has access to world-class talent, especially with respect to highly qualified technical, engineering, and acquisition expertise;¹⁰ and

(7) Ensure that service in the Department of Defense remains an attractive career option.¹¹

After the review is completed, Congress has directed that the Secretary of Defense enter into an arrangement with the National Academy of Public Administration¹² to “assess the findings and recommendations of [DoD’s] review” and provide its assessment of the review to the Secretary of Defense along with any such additional recommendations of their own.¹³

II. METHODOLOGY.

The Panel first examined the current regime of post-Government employment (PGE) restrictions that apply to DoD personnel. The Panel then collected and analyzed independent data and reports and examined this information within the context of the seven areas of interest specified in Section 833.

Specifically, the Panel collected and reviewed pertinent case law, GAO reports, and scholarly articles in the area of PGE restrictions. The Panel reviewed two informal surveys of key leaders in the DoD acquisition community. In addition, other information was gathered from the public and private sectors via focus groups and individual interviews. Many of these outside interviews and focus group interviews were accomplished by the National Academy of Public Administration (NAPA) under a specific fact gathering arrangement, completely separate from their future assessment responsibilities identified in section 833 (e). When used in this report, the NAPA paper will be referred to as the “NAPA Observations.”¹⁴ Wherever relevant to the analysis, this data is discussed and referenced in Section VI of the report. All of the data that the Panel considered is attached at Section VIII.

⁹ *Id.*, at 833 (b)(5)

¹⁰ *Id.*, at 833 (b)(6)

¹¹ *Id.*, at 833 (b)(7)

¹² See, www.napawash.org for more information about the Academy

¹³ Section 833 (e)

¹⁴ NAPA, *Observations from Research Support Project for the U. S. Department of Defense*, Revised Final Report, November 24, 2010.

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Furthermore, in an effort to help the reader more clearly understand when and how the PGE rules apply to the various types and levels of DoD employees, the Panel developed a matrix, included in Section V, as a summary of the existing laws and regulations discussed in Section IV. The Panel also felt it was important to help the reader understand the number of DoD employees impacted by these laws and regulations.

Based upon analysis of this comprehensive array of information, the Panel has provided its conclusions and recommendations regarding the suitability and effectiveness of the current PGE restrictions.

III. SUMMARY OF EXISTING POST-GOVERNMENT EMPLOYMENT (PGE) RESTRICTIONS

The law and regulation relating to Post-Employment (PGE) Restrictions is derived from the Constitution, three criminal statutes, two other statutes, and four different regulations. This section provides a brief summary and the specific restrictions of each of those laws and regulations. Please note that the law and regulations for Post Employment are complex, and are fact driven. An analysis under the Post Employment law must include consideration of, the nature of the work performed while working for the government or the military service, the grade or rank of the individual, and the nature of the job which the individual is about to undertake in the private sector.

A. U.S. Constitution: Emoluments Clause ¹⁵

While not often thought of as a Post-Government Employment (PGE) Restriction, the United States Constitution prohibits anyone who holds an office “of profit or trust,” which has been interpreted to include all retired military officers and retired, regular enlisted personnel, from accepting any compensation or other items of value, including salary, honoraria, and travel expenses, from a foreign state except as authorized by Congress. Generally, the prohibition does not apply to employment with international organizations such as the United Nations. There are no restrictions against working for a private foreign enterprise or organization that is substantially independent of a foreign government. However, it is sometimes difficult to determine whether a foreign corporation or organization is a private concern or an instrumentality of a foreign government.

¹⁵ U.S. Const., Art. I, Sec. 9, Cl. 8.

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B. Statutory Coverage

1. 18 U.S.C. §207. Restrictions on former officers, employees and elected officials of the executive and legislative branches¹⁶(Post-Government Employment Conflict of Interest Restrictions).

As used within this statute certain key terms are defined as follows:

(1) Communication. Former DoD personnel make a *communication* when they impart or transmit information of any kind, including facts, opinions, ideas, questions, or direction, to Federal personnel of the United States, whether orally, in written correspondence, by electronic media, or by any other means. This includes only those communications with respect to which the individual intends that the information conveyed will be attributed to himself although it is not necessary that any employee of the United States actually recognize the former employee as the source of the information.

(2) Appearance. A former DoD officer or employee makes an *appearance* when they are physically present before an employee or officer of the United States, in either a formal or informal setting. Although an appearance also may be accompanied by certain communications, an appearance need not involve any communication by the former employee.

(3) Behind the scenes assistance. A former officer or employee may provide assistance to another person, provided that the assistance does not involve a communication to or an appearance before an employee of the United States.

(4) With intent to influence. Communications or appearances made by a former Government employee with the intent to influence the United States. A communication or appearance is made with the intent to influence when made for the purpose of: (i) seeking a Government ruling, benefit, approval, or other discretionary Government action; or (ii) affecting Government action in connection with an issue or aspect of a matter which involves an appreciate element of actual or potential dispute or controversy.

(5) Particular matter. A particular matter includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.

(6) Particular matter Involving Specific Parties. Typically this involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license,

¹⁶ The treatment of 18 U.S.C. § 207 in this paper will only cover sections 207 (a) and (c). 18 U.S.C. § 207(e) applies to former legislative branch officials and will not be discussed because it is outside the intended scope of this report. In addition there are other applicable provisions of section 207, e.g. (f) and (k), but they are encountered much less frequently at DoD.

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product approval application, enforcement action, administrative adjudication, or court case.

(7) Personal Participation – means directly, either individually or in combination with other persons; or through direct and active supervision of the participation of any person he or she supervises, including a subordinate.

(8) Substantially – means that the employee’s involvement is of significance to the matter.

The most significant restrictions found in 18 U.S.C. §207 are summarized below.

a. Permanent Bar -- 18 U.S.C. §207(a)(1):

This subsection prohibits a former officer or Federal employee for the life of a particular matter involving specific parties from "switching sides" and representing a Non-Federal entity on the same particular matter involving specific parties that he or she worked on personally and substantially during Government service.

This lifetime bar applies where:

(1) The United States is a party or has a direct and substantial interest in the matter,

(2) The former officer or employee participated personally and substantially in the particular matter involving specific parties as a government officer or employee.

The permanent bar does not prohibit the former government official from being employed by any particular contractor. Behind the scenes assistance is permitted, even on the same particular matters involving specific parties on which the former official worked while in government service.

b. Two-Year Bar On Switching Sides -- 18 U.S.C. §207(a)(2):

Unlike the permanent ban that requires personal and substantial participation, this two-year bar applies if the particular matter involving specific parties was actually pending under the former officer’s or employee’s official responsibility during the final year of federal employment.

c. One-Year "Cooling-Off" Period for Senior Employees and Officers -- 18 U.S.C. §207(c):

This subsection prohibits a former senior employee or officer¹⁷ from representing anyone or entity concerning any matter, whether he or she worked on it or not, to

¹⁷ Employees paid at an Executive Level position, who serve military grade O-7 or above are "senior employees" including any individual whose rate of pay is equal to or greater than 86.5 percent of the rate for level II of the

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personnel of his former agency for a period of one year from the date of terminating the senior position in Federal service. The “One-Year Cooling-Off” prohibition is similar to other restrictions found in 18 U.S.C. §207(a) in that a communication or appearance before a government official is required, representing someone or an entity is required, and that behind-the-scenes assistance is not prohibited.

This revolving door provision is different from the permanent and two-year representation bars in a number of ways. First, coverage is broader; it does not require that the former DoD officer or employee have any prior involvement in the matter. Second, the bar is limited to contact with personnel of the individual’s former agency.¹⁸

For the purpose of determining what is the individual’s former agency for the one year post-Government employment representation restriction, the Office of Government Ethics (OGE) regulations divides DoD, and other Federal Departments, into separate components as listed in the footnote below.¹⁹ Also, if a particular organization is not specifically part of one of the OGE designated “components”, e.g. Defense Contract Management Agency (DCMA); it is treated as part of the larger parent organization, the Department of Defense.

The prohibition is generally limited to the component to which the senior official was assigned at the time the official departed the government. For example, a senior official who retired from the Department of the Army may not represent a non-federal entity or person before an Army employee, but may do so before a Navy employee. If the senior official is detailed to another DoD component and retires from that assignment, the one-year ban will apply both to the Army and to the component to which the official is detailed.

PAS Employees: Presidential Appointees confirmed by the Senate (PAS) are subject to the most extreme post employment restrictions. For example, during the “cooling-off period,” PAS employees within DoD may not take advantage of the “separate component”

Executive Schedule. For 2010 and 2011, this amount is \$155,440.50 and will remain the same until such time as there is a new pay raise.

¹⁸ 18 U.S.C. §207(h)

¹⁹ 5 C.F.R. §2641, Appendix B: Parent: Department of Defense

Components:

- Department of the Air Force
- Department of the Army
- Department of the Navy
- Defense Information Systems Agency (DISA)
- Defense Intelligence Agency (DIA)
- Defense Logistics Agency (DLA)
- Defense Threat Reduction Agency (DTRA)
- National Geospatial-Intelligence Agency (NGA)
- National Reconnaissance Office (NRO)
- National Security Agency (NSA)

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exception to 18 U.S.C. §207(c) described above. The PAS cooling-off applies to all of DoD, including the Office of the Secretary Defense [OSD] and all 10 of its components.

d. Penalties for violating 18 U.S.C. §207:

A violation of 18 U.S.C. § 207 may result in five years of imprisonment and/or a \$50,000 civil fine, per violation. Violations of section 207 can be charged as a felony or a misdemeanor or instituted as a civil action. Injunctive relief is also available.

The Department of Justice initiates criminal enforcement in cases involving 18 U.S.C. §207. Agency and Department “heads” are required to report substantiated allegations of violations of 18 U.S.C. §207 to the Department of Justice and to the Director, Office of Government Ethics.²⁰

2. National Defense Authorization Act (NDAA) for Fiscal Year 2008, section 847.

Section 847 of the NDAA for FY08 requires that certain current and former DoD officials, within two years after leaving the Department, request a written opinion from the appropriate DoD ethics official regarding the applicability of post-employment restrictions to activities that they may undertake on behalf of a DoD contractor. Section 847 prohibits a DoD contractor from knowingly paying compensation to such an official unless the contractor first determines that the official either has received the requested written opinion, or has requested the opinion at least 30-days prior to receiving compensation.

Section 847 covers government personnel²¹ who expect to receive compensation from any DoD contractor within two years from the date they left government service, if he or she:

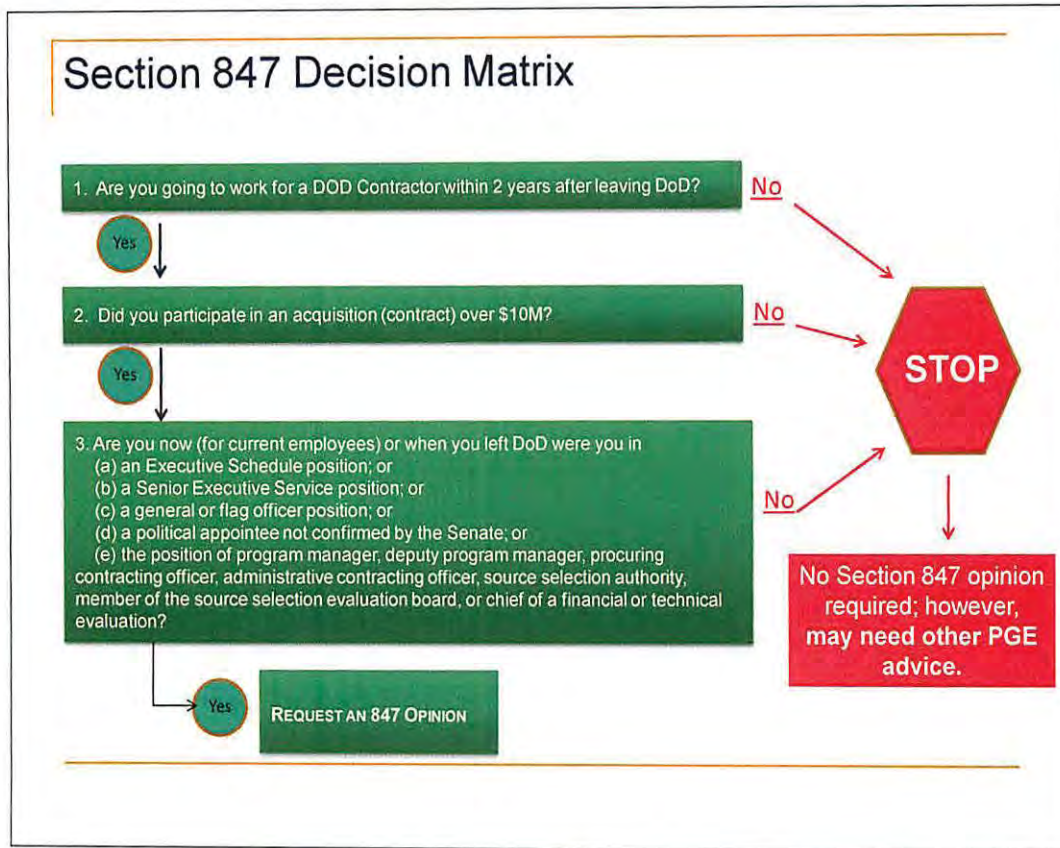
- a. Holds a position in the Executive Schedule, which is one appointed by the President and confirmed by the Senate; or in the Senior Executive Service; or in a General or Flag officer position (grade 0-7 and above); or a political appointee not confirmed by the Senate; and who either currently participates personally and substantially or participated personally and substantially at the time she or he left the department in an acquisition with a value in excess of \$10 million, or,
- b. Currently serves or served at the time he or she left DoD service, in one of the following positions: program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in excess of \$10 million.

²⁰ 5 CFR 2641.103(a); DOD 5500.7-R, Section 10-201(c)(1).

²¹ Current DoD personnel or personnel who left DoD on or after January 28, 2008

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The matrix below depicts who is required to request an opinion under Section 847.



To implement section 847, the Defense Federal Acquisition Regulation Supplement (DFARS) establishes a new requirement at DFARS 203.171-4 and DFARS clause 252.203-7000. As a result, contractors who compensate these former personnel without having the individual obtain an ethics opinion could be barred from participating in federal procurements.

As another way to ensure that former DoD officers or employees working for defense contractors are not violating 18 U.S.C. §207, the Procurement Integrity Act, or Section 847, DFARS Case 2010-D020, Representation Regarding Compensation of Former DoD Officials, has been opened. This proposed DFARS case would require defense contractors that bid on DoD contracts to represent that its employees are in compliance with post-employment law.

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3. 41 U.S.C. §§2101-2107--The Procurement Integrity Act²²

The Procurement Integrity Act, 41 U.S.C. §§2101-2107, applies to former officers, enlisted members, and civilians who participated in a contracting action in excess of \$10 million. Such former officials are prohibited from accepting compensation as an employee, officer, director, or consultant from the contractor for one year pursuant to 41 U.S.C. §2104, if one or more of the following applies to the individual:

a. The former official served, at the time of selection of that contractor or the time of contract award to that contractor, as the Procuring Contracting Officer, the Source Selection Authority, a member of the Source Selection Evaluation Board, or the chief of a financial or technical evaluation team for that contract in excess of \$10 million;

b. The former official served as the Program Manager, Deputy Program Manager, or Administrative Contracting Officer for that contract in excess of \$10 million; or

c. The former official personally made a decision for the Federal agency to:

(i) award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10 million to that contractor;

(ii) establish overhead or other rates applicable to a contract or contracts for those contractors that are valued in excess of \$10 million;

(iii) approve issuance of a contract payment or payments in excess of \$10 million to that contractor; or

(iv) pay or settle a claim in excess of \$10 million to that contractor.

Penalties. Violation of this provision may result in a civil penalty against the former official of \$50,000 for each violation, plus an amount equal to twice the amount of compensation received from the contractor. A contractor violation can result in a civil penalty against the contractor of \$500,000.00 for each violation, plus an amount equal to twice the compensation offered or paid to the former official.

There is one exception rarely used in the DoD when the former Federal officer or employee may accept compensation from the defense contractor under the Procurement Integrity Act. That is in the narrow circumstance when, the individual accepts employment from a division or affiliate of the defense contractor that does not produce the same or similar items as the division that has the \$10M or more contract.

As to the disqualification requirements of this statute, see section E. 1. below.

²² Section 27 of the Office of Federal Procurement Policy Act, as amended. Prior to codification of Title 41, it appeared at 41 U.S.C. 423.

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4. Conflicts of Interest Statute -- 18 U.S.C. §208

This statute makes it a crime for Federal personnel in the Executive Branch to participate personally and substantially in a particular matter that has a direct and predictable effect on his or her financial interest. The financial interest of a prospective employer is imputed to the Federal officer or employee.²³ Therefore, DoD officers and civilian employees cannot participate in any particular matter involving a government contractor or other commercial or private organization, with whom they are negotiating for employment.

As a result, DoD personnel must either terminate their employment negotiations or disqualify themselves from participation in the particular matter. For purposes of this restriction, "negotiating" means 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. It does not include requesting a job application or submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other discrete class. 5 C.F.R. §2635.603(b) (1) (ii).

C. Regulatory Coverage

1. 5 C.F.R. Part 2641.- Post-Employment Conflict of Interest Restrictions

Part 2641 explains the scope and content of 18 U.S.C. §207 as it applies to former employees of the executive branch or of certain independent agencies (including current employees who formerly served in "senior" or "very senior" employee positions). Although certain restrictions in section 207 apply to former employees of the District of Columbia, Members and elected officials of the Congress and certain legislative staff, and employees of independent agencies in the legislative and judicial branches, this part is not intended to provide guidance to those individuals.

Part 2641 is a robust, detailed, comprehensive, and exhaustive post-government employment regulation. For example, it breaks down each element of the criminal statute, and provides examples of what does and does not constitute a violation of the criminal

²³ "whoever, being an officer or employee of the Executive Branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest" would violate this statute if he or she participated in the matter. The penalties for violating this statute are the same as for violating 18 U.S.C. §207.

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statute. The regulation is over 40 pages long, and includes over 120 examples that appear in the discussion of the various elements of the law such as “intent to influence”, “particular matter involving specific parties”, “personal and substantial participation” and then addresses these elements in the context of the appropriate representation ban.

2. 5 C.F.R. Part 2637. Employees Terminating Between July 7, 1979, and December 31, 1990

This regulation provides interpretive guidance as to the post-employment statute, 18 U.S.C. §207, for those employees and officers who left government service between July 1, 1979 and December 31, 1990.²⁴

3. DoD 5500.07-R. The Joint Ethics Regulation (JER)

The JER is the Department of Defense’s supplemental ethics regulation to 5 C.F.R. Part 2635. It applies to all DoD personnel (please note that certain provisions of the law such as 18 U.S.C. §207 do not apply to enlisted personnel), and consists of 12 chapters. In addition to 5 C.F.R. part 2641 discussed above, Chapter 9 of the JER addresses post employment regulations unique to the DoD. Some examples of these restrictions covering military officers include issues regarding terminal leave and the applicability of the emoluments clause of the Constitution to retired regular military members and reserve military members. Additional post government employment restrictions involving DoD civilian personnel are also covered in this chapter. An example of a regulation applying to all but enlisted personnel at DoD is a required post-employment briefing before the DoD person terminates his or her position. Chapter 8 of the JER requires that all public financial disclosure filers in DoD certify annually that they are aware of the disqualification and employment restrictions of 18 U.S.C. §207 and 18 U.S.C. §208, and 41 U.S.C. §§2101-2107, and that they have not violated those restrictions. Finally, in Chapter 11, the JER includes a provision that requires including discussion of disqualification and employment restrictions in annual ethics briefings.

4. 5 C.F.R. Part 2635, Subpart F (Seeking Employment)

This regulation provides interpretive guidance of 18 U.S.C. §208 as to when an employee or officer must disqualify himself or herself from participation in a particular matter because of a prospective employment interest. This regulation addresses terms such as “outside employment”, “interview trips and entertainment” and “negotiations for employment.” The regulation provides 15 examples of what is and is not a violation of the seeking employment rule. It is 6 pages in length.

²⁴ 2641.102 (b)

D. Executive Order 13490 (also referred to as “The Obama Ethics Pledge”)

This Executive Order, signed by the President on January 21, 2009, requires, among other things, that those senior political appointees subject to the one-year cooling-off restriction in 18 U.S.C. §207(c) not represent anyone or entity before their former Department for an additional year (for a total of two years) after the end of their appointment. This “two-year cooling off restriction” applies regardless of whether or not the position requires Senate confirmation, but is based instead on rate of basic pay. The two-year cooling-off rule is the same as for the one-year cooling-off period for non-political appointees²⁵ except the coverage is for two years from the end of the appointment, and not one year from the end of service in the position.

In addition, all political appointees have certain lobbying restrictions once they leave the Department. They may not, as a “registered lobbyist” lobby “covered employees” until after the end of the administration.

E. Disclosure Requirements

1. Employment Contacts Covered under the Procurement Integrity Act

Another section of the Procurement Integrity Act, 41 U.S.C. §2103, applies to government personnel participating personally and substantially in competitive federal agency procurements in excess of the current simplified purchase threshold. If Federal personnel contact or are contacted by an individual who is a bidder or offeror in the procurement, the Federal officer or employee must promptly report the contact in writing to his or her supervisor and Ethics Counselor. Unless the officer or employee rejects the possibility of non-federal employment, he or she must disqualify himself or herself from further personal and substantial participation in the procurement. The disqualification will last until the Ethics Official determines that the person may resume participation in the procurement.

2. Future Employment Arrangements Reported on Financial Disclosure Reports

All DoD political appointees, General and Flag Officers appointed at O-7 and above and members of the Senior Executive Service (“senior officials”), and all DoD officials who have significant decision-making authority regarding procurement are required to file an annual financial disclosure report.²⁶ In DoD, these reports are reviewed by a filer’s supervisor and certified by an ethics official. Senior officials file a detailed OGE 278 Public Financial Disclosure Form, while other DoD personnel file an OGE Form 450 Confidential

²⁵ See the discussion of 18 U.S.C. §207(c) at Section IV B 1 c above.

²⁶ See: Title I of the Ethics in Government Act of 1978 (5 U.S.C. App.), Executive Order 12674 (as modified by Executive Order 12731), and 5 CFR Part 2634, Subpart I

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Financial Disclosure Form. The purpose of the annual disclosure requirement is to identify and mitigate actual or potential conflicts of interest, and in this case, it would address the filers' financial interests and outside activities.

Both the OGE 278 and the OGE 450 forms require that the filer report any agreements or arrangements that they may have entered into for future outside employment including future employer, anticipated duties, and the date that the employment was accepted. Please note that the OGE 278 filer must also file a termination report when they terminate their position. Generally, at that time, the Senior officials know the agreements and arrangements they have with a future employer and report such arrangements in the termination OGE 278 disclosure report.

IV. TO WHOM DO THE RESTRICTIONS APPLY?

The restrictions noted above are often confusing and complicated in their application. The Panel has prepared two charts to help guide the readers through an analysis of which rules apply to which type of employee. The first chart provides some feel for the order of magnitude of the numbers of people who fall under the major employee classes. The second chart is a matrix which lists on the left the various individual types or classes of employees and lists across the top the various major post employment restrictions that apply.

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CHART 1: Order of Magnitude within Each Category of Employee

The purpose of this Chart is to provide some order of magnitude as to the number of personnel within DoD that are most likely to be impacted by post-employment restrictions of 18 U.S.C. §207. For example, all DoD personnel [except enlisted] are subject to the post-employment lifetime ban restrictions of 18 U.S.C. §207(a)(1) but those numbers have not been included in this Chart.

The following categories are likely to be impacted by the post-employment law: all 54 Presidential appointees subject to confirmation by the Senate (PAS), all 134 Schedule C appointees, all 94 non-career SES (NC) appointees, all 950 General and Flag officers (GO/FO), all 222 Highly Qualified Experts (HQE), all 151 Science and Technology (ST) appointees, all 100 Intergovernmental Personnel Act (IPA) detailees (for OSD only), and all 300 consultants (SGE) (for OSD only).

ROW	CATEGORY OF EMPLOYEE	NUMBERS IN CATEGORY
1.	Presidential Appointees Subject to Confirmation by the Senate [PAS](OSD and services)	54
2.	Schedule C Employees (OSD and services)	134
3.	Non-Career Senior Executive Service [SES(NC)] appointees (OSD and services)	94
4.	General and Flag Officers [GO/FO]	
	Army	317
	Navy	247
	Air Force	301
	Marines	85
		950
5.	Career Senior Executive Service [SES OSD and services]	1276
6.	Highly Qualified Experts [HQEs](OSD only)	222
7.	Science and Technology [STs](OSD only)	151
8.	Intergovernmental Personnel Act [IPAs] [OSD only]	99
9.	Special Governmental Employee [SGEs] Consultants [OSD Only]	300
10.	TOTAL COVERED	3280

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CHART 2 Matrix of coverage of the main restrictions found in 18 U.S.C. §207:

<u>Personnel Status</u>	<u>1-Yr Cooling Off^I (Statutory)</u>	<u>2-Yr Cooling Off^{II} (By Pledge)</u>	<u>Representation Ban^{III} (2-Yr)</u>	<u>“Matter” Lifetime Ban^{IV}</u>
1. POLITICAL:				
a. Presidential Appointees Confirmed by the Senate (PAS) ^V	Yes	Yes	Yes	Yes
b. Noncareer SES	Yes	Yes	Yes	Yes
c. Schedule C – Supervisor	No	No	Yes	Yes
d. Schedule C – Non Super	No	No	No	Yes
2. CIVILIAN:				
a. SES – Salary = or > \$155,440.50	Yes	No	Yes	Yes
b. SES – Salary < \$155,440.50	No	No	Yes	Yes
c. GS Grade Supervisor	No	No	Yes	Yes
d. GS Grade Non-Super	No	No	No	Yes
3. MILITARY:				
a. Flag & General Officer	Yes	No	Yes	Yes
b. Officer – Supervisor	No	No	Yes	Yes
c. Officer – Non Super	No	No	No	Yes
d. Enlisted	No	No	No	No
4. SPECIAL GOVT EMPLOYEES (SGEs)^{VI}				
a. Consultant – Supervisor >60 days	No	No	Yes	Yes
b. Consultant – Supervisor = or <60	No	No	Yes	Yes
c. Consultant – Non Super >60 days	No	No	No	Yes
d. Consultant – Non Super = or <60	No	No	No	Yes
e. Advisory Committee Member >60	No	No	No	Yes
f. Advisory Committee Member = <60	No	No	No	Yes
5. Highly Qualified Experts				
a. If paid at or above \$155,440.50 in 2010 and supervise	Yes	No	Yes	Yes
b. If paid as in (a) and not supervise	Yes	No	No	Yes
c. If paid less than \$155,440.50 in 2010 and supervise	No	No	Yes	Yes
d. If paid as in (c) and not supervise	No	No	No	Yes
6 Intergovernmental Personnel Act (IPA)				
a. If paid at or above \$155,440.50 in 2010 and supervise	Yes	No	Yes	Yes
b. If paid as in (a) and not supervise	Yes	No	No	Yes
c. If paid less than \$155,440.50 in 2010 and supervise	No	No	Yes	Yes
d. If paid as in (c) and not supervise	No	No	No	Yes

^I**Cooling Off (Statutory)** – For a period of 1 year after leaving a senior position, former *senior officials* may not make any communication or appearance on behalf of any other person, with the intent to influence, *before any officer or employee* of the *agency* or agencies in which the individual served within 1 year prior to leaving the senior position, in connection with any matter on which official action is sought by such individual. [18 U.S.C. §207(c)]. The breadth of this rules applies only to the agency or department from which they had been serving, *e.g.*, if one had worked in the U.S. Air Force, then he or she could not represent someone before the Air Force during the cooling off period. If someone had worked for OSD, then he or she could not represent someone before OSD during the cooling off period.

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The only separate DoD components that the OSD person could appear before on behalf of another during the cooling off period would be the Military Departments, DISA, DIA, DLA, NGA, NRO, DTRA, and NSA.²⁷

ii Cooling Off (By Pledge) – This applies to all presidential appointment positions whether needing Senate confirmation or not. The rules are the same as above, except the coverage is for two years from departure.

iii Representation Ban – The two-year representation ban applies on matters pending under the person's official responsibility during his or her last year. For a period of two years after termination of government service, former government officers and employees may not knowingly make a communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of any Federal agency or court, in connection with a particular matter which the officer or employee reasonably should have known was actually pending under his or her official responsibility within 1 year before the officer or employee left government service, which involved a specific party at that time, and in which the U.S. is a party or has a direct and substantial interest. [18 U.S.C. §207(a) (2)].

iv Lifetime Ban - The lifetime representation ban applies to representation before the entire Federal Government. Former government officers and employees may not knowingly make a communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of any Federal agency or court in connection with a particular matter in which the officer or employee personally and substantially participated, which involved a specific party at the time of the participation and representation, and in which the U.S. is a party or has a direct and substantial interest. (18 U.S.C. §207(a) (1)).

v Secretary of Defense – The SECDEF has a two-year statutory cooling off period [18 U.S.C §207(d)]

vi Special Government Employees [SGEs] – In the Department, almost all consultants and all members of advisory committees serve as Special Government Employees (SGEs). Should an individual work for the government either as an employee or as an SGE, for more than 60 days during the immediately preceding period of 365 consecutive days, then the individual cannot represent their employer before the government. [18 U.S.C. §§203 and 205]. This is also relevant to former senior officials subject to the one-year cooling off period (18 U.S.C. §207(c)). For example, if such an individual leaves Government service on a Friday, and comes back the following week to begin part-time consulting as an SGE for 90 days, and that same person also has another job with Company X, the individual cannot represent Company X before the Government until 13 months after the 90 days of SGE time.

²⁷ Defense Information Systems Agency (DISA); Defense Intelligence Agency (DIA); Defense Logistics Agency (DLA); Defense Threat Reduction Agency (DTRA); National Geospatial-Intelligence Agency (NGA) National Reconnaissance Office (NRO); National Security Agency (NSA)

V. ANALYSIS, FINDINGS, AND RECOMMENDATIONS

A. Do the current post-employment restrictions appropriately protect the public interest by preventing personal conflicts of interests and preventing former Department of Defense officials from exercising undue or inappropriate influence on the Department of Defense?

A wide range of views exist about the importance and effectiveness of the current post-employment restrictions. At one end of the spectrum, some private employers may wish to hire former senior government officials for their knowledge, technical skills and their potential ability to influence former employer or office, e.g., the Department of Defense. Some say this could cause an abuse of the public trust — either real or apparent.²⁸ Laws and regulations must strike a balance between one's right to seek employment and the public's interest in fairness.

On the other hand, private employment of former senior government officials mutually benefits the Department of Defense and industry. For example, former acquisition officials bring with them the knowledge and skills of the federal acquisition practices they have developed at DoD. That depth of knowledge benefits defense contractors in obvious ways, but it also benefits the government because of the efficiencies gained through engaging with someone who already knows the process because they managed that process at one time. Nevertheless, sometimes the public perceives this situation negatively. Once employment transition is imminent, there is a concern that future employment considerations may influence official decision-making. Even after transition, concerns remain. If a former official uses contacts with their former government colleagues to the benefit of their new employer, the question is whether that is in the public interest. The current interest in government transparency has made the review of the current post-government employment rules very timely and relevant.

The Panel's analysis begins with a look at the facts collected in the study. With respect to conflicts of interest and improper influence that resulted in formal criminal penalties involving high level officials, the Panel found three specific instances in the last seven years. These cases involve high level civilians in the Dept of U.S. Air Force, a U.S. Navy Flag Officer, and a U.S. Navy Captain who was a program manager.²⁹ Note that two of

²⁸ Bender, Bryan; *Boston Globe*, *From The Pentagon To The Private Sector*, (Dec 26, 2010). The article discusses the large number of retiring generals who are taking lucrative defense-firm jobs and infers that these actions "would seem [to be] a clear conflict of interest."

²⁹ *U.S. v. Druyun* –USDC for Eastern District of Virginia, Criminal No. 04-150-A (2004): Air Force Chief of Acquisition was sentenced to 9 months in jail for violating 18 U.S.C. §208 because she was negotiating the tanker lease on behalf of the Air Force with Boeing, and negotiating for employment with Boeing at the same time. *U.S. v. Betancourt* –USDC SD of California, Criminal Case No. 07CR 1816-L (2007): Violation of 18 U.S.C. §207c for

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the three cases involved violations of the conflict of interest law at 18 U.S.C. §208, and not the post-employment law at 18 U.S.C. §207.

Next, the Panel's analysis of the GAO reports related to post-government employment restrictions, and discussions with various IG offices, show, that other than the three cases above, there are no other documented instances where post-government employment considerations improperly influenced major defense procurement decisions.³⁰

A 1988 thesis by a US Air Force officer cites and compares four GAO reports from the 1980s on the post-retirement restrictions topic concluding that there was no evidence of widespread post-employment violations.³¹ Similar results were found in another GAO report on post-employment restrictions issued in 2008 (GAO-08-485). The Panel notes that twice in the last 20 years, GAO has rendered studies finding no conclusive evidence that there were any widespread post-employment violations.

In addition, the Panel notes that in preparing their 1988 report entitled, *Results of Conflict of Interest Investigations*,³² the GAO surveyed 51 agency Inspector General Offices and collected post-employment violations data from the ten whose data systems were able to identify the particular standards of conduct statute associated with each alleged violation. The report noted that while the Department of Defense's Office of the Inspector General (DoD OIG) data was readily retrievable, their system could not identify which statutes were involved.

The DoD OIG currently records complaints received over the DoD Hotline under several broad allegation categories. These categories do not identify the statutory basis for each alleged violation. Improvements to the DoD Hotline database made since the 1988 GAO report allow the Hotline to include information on violations of conflict of interest criminal statutes; however, that information may not be consistently and uniformly entered.

The Panel recommends the DoD OIG determine how the Hotline database can be improved to ensure consistency in identifying substantiated violations involving the Procurement Integrity Act and the conflict of interest criminal statutes (18 U.S.C. §§203-

representing back to his former Department during his one-year cooling off period. *U.S. vs. Seidel*, –USDC SD of California, Criminal Case No. 10-CR-3927 (2010): Violation of 18 U.S.C. §208 (Acts Affecting a Personal Financial Interest), Seidel participated personally and substantially in matters in which he knew that a contractor had a substantial financial interest, while he was negotiating for employment with that contractor.

³⁰ The Panel notes that there were some contrary perceptions as found in the anecdotal comments from current employees in a recent DoD Ethics survey. See Appendix D.

³¹ Lheureux, Richard (CPT USAF), *An Analysis of Conflict of Interest Law and the Effect those Laws have on the Post-Service Employment of Air Force Contracting Officers and Engineering Managers*, Thesis, December 20, 1988. See Attachment C of this report for a more detailed summary of this thesis.

³² GAO/GGD-88-34 (February 1988)

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209, including the post-government employment statute 18 U.S.C. §207), so that these cases can be more easily searched and identified by the statute violated.

The Panel also felt it was significant that the NAPA Observations' survey and focus groups of industry and government respondents (the "Respondents") found that they are satisfied with existing restrictions, and that these restrictions adequately protect the public interest. The respondents viewed recent high-profile corruption cases as isolated instances of determined criminal acts that will not be prevented by additional post-employment restrictions. In addition, discussions with senior ethics attorneys at the military department level indicated that the current post-employment restrictions protect the public's interests.

Nevertheless, as reported in the NAPA Observations, the Revolving Door Working Group³³ stated that the ability for senior officials to provide behind the scenes assistance to contractors during their cooling-off period posed the "most serious risk given its potentially corrupting influence on policy decision." The working group recommended the adoption of a time-limited ban on the employment of PAS and SES policymakers by contractors that have significantly benefited from policies they formulated while in government service.

The Panel does not view "behind the scenes" activities of former senior officials by contractors as a danger, *per se*. It recognizes that some current officials could seek to exercise improper influence in favor of a potential contractor-employer as long as the possibility of "behind the scenes" employment exists. The Panel does not agree with the Revolving Door Working Group that a complete time-limited employment ban is necessary to address the danger of undue influence by current senior officials in favor of prospective employees.

The Panel considers the multiple layers of existing statutory and regulatory restrictions to serve as adequate protection against the exercise of undue influence by current senior officials in favor of prospective employers. For example, under existing law, these officials would already have to disqualify themselves from participation in a matter involving their potential employer pursuant to 18 U.S.C. §208. Further, senior officials must disclose on their OGE 278 public disclosure report future plans and arrangements including employment when they file a termination report. In addition, officials who are subject to section 847 of the NDAA for FY08 must seek formal ethics advice prior to undertaking private employment with a defense contractor. Finally, as a result of the 2008 GAO study, a proposed change to the DFARS is being considered to require defense contractors to represent to the DoD that former DoD personnel have not violated 18 U.S.C.

³³ The membership of the Revolving Door Working Group can be found on bottom of page 9 of the NAPA Observations at Attachment F.

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§207 by working on the new project.³⁴ The Panel believes these multiple safeguards ensure adequate protection.

The Panel also considers that basing the restriction on whether the employee promulgated policies that “significantly benefited” their potential employer adds another subjective element to the post-government employment rules that may be difficult to comprehend and is subject to varying interpretation.

***FINDING:* A. Current post-employment restrictions appropriately protect the public interest and prevent former officials from exercising undue or inappropriate influence.**

Recommendation A. The DoD OIG determine how the Hotline database can be improved to ensure consistency in identifying substantiated violations involving the Procurement Integrity Act and the conflict of interest criminal statutes (18 U.S.C. §§203-209, including the post-government employment statute 18 U.S.C. §207), so that these cases can be more easily searched and identified by the statute violated.

B. Do the current post-employment restrictions appropriately require disclosure of personnel accepting employment with contractors of the Department of Defense involving matters related to their official duties?

Overall, the Panel was satisfied that existing disclosure rules provide an adequate level of transparency while preserving privacy and avoiding burdensome administrative requirements. Current disclosure rules reach DoD procurement officials and financial disclosure filers, and may soon reach contractors seeking to do business with DoD. This is the population that the Panel believes poses the greatest potential for conflicts of interest arising from the employment of DoD personnel by defense contractors.

The Panel analyzed this question from two perspectives – current personnel and former personnel.

Current Personnel. All DoD personnel are subject to the criminal conflict of interest prohibition of 18 U.S.C. §208.³⁵ This law makes it a crime for Executive Branch government personnel to take official action on a particular matter in which the individual has a personal financial interest. Under the law, when DoD personnel engage in employment negotiations with an outside company, the individual is considered to now have a personal financial interest in that company, similar to owning stock. The conflict of interest prohibition is a powerful disclosure tool. In order to avoid violating the law, the DoD Joint

³⁴ DFARS Case 2010-D020, *Representation Relating to Compensation of Former DoD Official*, discussed infra at Section VI. B. of this paper.

³⁵ Enlisted personnel are indirectly covered by Section 5-301 of DoD 5500.07-R (The Joint Ethics Regulation (JER)).

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Ethics Regulation requires that DoD personnel disqualify themselves in writing from participating in official matters affecting their prospective employer.³⁶ The written disqualification statement serves to notify an individual's supervisory and ethics chain of the potential for a conflict of interest so that any official matters that could affect the prospective employer may be assigned elsewhere.

Another important disclosure requirement is found in the Procurement Integrity Act at 41 U.S.C. §2103. Personnel involved in competitive procurements over the simplified acquisition threshold, currently \$150,000, must report to their supervisors and ethics counselors, any contacts with bidders or offerors regarding future employment, and must disqualify themselves from further participation if they do not immediately reject the contact.³⁷

These early disqualification notices are an important element of protecting both the individual from a criminal violation as well as protecting the public's interests. By making the notice to one's own supervisor, the individual places himself and the supervisory chain on notice that he can no longer perform functions that involve that potential employer.

DoD personnel who file financial disclosure reports are subject to additional requirements. Section 2-206 of The Joint Ethics Regulation (DoD 5500.7-R) requires that any DoD personnel, other than a Special Government Employee, who files a public or confidential financial disclosure report, must obtain approval from a supervisor or ethics counselor before accepting outside employment with a company that does business with DoD. This is a significant safeguard. There are tens of thousands of financial disclosure report filers in DoD.³⁸ All DoD personnel who hold sensitive acquisition positions should be financial disclosure report filers.

Personnel who file financial disclosure reports must also disclose outside employment as a "Financial Arrangement" on their report. Although this can be useful information, the timing of this disclosure reduces its value in identifying potential conflicts of interest. Confidential Financial Disclosure Reports (OGE 450)³⁹ are filed on an annual

³⁶ The Joint Ethics Regulation (DoD 5500.7-R), Section 2-204. Note that the written disqualification requirement is triggered at the point when an individual seeks employment, not at the acceptance of the employment.

³⁷ Prior to codification of Title 41, it appeared at 41 U.S.C. 423(c)

³⁸ For example, the Army reported that 56,165 Confidential Financial Disclosure reports (OGE 450) and 1,100 Public Financial Disclosure reports (SF 278) were filed by Army military and civilian personnel in 2009 (an additional 72 OGE 450 reports and five 278 reports were filed by Special Government Employees such as Advisory Committee members and experts).

³⁹ 5 CFR 2634.904 **Confidential filer defined.** The term confidential filer includes: (a) Each officer or employee in the executive branch whose position is classified at GS-15 or below of the General Schedule prescribed by U.S.C. 5332, or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate which is less than 120% of the minimum rate of basic pay for GS-15 of the General Schedule; each officer or employee of the United States Postal Service or Postal Rate Commission whose basic rate of pay is less than 120% of the minimum rate of basic pay for GS-15 of the General Schedule; each member of a uniformed service whose pay grade is less than O-7 under 37 U.S.C. 201; and each officer or employee in any other position determined by the designated agency ethics official to be of equal classification; if: (1) The agency concludes that the duties and responsibilities of the

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basis. Filers often leave DoD service for outside employment before the next report is due. Public Financial Disclosure Report (SF or OGE 278)⁴⁰ filers, including all General and Flag Officers and civilian members of the Senior Executive Service, must submit a termination report within 30 days after leaving Federal employment. Although information about outside employment must be reported, the disclosure is of limited utility as the termination report is filed after DoD employment has ended. Despite these shortcomings, the Panel determined that the multiple disclosure requirements discussed above are sufficiently robust to safeguard the public interest.

Nevertheless, the potential does exist for some DoD personnel to fall through the cracks. Notwithstanding the high number of financial disclosure filers, most DoD personnel are not subject to any financial disclosure requirement. There is no DoD-wide requirement that employees in this “Non-Filing Group” receive annual ethics training. As a result, some members of this group might not readily recognize a potential conflict of interest or be aware of the existence of the conflict of interest statute (18 U.S.C §208). One recommendation that could close this gap would be to require, by statute or regulation,

employee’s position require that employee to participate personally and substantially through decision or the exercise of significant judgment, in taking a Government action regarding: (i) Contracting or procurement; (ii) Administering or monitoring grants, subsidies, licenses, or other federally conferred financial or operational benefits; (iii) Regulating or auditing any non-Federal entity; or (iv) Other activities in which the final decision or action will have a direct and substantial economic effect on the interest of any non-Federal entity; or (2) The agency concludes that the duties and responsibilities of the employee’s position require the employee to file such a report to avoid involvement in a real or apparent conflict of interest, and to carry out the purposes behind any statute, Executive order, rule, or regulation applicable to or administered by that employee. Positions which might be subject to a reporting requirement under this subparagraph include those with duties which involve investigating or prosecuting violation of criminal or civil law.

⁴⁰ 5 CFR 2634.202 **Public filer defined.** The term public filer includes: (a) The President; (b) The Vice President; (c) Each officer or employee in the executive branch, including a special Government employee as defined in 18 U.S.C. 202(a), whose position is classified above GS15 of the General Schedule prescribed by 5 U.S.C. 5332, or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate equal to or greater than 120% of the minimum rate of basic pay for GS15 of the General Schedule; each member of a uniformed service whose pay grade is at or in excess of O7 under 37 U.S.C. 201; and each officer or employee in any other position determined by the Director of the Office of Government Ethics to be of equal classification; (d) Each employee who is an administrative law judge appointed pursuant to 5 U.S.C. 3105; (e) Any employee not otherwise described in paragraph (c) of this section who is in a position in the executive branch which is excepted from the competitive service by reason of being of a confidential or policy-making character, unless excluded by virtue of a determination under 2634.203 of this subpart; (f) The Postmaster General, the Deputy Postmaster General, each Governor of the Board of Governors of the United States Postal Service and each officer or employee of the United States Postal Service or Postal Rate Commission whose basic rate of pay is equal to or greater than 120% of the minimum rate of basic pay for GS15 of the General Schedule; (g) The Director of the Office of Government Ethics and each agency's primary designated agency ethics official; (h) Any civilian employee not otherwise described in paragraph (c) of this section who is employed in the Executive Office of the President (other than a special Government employee, as defined in 18 U.S.C. 202(a)) and holds a commission of appointment from the President; and (i) Anyone whose employment in a position or office described in paragraphs (a) through (h) of this section has terminated, but who has not yet satisfied the filing requirements of 2634.201(e) of this subpart.

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that members of the “Non-Filing Group” report all employment negotiations with defense contractors to their supervisor or ethics counselor.

The Panel has not adopted this recommendation. The employment of members of the “Non-Filing Group” by defense contractors generally poses a lower danger of potential conflicts with that individual’s former official duties. The creation of a sweeping new disclosure requirement would impose an unwarranted administrative burden on both employees and the organization. The Joint Ethics Regulation already requires that all DoD personnel, including those in the “Non-Filing Group,” receive guidance about relevant Federal and DoD post-government service employment restrictions as part of out-processing procedures when leaving Federal employment.⁴¹ Finally, the data collected for this report did not lead the Panel to conclude that the “Non-Filing Group” was an area of special concern.

Former Personnel. The rules noted above adequately require disclosure by current DoD personnel when they depart the government to take a position with a contractor. But what about the situation where individuals who have already departed Federal service, seek a job at a later date? The rules cited above do not require them to make any disclosures. This is not to say, however, that the public is not protected. As described elsewhere in this report, other significant post-government employment restrictions still apply to many of these former officials, such as the criminal representation restrictions in 18 U.S.C. §207, and the requirement found in section 847 of the NDAA for FY08 that certain former officials must seek ethics advice from a DoD ethics official in order to accept compensation from a defense contractor.

A new disclosure requirement has also been proposed within DoD that will apply to firms submitting proposals for new contracts. Under the draft amendment to the Defense Federal Acquisition Regulation Supplement (DFARS), offerors must represent in their proposals that all former DoD personnel who may work on the potential contract are able to do so without violating 18 U.S.C. §207.⁴² If implemented, this places an affirmative duty on contractors to ensure that their employees are in compliance with post-government employment restrictions.

Another recommendation that the Panel considered was to improve transparency in government by imposing a requirement that all meetings between contractors and government officials be disclosed. The Panel has not adopted this sweeping recommendation because there are presumably thousands of routine meetings going on at all levels on a daily basis, and it is not clear to whom such a disclosure should be made.

⁴¹ The Joint Ethics Regulation (DoD 5500.7-R), Section 9-502.

⁴² See, DFARS Case 2010-D020 “Representation Relating to Compensation of Former DoD Officials”

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***FINDING:* B. The current post-employment restrictions appropriately require disclosure of personnel accepting employment with contractors of the Department of Defense involving matters related to their official duties.**

Recommendation B. None.

C. Do the current post-employment rules use appropriate thresholds, in terms of salary or duties, for establishment of such restrictions?

The restrictions contained in 18 U.S.C. §207(c) are based on the individual's salary. The salary threshold may change. For 2010 and 2011, a Federal officials' base pay of \$155,440.50 or more would subject them to a one-year cooling off period where they could not represent a person or entity before DoD subject to a separate components rule discussed above. This covers 80% of all SES. The restriction also covers all General and Flag Officers. As to coverage of political appointees, see III, paragraph D of this report.

The restrictions under the Procurement Integrity Act and Sec. 847 of the NDAA for FY08 are based on the dollar value of the "particular matter involving specific parties." The restrictions are triggered when the particular matter is \$10 million or more.

Discussions with senior ethics attorneys at the military department level found they had no objection to the current pay thresholds for the various representation bans in 18 U.S.C. §207 or under the Procurement Integrity Act. Of those responding to the questions for Defense Science Board and the Panel on Contracting Integrity, 60% thought the thresholds were appropriate, while the remaining 40% thought they were arbitrary.

The focus groups and interviews performed as part of the NAPA Observations provided several insights in this topic area. They noted that while no significant concern was expressed about the use of authority and pay thresholds *per se*, some respondents disagreed with the across-the-board application of restrictions, especially the cooling-off period, based solely on these thresholds. This minority favored a more targeted and sophisticated approach that focuses on desired policy outcomes and balances the potential risks to the public interest and to the employment options of former DoD personnel and DoD's access to the best talent.

Several NAPA interviewees offered suggestions in keeping with the more targeted and sophisticated approach, including:

- (1) limiting the DoD-wide cooling-off restrictions to PAS positions in OSD;
- (2) imposing tougher restrictions (e.g., a time-limited employment ban) on a limited set of PAS positions when needed, while relaxing restrictions on other PAS positions;

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(3) providing for alternative employment in the case of an employment ban (e.g., providing for departing senior officials to work in think tanks/FFRDCs and allow them to earn a living while working productively in the defense area); and

(4) reducing the restrictions on those officials who serve less than some minimum time.

As indicated in the NAPA Observations, in a 2006 review of post-employment restrictions, the Office of Government Ethics (OGE) discussed several options for setting the pay and authority thresholds and for defining senior civilian officials and the trade-offs they would entail. Ultimately, OGE did not recommend any changes to the existing thresholds. OGE did recommend the expansion of the existing exceptions to 18 U.S.C. §207(j) to include not just communications on scientific and technical subjects, but also communications with former individuals who possess “unique knowledge or perspectives in fields such as national security or other fields involving specialized knowledge.” The Panel strongly concurs with this 2006 OGE recommendation which would require adding an additional exception to 18 U.S.C. §207(j).

In the past, others have called for a variety of alternative approaches to protecting the public interest, including improved procurement oversight, better enforcement of existing statutes, and expanding disclosure and certification requirements to increase transparency in the procurement process.

Although many of the ideas have merit, the breadth and variance among the duties performed by DoD officials makes the use of common government-wide thresholds -- coupled with the existing across-the-board restrictions -- a reasonable and practical way to provide post-employment protections. Significantly more tailored approaches would require making the rules even more cumbersome to interpret and implement.

Due to the potential for undue influence, the Panel is concerned about whether the one-year cooling-off period of 18 U.S.C. §207(c) is being applied too narrowly within DoD with respect to senior officials leaving government service from a Joint Command. The Panel received a recommendation to expand the cooling-off period, perhaps up to five years, and, with respect to three- and four-star officers, to even expand the cooling-off restriction to include the entire DoD.

The Panel does not agree that extending the time period of the representation cooling-off period would result in any fruitful additional protections. However, the Panel does recommend that the DoD General Counsel examine two areas:

- Whether the representation restriction should be expanded to apply to subordinate commands of the Joint Commands. For example, for USTRANSCOM this restriction would also include the components, Military Surface and Deployment Distribution Command (Army), Military Sealift Command (Navy)

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and Air Mobility Command (Air Force); and,

- Whether three- and four-star officers and SES Tier III officials should not be able to take advantage of appearing before DoD separate components for purposes of 18 U.S.C. §207(c) during their respective one-year cooling off period because they have potential influence well beyond their own service or command.

FINDING: C. Although not perfect, current post-employment restrictions thresholds are appropriate, in terms of salary or duties, for the establishment of such restrictions.

Recommendation C-1. The Panel recommends that the DoD General Counsel examine whether the one-year cooling-off period of 18 U.S.C. §207(c) should be expanded to apply to subordinate commands of Joint Commands.

Recommendation C-2. The Panel recommends that the DoD General Counsel examine whether three- and four-star officers and members of the Senior Executive Service holding Tier III positions should not be able to take advantage of appearing before the DoD separate components during their respective one-year cooling off.

Recommendation C-3. In accordance with OGE recommendations, add an additional exception to 18 U.S.C. §207(j) for former personnel who possess “unique knowledge or perspectives in fields such as national security or other fields involving specialized knowledge.”

D. Are the rules sufficiently straightforward and have they been explained to personnel of the Department of Defense so that such personnel are able to avoid potential violations of post-employment restrictions and conflicts of interest in interactions with former personnel of the Department?

This provision of section 833 raises two distinct questions: 1. Are the post-government employment rules sufficiently straightforward and understandable; and, 2. Are DoD personnel receiving adequate training on the rules so that they are able to avoid potential violations? With regard to the issue of ethics training, the Panel examined this question from the perspectives of both current and former personnel.

1. Are the rules themselves straightforward and understandable?

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This is a difficult question to answer precisely because what may be obviously clear to one person may be incomprehensible to the next. In the course of preparing this report, the Panel viewed the numerous laws and regulations as discussed in Section IV of this report.

This list is quite challenging. For example, 18 U.S.C. §207 is 14 pages long, and its implementing regulation runs to 24 pages. Ethics officials must be aware of all the post-employment rules, regulations, executive orders, and statutes or they could easily be providing improper advice. 18 U.S.C. §207(c) imposes a one-year cooling-off period for senior officials from representing someone or an entity back before the government. Executive Order 13490 extends that cooling off period to two years for senior political appointees.

The presence of concepts in 18 U.S.C. §207(a) such as “particular matter involving specific parties;” “personal and substantial participation;” and particular matters that a person “knows or reasonably should know was actually ending under his official responsibility,” lead to varying interpretations by ethics counselors who are advising DoD personnel.⁴³

The existing post-employment restrictions were promulgated in piecemeal fashion and can reflect different approaches, sometimes within the same statute. 18 U.S.C. §207(c), the one-year cooling-off period, for example, takes the approach of a blanket restriction that applies to virtually all communications by a limited group of senior personnel. 18 U.S.C. §207(a), on the other hand, applies to all federal officers or employees, but takes the more tailored approach of limiting the restriction to communications concerning “particular matters involving specific parties.” In addition, whereas 18 U.S.C. §207(a) applies to communications made to any U.S. government official, 18 U.S.C. §207(c) extends only to communications made to officials assigned to the former officer or employee’s former agency.

The Panel considered comments submitted to the NAPA Observations indicating that restrictions should be more tailored to specific job categories, such as certain PAS positions. While the Panel agrees with this assessment, it also notes that there is generally a direct relationship between the complexity of the rules and tailoring them to specific situations so that they are not overbroad. Considered merely from the standpoint of being a straightforward concept, the “one-year blanket cooling-off” restriction is easier to understand by individuals than the restrictions in 18 U.S.C. § 207(a)(1) and (2) that require an understanding of terms like “particular matters involving specific parties”, “personal and substantial” participation. A blanket rule is also less dependent on the availability and characterization of the relevant facts. On the other hand, although blanket rules may be

⁴³ The Panel notes that 5 CFR Part 2641, the relatively new OGE regulation that implements the 18 U.S.C. §207 restrictions, is clearly written and provides useful guidance and examples that have improved the quality and consistency of ethics advice in this area.

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easier to understand and administer than more complex tailored rules, they may also be overly broad and less equitable.

The Panel recognizes that diverse approaches and a degree of complexity are unavoidable because of the need to balance the public interest against the need to attract talent to DoD and to offer opportunities for DoD personnel. Although the current rules cannot be said to be straightforward, in the Panel's opinion they present an integrated and balanced set of rules in this complex area. With proper training and enforcement, the current restrictions can provide effective protections.

2. Are DoD personnel receiving adequate training on the rules so that they are able to avoid potential violations?

Current DoD Personnel. Given the difficulty in comprehending the volume of rules, it follows how difficult it can be in explaining the rules. This is quite a challenge. The Joint Ethics Regulation (JER) DoD 5500.7-R, through a Memorandum of the Deputy Secretary of Defense, dated October 25, 2004, mandates that discussion about post-employment restrictions be included in all annual ethics training. In addition, JER 9-502 requires that all personnel receive post-employment guidance as they prepare to depart government service.

Interviews with senior ethics attorneys at the Military Department level indicated that the current requirements are adequate in most cases. The Panel shares this conclusion but recognizes that there are some shortcomings. The mandate for annual training only applies to those individuals who file financial disclosure statements. The JER 9-502 briefing, although a valuable safeguard, might occur after an individual has already accepted a job offer.

According to the NAPA Observations, senior officials and former personnel found the rules complex, and recommended they be simplified, particularly the two-year restriction for matters pending under an official's supervisory responsibility under 18 U.S.C. §207(a) (2). Although not necessarily a representative sample of opinion, many of the comments submitted by DoD acquisition community respondents to an ethics survey indicated a misunderstanding of the ethics rules (see Appendix D). For example, some respondents erroneously believed that DoD employees were prohibited from being hired in any capacity by any contractor with which they had dealt as a DoD official. As acquisition officials, many of the respondents should have received annual ethics training.

It is not known whether the reason for this lack of understanding is inadequate training, the complexity of the post-employment restrictions, or a measure of both. It also seems quite possible that regardless of the availability and quality of training, some people will simply not focus on the details of the post-government employment rules until they are personally affected by them. For this reason, the Panel recommends that ethics training be both rules/compliance based, and also values based. The goal should be to imbue everyday

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actions and decision-making with ethical thinking and a culture of integrity. For this to be most effective, ethics training should be taught in small groups by organization leaders and supervisors. The training should also include examples and a discussion of the proper protocol to follow when involved in business contacts with former DOD personnel.

The NAPA Observations also found inconsistencies in interpreting the post-employment restrictions. This is not too surprising, given the complexity of the rules. For example, some like the representational ban of 18 U.S.C. §207(a), contain subjective elements such as “personal and substantial participation”. This is a highly fact dependent determination. Given these constraints, different ethics officials might understandably reach inconsistent legal conclusions. There should be no such inconsistency, however, when it comes to simply informing personnel of the rules.

Several prudent steps could be taken to reduce the inconsistent interpretation of the ethics rules among ethics counselors. As a best practice, the panel recommends that review protocols be established for post-government employment opinion letters. A standard format for such opinions would also enhance the consistency of the legal analysis and facilitate efficient review and better understanding of the opinions. Finally, in an expansion of the Section 847 requirement, the panel recommends that all post-government employment ethics opinions be maintained in a central repository and be available on a need to know basis.

Former DoD Personnel. Although DoD does not provide ethics training for former officials after they leave Federal employment, it has recently taken an important step to ensure that this responsibility is taken up by employing defense contractors.

FAR Subpart 3.10 requires that contractors that have a non-commercial item contract over \$5 million with a performance period of over 120 days, have a written code of business ethics and conduct. FAR 3.1002(b) requires that the contractor institute an ethics and compliance training program to facilitate the timely discovery and disclosure of improper conduct and to ensure that corrective measures are taken.

The contract clause at FAR 52.203-13 states that the training program, “... shall include reasonable steps to communicate periodically and in a practical manner the Contractor’s standards and procedures and other aspects of the Contractor’s business ethics awareness and compliance program and internal control system...” and otherwise disseminating information appropriate to an individual’s respective roles and responsibilities. The training must be provided to the Contractor’s principals and employees, if appropriate, also to the contractor’s agents and subcontractors.

In addition, as discussed previously, former DoD personnel who are subject to section 847 of the NDAA for FY08 must seek ethics advice from a DoD ethics counselor. This process affords an opportunity to review the post-government employment restrictions with them. Former DoD officials who are not subject to section 847 may also

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request supplemental post-government employment ethics advice from a DoD ethics counselor.⁴⁴

The Panel believes that the issue of undue influence by former senior military officers merits special attention. The military is a uniquely hierarchical society which is highly sensitive to rank. Military courtesy demands that retired senior officers are afforded great deference and respect. While this courtesy is earned and deserved, it can pose a problem when the former officer is acting as a representative of private interests. As a practical matter, it is very difficult for any military staff officer or leader to say “no” to a retired three- or four-star General or Flag officer who requests a meeting on behalf of a defense contractor. Upon retirement, former senior officers may be sought out by companies or organizations for their ability to “open doors” (after the expiration of any applicable cooling-off period(s)).

The Panel has no data to indicate that former officers actually exercise undue influence in DoD decision-making. The appearance and the potential for harm, however, are enough to undermine public confidence in the procurement process. News stories and articles, such as recently appeared in the Boston Globe, all too often describe a scenario of undue deference and open access to DoD officials by retired General Officers who are representing the interests of defense contractors.⁴⁵ As described in Section VIII, Attachment D, the perception of undue influence is also prevalent in many of the comments submitted by DoD personnel in response to an ethics survey.⁴⁶

The one-year cooling-off period, and the two-year and lifetime representational restrictions, contained 18 U.S.C §207 already provide significant protection in this area and do not need to be expanded or modified. Some additional steps, however, should be taken by DoD in view of its unique military culture.

In Section VI-B, the Panel recommended that a log be maintained of all meetings with former senior DoD officials, including a disclosure of who they represent, in order to enhance transparency. The Panel also recommends that appropriate policies and procedures be established at the DoD or Service Component Headquarters level to ensure that former DoD officials, such as retired General and Flag Officers, are not afforded special access or preferential treatment when representing non-Federal organizations. DoD personnel, including senior officials, Executive Officers, and Chiefs of Staff, must also be trained about the ethical considerations of meeting with former senior officials and be given clear guidelines about how to handle meeting requests.

Finally, to some degree, the lack of understanding of the ethics rules presents a public relations challenge. The Panel recommends that Public Affairs be enlisted to help

⁴⁴ In providing ethics advice to current and former employees, DoD ethics counselors represent the agency and do not enter into an attorney-client relationship with the employee. See JER 9-500

⁴⁵ *From the Pentagon to the Private Sector*, by Bryan Bender. Boston Globe, December 26, 2010.

⁴⁶ As reflected in Attachment D, these comments are not necessarily a representative sample of opinion among DoD employees.

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dispel misconceptions among both DoD personnel and the public concerning the ethics restrictions, and to explain how the current restrictions protect the national interest.

FINDING: D. Current post-employment rules are not always straightforward, but – with proper training and enforcement – they provide adequate protection.

Recommendation D-1. Establish a standard format and review protocol for post-government employment ethics opinion letters.

Recommendation D-2. Maintain all post-government employment ethics opinion letters in a central repository.

Recommendation D-3. DoD establish Values-Based Ethics training to be taught by the individual's own organizational leaders or supervisors⁴⁷.

Recommendation D-4. Enlist Public Affairs to help educate DoD personnel and the public about how the ethics rules protect the national interest

Recommendation D-5. DoD personnel, including senior officials, Executive Officers, and Chiefs of Staff, must also be trained about the ethical considerations of meeting with former senior officials and be given clear guidelines about how to handle meeting requests.

E. Do the post-employment restrictions rules appropriately apply to all personnel performing duties in acquisition-related activities?

Such as personnel involved in:
--The establishment of requirements;
--Testing and evaluation; and
--The development of doctrine.

As noted earlier in this report, the post-employment restrictions apply to a wide range of individuals. The Panel is not aware of any restrictions that expressly refer to those personnel who establish requirements, do testing and evaluation, or develop doctrine. These classes of individuals can still be covered by most of the current post-retirement restrictions based upon their involvement in any "particular matter."

⁴⁷ The Panel notes that its own Subcommittee 10 is currently engaged in a study examining how best to present values-based training.

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Post-employment restrictions may attach to personnel performing acquisition-related activities via several paths. First, the post-employment restrictions under the Procurement Integrity Act and the NDAA for FY08, section 847 apply to individuals holding certain delineated positions involved in acquisitions of \$10 million or more. These include:

- Individuals acting as program managers, deputy program managers, procuring contracting officers, administrative contracting officers, source selection authorities, members of the source selection evaluation board, and chiefs of a financial or technical evaluation team for a contract; or,
- Individuals who establish overhead or other rates applicable to a contract or contracts that are valued in excess of \$10 million; or,
- Individuals that approve issuance of a contract payment or payments in excess of \$10 million, or
- Individuals that authorize the payment or settlement of a claim in excess of \$10 million.

Another path to reach those performing duties in acquisition related activities is through a look at the duties performed by an individual. This major source of post-government employment restrictions, 18 U.S.C. §207(a), is not targeted at identified job positions, as in the Procurement Integrity Act, but rather imposes representational restrictions that are triggered by the duties performed by the individual concerning a particular matter involving specific parties, such as regarding a procurement, contract, or claim. The two-year and lifetime representation bans contained in 18 U.S.C. §207(a) have no dollar threshold and apply to all individuals who (a) have particular matters pending under their official responsibility, or (b) personally and substantially participate in the particular matter. Although certain elements of the law, such as personal and substantial participation, are open to varying interpretation, the Panel feels that this law appropriately covers most of the acquisition related duties performed by DoD personnel.

The NAPA Observations concluded that there was no significant concern expressed about the appropriateness of the restrictions applied to personnel performing acquisition-related activities. Some DoD officials who participated in the NAPA interviews did comment that members of “this group” might not be as aware of the restrictions as they need to be. The NAPA Observations did not specify how NAPA categorized personnel performing acquisition-related activities. Discussions with senior ethics attorneys at the military department level indicated similar conclusions to the NAPA Observations.

The Panel asked members of the Defense Science Board and the senior members of the Panel on Contracting Integrity whether they believed that the rules were appropriately applied to DoD personnel performing duties in the following three acquisition-related activities: (1) establishment of requirements, (2) testing and evaluation, and (3) development of policy. It was only in the area of the development of requirements that the respondents expressed reservations; approximately, 40% felt that too little attention is

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paid to the developers of requirements. The Panel agrees with this observation and recommends that DoD ensure that individuals who develop and provide requirements receive ethics training so they understand how their actions will shape their post-employment options.

It is interesting to note that DoD has established Critical Acquisition Positions⁴⁸ (CAPs) that include various types of engineers, auditors, computer scientists, price or cost analysts, technical assessment managers, customer liaison representatives, earned valued management specialists, logistics specialists and IT specialists. The term Critical Acquisition Positions (CAP) and the CAP positions themselves are not referenced in the statutes and regulations dealing with post-government employment restrictions, financial disclosure requirements, and ethics training. The Panel notes that this is an area where a more integrated approach could be helpful in identifying a class of personnel who are engaged in the type of acquisition-related duties to whom these rules should apply. A cross-walk is needed between the CAPs and the ethics requirements to ensure appropriate coverage.

FINDING: E. Post-employment restrictions rules adequately apply to DoD personnel who are performing acquisition-related activities; however, there is some concern that these personnel may not be fully aware of how the restrictions apply to themselves.

Recommendation E-1. A crosswalk is needed between the Critical Acquisition Positions (CAP) and the ethics requirements to ensure appropriate coverage.

Recommendation E-2. Ensure that individuals who develop and provide requirements receive ethics training so they understand how their actions will shape their post-employment options.

F. Do the current rules ensure that the DOD has access to world-class talent, especially with respect to highly qualified technical, engineering, and acquisition expertise?

Working in Federal government will likely always be an attractive career option. For many, the chance to perform public service while receiving invaluable training and experience is a major recruitment attraction. Today's long list of quality personnel benefits and job security also are attractive. But do these key attractions sufficiently outweigh the impacts of the Post-Retirement Restrictions to ensure DoD has access to the world class talent it needs? The Panel analyzed this question by examining three different, but closely

⁴⁸ See <http://www.dau.mil/workforce/pages/caps.aspx>

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related groups of personnel – PAS and non-career SES; scientific and technical experts; and, all other classes of employees.

Based on an informal survey, and the NAPA Observations, the myriad of post-employment restrictions are a factor in the Department's ability to recruit talented scientists and engineers and contracting personnel. The Senate Armed Services Committee (SASC) divestiture requirement discussed in Footnote 54, was cited as a factor for Presidential appointees confirmed by the Senate to turn down offered positions. In addition, some individuals employed under the Intergovernmental Personal Act (IPA) may be hesitant to work on certain DoD matters because they could be restricted from working on those matters after leaving the government.

PAS and non-career SES. From the Panel's research, this class of employees was the one which received the most comments and concerns. According to the NAPA Observations, most government and industry respondents believe that DoD's ability to attract the most qualified individuals to serve in these senior politically-appointed policy-making positions has declined significantly over the past years.

This decline was generally attributed to a combination of factors that have made public service less attractive over time, including: a complex and costly White House clearance process; a hostile and protracted confirmation process (in the case of PAS), financial divestiture requirements; and the "negative atmosphere" surrounding government-industry interchange in recent years; as well as the significant pay cut often entailed by public service. It is very important to point out that while post-employment restrictions are generally seen as an important consideration, they are not the most important factor in a decision to choose federal service.

All other categories of employees. Industry and government respondents also expressed particular concern about DoD's declining ability to attract mid-career private sector professionals from industry to serve in key politically-appointed policy-making positions. Some respondents commented that restrictions are becoming a more important factor in light of changing career patterns.⁴⁹ For example, younger people are less likely to enter the government with the expectation of staying until retirement. Instead, just like many areas in the private sector, they enter with the expectation of staying for only a limited period of time and then leaving for opportunities elsewhere. Therefore, the prospect of post-employment restrictions might not deter them from entering government at the beginning of their career; but the rules might hinder their decision to return to the government in the middle of their career.

A 1992 Committee on Science, Engineering, and Public Policy [COSEPUP]⁵⁰ report, issued prior to the expansion of post-employment restrictions in recent years, provides

⁴⁹ See Attachment F. [NAPA Observations at Page 14]

⁵⁰ Ibid at Page 13 and 27.

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some evidence that post-employment restrictions may be a more significant barrier to recruitment of top scientific, technical, and related management talent for PAS positions. It reported: "According to presidential recruiters as well as scientists and engineers who have been approached by recruiters, the laws restricting post-government employment have become the single biggest disincentive to public service, now that pay levels have been increased substantially." Of particular concern is the potential scope of restrictions on the post-government employment of those serving in PAS positions with broad procurement oversight responsibilities.

The Panel believes there are more than enough rules as evidenced by the respondents' comments. These same respondents are concerned that additional restrictions will only further constrain DoD's ability to attract talent.

Especially at the more senior levels, the option to be a Federal employee must remain competitive with private sector counterparts who offer high salaries without the post-employment ethics restrictions. The government must continue to make the case for DoD service despite these restrictions. From the Panel's research and surveys conducted, it does not appear that the restrictions have hindered the ability to attract talent from the private sector; however, it does appear that lack of education about the post-employment rules has led to some significant misunderstanding on the part of personnel leaving government employment who have noted some surprise regarding what they can and cannot do when they return to the private sector.

Some have argued that the Secretary of Defense's Policy on Senior Mentors, April 1, 2010, is in the nature of a post-employment restriction. That policy is implemented in DFARS 237.102-73. The policy establishes how the Department would purchase senior mentor services.⁵¹ Up until this policy was implemented, many mentors were being hired via the contracting process with significant compensation and limited ethics rules. By the new policy, all such senior mentors must now be hired as "highly qualified experts (HQEs)" (5 U.S.C. 9903) and are required to comply with all applicable Federal personnel and ethics laws and regulations. While this has caused some change in the process, the Panel has not heard of major actual complaints about not being able to get the expertise needed.⁵²

⁵¹ "For the purposes of this policy, "senior mentor" means a retired flag, general or other military officer or senior retired civilian official who provides expert experience-based mentoring, teaching, training, advice, and recommendations to senior military officer, staffs and students as they participate in war games, warfighting courses, operational planning, operational exercise, and decision-making exercises." SecDef Memo Apr 1, 2010, Subject: Policy on Senior Mentors

⁵² It has come to the Panel's attention that the number of individuals providing mentor services under contract in 2009-2010 was over 450 and there are now roughly 21 HQE senior mentors providing services to DOD. To the extent that the services previously being provided under contract were providing required expertise, it could appear that the HQE Senior Mentor policy has reduced DoD's ability to obtain that expertise. In the Panel's judgment, it is premature to reach such a conclusion.

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Federally Funded Research and Development Centers (FFRDCs) Employees.

Current post-employment ethics rules apply equally to non-profit FFRDCs⁵³ and to for-profit defense contractors. The Panel heard from senior contracting and legal personnel from one combatant command, and from a senior leader at one of the FFRDC's, on the impact of post-employment conflicts of interest. Both contend that because FFRDCs are required to operate in the public interest, the risk of a conflict of interest, actual or perceived, arising from the movement of personnel between the government and the FFRDCs is reduced. Moreover, because of an FFRDC's unique relationship to the government, it can attract top talent to its ranks. The government obtains a direct benefit from that qualified pool of experts, particularly under special employment provisions like those provided by the Intergovernmental Personnel Act (IPA).⁵⁴ These IPA provisions allow the government to "borrow" highly qualified experts from FFRDCs (and others). Then, after a specified period of time, the individual returns to the FFRDC.

It is important to note that the post-employment rules also apply to individuals who transfer from FFRDCs to the government utilizing the IPA authority. Some argue that by applying the rules to such individuals, it demands a high price from both the FFRDC and the individual. For example, depending upon the nature of the work performed by an IPA transferee while with the government, the transferee's talent may no longer be available to the FFRDC upon return because the post-employment restriction rules might cause a conflict for other work. Thus, a risk to DoD for participating in IPA - FFRDC swaps, is the possible diminution of the top expert talent pool within the FFRDC. An exception in 18 U.S.C. §207(j) similar to that for state universities at (j)(2) would be one appropriate to solve this issue.

By contrast, personnel in Acquisition, Technology and Logistics at DoD directly involved with the FFRDCs paint a different picture. They believe that the FFRDCs play an important role in assisting the Department. But they do not believe that very many IPAs from the FFRDCs are confronted with the post-employment problem. Of the few that could be, they recommend that the Department take advantage of current exceptions in 18 U.S.C. §207, such as the one at 207(j)(5).⁵⁵ The Panel agrees with this approach and does not recommend a legislative change to the statute at this time.

⁵³ FAR 35.017

⁵⁴ Intergovernmental Personnel Act of 1970, (5 U.S.C. § 3371 et seq.).

⁵⁵ 18 U.S.C. §207 (j) (5): Exception for scientific or technological information. - The restrictions contained in subsections (a), (c), and (d) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee. For purposes of this paragraph, the term "officer or employee" includes the Vice President.

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FINDING: F. Current post-employment rules have some impact on the ease of accessing non-career, highly qualified technical, engineering, and acquisition expertise.

Recommendation F. That DoD explore whether the current exceptions in 18 U.S.C. §207(j) may appropriately accommodate FFRDC employees who seek to represent back to the government.

G. Do the current rules adequately ensure that service in the Department of Defense remains an attractive career option?

During the Panel's extensive review of the impacts caused by the full range of post-employment restriction rules, the Panel found no concrete evidence that the rules themselves negatively impact an individual's decision to make service in the Department of Defense a career option. As noted in F above, there may be some impact with respect to PAS, senior, or expert individuals joining the Department late in their career.

Career choices are usually made earlier in one's working life rather than later. In addition, most of the significant post-retirement restrictions apply to those types of jobs that often do come later in a career, e.g., Project Manager; Program Level Contracting Officer. The NAPA Observations did not find the post-employment restrictions were hampering individual career options with DoD.

In its research, the Panel only found one instance where a personnel office advised that the post-employment restrictions were negatively affecting its ability to recruit. This was in the Defense Advanced Research Projects Agency (DARPA) which had trouble recruiting career scientists.

FINDING: G. Post-employment restrictions have some impact on individual decisions to make service in the DoD an attractive career option.⁵⁶

Recommendation G. None.

⁵⁶ While not involving post employment, in gathering information on recruitment and retention, we learned of a Senate Armed Services Committee policy that some people have found burdensome. Unlike other appointees, the PAS must be confirmed by the Senate. The Senate Armed Services Committee (SASC) requires all PAS to divest of all stock holdings of companies that have contracts with DoD of \$25,000. or more. This requirement may impact a PAS candidate's pension plan, because any stock in the pension plan that is on the listing must be divested. Note that this is not a statutory based rule, but rather a rule imposed by the SASC itself. Some individuals have declined to pursue confirmation because of this restriction.

VI. SUMMARY OF FINDINGS AND RECOMMENDATIONS

FINDING: A. Current post-employment restrictions appropriately protect the public interest and prevent former officials from exercising undue or inappropriate influence.

Recommendation A. The DoD OIG determine how the Hotline database can be improved to ensure consistency in identifying substantiated violations involving the Procurement Integrity Act and the conflict of interest criminal statutes (18 U.S.C. §§203-209, including the post-government employment statute 18 U.S.C. §207), so that these cases can be more easily searched and identified by the statute violated.

FINDING: B. The current post-employment restrictions appropriately require disclosure of personnel accepting employment with contractors of the Department of Defense involving matters related to their official duties.

Recommendation B. None.

FINDING: C. Although not perfect, current post-employment restrictions thresholds are appropriate, in terms of salary or duties, for the establishment of such restrictions.

Recommendation C-1. The Panel recommends that the DoD General Counsel examine whether the one-year cooling-off period of 18 U.S.C. §207(c) should be expanded to apply to subordinate commands of Joint Commands.

Recommendation C-2. The Panel recommends that the DoD General Counsel examine whether three and four star officers and members of the Senior Executive Service holding Tier III positions should not be able to take advantage of appearing before the DoD separate components during their respective one-year cooling off.

Recommendation C-3. In accordance with OGE recommendations, add an additional exception to 18 U.S.C. §207(j) for former personnel who possess “unique knowledge or perspectives in fields such as national security or other fields involving specialized knowledge.”

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FINDING: D. Current post-employment rules are not always straightforward, but – with proper training and enforcement – they provide adequate protection.

Recommendation D-1. Establish a standard format and review protocol for post-government employment ethics opinion letters.

Recommendation D-2. Maintain all post-government employment ethics opinion letters in a central repository.

Recommendation D-3. DoD establish Values-Based Ethics training to be taught by the individual's own organizational leaders or supervisors.⁵⁷

Recommendation D-4. Enlist Public Affairs to help educate DoD personnel and the public about how the ethics rules protect the national interest

Recommendation D-5. DoD personnel, including senior officials, Executive Officers, and Chiefs of Staff, must also be trained about the ethical considerations of meeting with former senior officials and be given clear guidelines about how to handle meeting requests.

FINDING: E. Post-employment restrictions rules adequately apply to DoD personnel who are performing acquisition-related activities; however, there is some concern that these personnel may not be fully aware of how these restrictions apply to themselves.

Recommendation E-1. A crosswalk is needed between the Critical Acquisition Positions (CAP) and the ethics requirements to ensure appropriate coverage.

Recommendation E-2. Ensure that individuals who develop and provide requirements receive ethics training so they understand how their actions will shape their post-employment options

FINDING: F. Current post-employment rules have some impact on the ease of accessing non-career, highly qualified technical, engineering, and acquisition expertise.

Recommendation F. That DoD explore whether the current exceptions to 207(j) may appropriately accommodate FFRDC employees who seek to represent back to the government.

⁵⁷ The Panel notes that its own Subcommittee 10 is currently engaged in a study examining how best to present values based training.

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FINDING: G. Post-employment restrictions have some impact on individual decisions to make service in the DoD an attractive career option.

Recommendation G. None.

VII. ATTACHMENTS/EXHIBITS

Attachment A: Sec. 833 of Public Law 111-84; NDAA for FY 2010

SEC. 833. REVIEW OF POST-EMPLOYMENT RESTRICTIONS APPLICABLE TO THE DEPARTMENT OF DEFENSE.

(a) REVIEW REQUIRED.—The Panel on Contracting Integrity, established pursuant to section 813 of the John Warner NDAA for FY07 (Public Law 109- 364), shall review policies relating to post-employment restrictions on former Department of Defense personnel to determine whether such policies adequately protect the public interest, without unreasonably limiting future employment options for former Department of Defense personnel.

(b) MATTERS CONSIDERED.—In performing the review required by subsection (a), the Panel shall consider the extent to which current post-employment restrictions—

(1) appropriately protect the public interest by preventing personal conflicts of interests and preventing former Department of Defense officials from exercising undue or inappropriate influence on the Department of Defense;

(2) appropriately require disclosure of personnel accepting employment with contractors of the Department of Defense involving matters related to their official duties;

(3) use appropriate thresholds, in terms of salary or duties, for the establishment of such restrictions;

(4) are sufficiently straightforward and have been explained to personnel of the Department of Defense so that such personnel are able to avoid potential violations of post-employment restrictions and conflicts of interest in interactions with former personnel of the Department;

(5) appropriately apply to all personnel performing duties in acquisition-related activities, such as personnel involved in—

(A) the establishment of requirements;

(B) testing and evaluation; and

(C) the development of doctrine;

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(6) ensure that the Department of Defense has access to world-class talent, especially with respect to highly qualified technical, engineering, and acquisition expertise; and

(7) ensure that service in the Department of Defense remains an attractive career option.

(c) **COMPLETION OF THE REVIEW.**—The Panel shall complete the review required by subsection (a) not later than one year after the date of the enactment of this Act.

(d) **REPORT TO COMMITTEES ON ARMED SERVICES.**—Not later than 30 days after the completion of the review, the Panel shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report containing the findings of the review and the recommendations of the Panel to the Secretary of Defense, including recommended legislative or regulatory changes, resulting from the review.

(e) **NATIONAL ACADEMY OF PUBLIC ADMINISTRATION ASSESSMENT.**—

(1) Not later than 30 days after the completion of the review, the Secretary of Defense shall enter into an arrangement with the National Academy of Public Administration to assess the findings and recommendations of the review.

(2) Not later than 210 days after the completion of the review, the National Academy of Public Administration shall provide its assessment of the review to the Secretary, along with such additional recommendations as the National Academy may have.

(3) Not later than 30 days after receiving the assessment, the Secretary shall provide the assessment, along with such comments as the Secretary considers appropriate, to the Committees on Armed Services of the Senate and the House of Representatives.

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Attachment B: GAO Reports Considered

1. Report 08-485 (May 2008), Post-Government Employment of Former DoD Officials Needs Greater Transparency (In this report, GAO found that in 2006, 52 major defense contractors employed 86,181 of the 1,857,004 former military and civilian personnel who had left DoD service since 2001. This includes 2,435 former DoD officials who were hired between 2004 and 2006 by one or more of the contractors. 1,581 of the 2,435 former DoD officials were employed by 7 defense contractors. 422 of those could have been working on contracts under the responsibility of their former agency, office or command. Nine of those could have performed services under defense contracts but it was unclear if they worked on them at DoD, and if the one-year cooling off period was over. The report was inconclusive as to post-employment violations occurring under 18 U.S.C. §207.)
2. DOD Revolving Door - Many Former Personnel Not Reporting Defense-Related Employment (GAO/NSIAD-86-71, Mar. 1986).
3. DOD Revolving Door - Relationships Between Work at DOD and Post-DOD Employment (GAO/NSIAD-86-180BR, July 1986).
4. DOD Revolving Door - Post-DOD Employment May Raise Concerns (GAO/NSIAD-87-116, Apr. 1986).
5. Implementation of the DOD Revolving Door Legislation, Statement by Martin M. Ferber, Director Manpower and Logistics Issues, National Security and International Affairs Division (GAO/T-NSIAD-89-17, Mar. 15, 1989).
6. DOD Revolving Door - Processes Have Improved but Post-DOD Employment Reporting Still Low (GAO/NSIAD-89-221, Sept. 1989).
7. DOD Revolving Door - Few Are Restricted From Post-DOD Employment and Reporting Has Some Gaps (GAO/NSIAD-90-103, Feb. 1990).
8. Defense Ethics Program Opportunities Exist to Strengthen Safeguards for Procurement Integrity (GAO-05-341).
9. Defense Contracting Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees (GAO-08-169).

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Attachment C: Articles Considered

The Panel reviewed numerous GAO Reports, articles, and studies delving into subject matter related to the “DoD Revolving Door,” reporting processes, opportunities for strengthening procurement integrity safeguards, and government oversight and transparency of post-employment restrictions. This Attachment and Attachment B, describe the most pertinent documents reviewed with a brief summary of the content. A range of topics and issues were raised with differing points of few for recommended improvements depending upon the source of the article.

1. ***An Analysis of Conflict of Interest Law and the Effect those Laws have on the Post-Service Employment of Air Force Contracting Officers and Engineering Managers***, Thesis, Captain Richard Lheureux, December 20, 1988.

Among other things, this thesis cites four GAO reports including the Results of Conflict of Interest Investigations dated February 1988. The February 1988 report noted there were 304 violations reported to the OIGs, and, of those, only two were prosecuted by the Department of Justice. Only one conviction resulted, and that was a violation of 18 U.S.C. 208. There were no reports of prosecutions of 18 U.S.C. §207 violations. The report also commented that it could not obtain ethics criminal statute violations from the DoD OIG because they did not keep a database of those violations.

Lheureux’s thesis was a reaction to a wave of interest in post-employment rules following the investigation of four high-level presidential appointees for alleged violations of conflict of interest laws and a Department of Justice that reported widespread corruption in the defense procurement system (this era spawned the now iconic references to \$500 hammers and \$700 toilet seats). Then, as now, people expressed concerns both with tightening the rules and with loosening them. Lheureux points out no verifiable studies with measurable data were conducted to verify what the problem is or what to what degree. This may be, in part a need for standardized data collection and reporting.

In preparing his thesis, Lheureux conducted his own survey and compared it to a similar survey conducted by the General Accounting Office from 1987 focused on how often DOD personnel work for defense contractors. In both surveys, participants overwhelmingly felt it was advantageous for both DOD and private contractors to facilitate movement of personnel between the two. A strong majority in both surveys opposed post-employment restrictions and found the restrictions in place at the time to be “unfair.”

Lheureux found no data available to measure the extent of private sector hiring of former military members. He also found no data correlating conflict of interest laws with violations of those laws. Lheureux concluded that employees lacked information about the nature and extent of post-employment restrictions, but most nonetheless felt post-employment restrictions were adversely affecting their future job prospects. Lheureux recommended providing separating members specific guidance on post-employment rules and that DOD standardize the collection of post-employment data for future analysis

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2. ***The Politics of Contracting***, Project on Government and Oversight (POGO). (June 2004)

POGO points out that the existing “revolving door” protections and enforcement mechanisms, if any, are weakest against abuse by high-level officials. They suggest that there are three specific loopholes: (1) the laws exclude policy makers; (2) the laws allow former government employees to take jobs in corporations they favored if those are in a different division than the one they oversaw; and several changes in laws over decades and also (3) the laws do not require reporting of disqualifications or recusal.” “POGO concluded that “revolving door” laws do not apply to the most senior policymakers who ultimately have the most power in shaping programs and policies that benefit contractors.

3. **A Matter of Trust How the Revolving Door Undermines Public Confidence in Government**. The Revolving Door Working Group (RDWG). (October 2005)

This paper argues that there are at least six important reasons why the public should pay more attention to the revolving door:

- It can provide a vehicle for public servants to use their office for personal or private gain at the expense of the American taxpayer;
- The revolving door casts grave doubts on the integrity of official actions and legislation. A Member of Congress or a government employee could well be influenced in his or her official actions by promises of a future high-paying job from a business that has a pecuniary interest in the official’s actions while in government. Even if the official is not unduly influenced by promises of future employment, the appearance of undue influence itself casts aspersions on the integrity of the federal government;
- It can provide some government contractors with unfair advantages over their competitors, due to insider knowledge that can be used to the benefit of the contractor, and potentially to the detriment of the public interest;
- The former employee may have privileged access to government officials. Tapping into a closed network friends and colleagues built while in office, a government employee-turned lobbyist may well have access to power brokers not available to others. In some cases, these networks could involve prior obligations and favors. Former Members of Congress even retain privileged access to the Congressional

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gym, dining hall and floors of Congress.

- It has resulted in a highly complex but ultimately ineffective framework of ethics and conflict-of-interest regulations. Enforcing those regulations has become a virtual industry within the government, costing significant resources but rarely resulting in sanctions or convictions of those accused of violating the rules. As a result, ethics rules offer little or no deterrent to those who might violate the public trust; and
- The appearance of impropriety exacerbates public distrust in government, ultimately causing a decline in civic participation. It also demoralizes honest government workers who do not use their government jobs as a stepping stone to lucrative employment government contractors or lobbying firms.

After describing the various types of revolving-door conflicts of interest and pointing out the weaknesses in the existing rules framework, the paper proposes a set of policy reforms. These remedies seek to enhance transparency, increase vigilance, and establish mechanisms to reduce impropriety (whether perceived or actual) by establishing appropriate boundaries between public service and the pursuit of private interests. Among the specific proposals are:

- Consolidation of ethics oversight entities in the executive branch and in Congress;
- Granting the consolidated entities greater oversight and enforcement powers;
- Standardization of conflict-of-interest rules throughout the federal government;
- Adoption of procedures that would allow the Office of Government Ethics to rule a person ineligible for a certain post if that person's employment background would tend to create frequent conflicts with the rule requiring impartiality on the part of federal employees;
- Strengthening of recusal rules that bar appointees from handling matters involving their former employers in the private sector, including mandatory recusal on matters directly involving one's employers and clients during the 24-month period prior to taking office;
- Monitoring of recusal agreements by the Office of Government Ethics;
- Prohibiting, for a period of time, senior officials from seeking employment with contractors that may have significantly benefited from policies formulated by those officials;
- Restricting the granting of waivers that allow public officials to negotiate future employment in the private sector while still in office;
- Extending the period during which officials cannot engage in lobbying after leaving office and expanding the scope of prohibited activities;
- Requiring federal officials to enter into a binding ethics "exit plan" when leaving the public sector to clarify what activities will be prohibited;

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- Revoking the special privileges granted to former members of Congress while they are serving as lobbyists; and improving the reporting and disclosure of recusal agreements, waivers, lobbyist reports and other ethics filings.

The paper's recommendations do not seek to disqualify all private-sector veterans from government service, nor do we suggest that federal officials be completely barred from moving to the business world. Yet there is clearly a need to strengthen the existing regulatory framework covering revolving door activity and to tighten its enforcement. Doing so will go a long way toward restoring integrity to the federal government.

4. ***Avoiding the Revolving Door: Ethical Issues for Government Lawyers Transitioning to the Private Sector.*** Vol. 19, Pass It On Magazine, No. 4. (American Bar Association) (Summer 2010). This article discusses the ethical issues public lawyers must face as soon as they begin their job search due to the variety of internal departmental and state/local rules. This article only applies to attorneys but is a real eye opener regarding the additional challenges attorneys are faced with.
5. Epstein, Stephen. ***Companies Must Be Aware of New Revolving Door Policies.*** National Defense, NDIA's Business & Technology Magazine (October 2009). This article discusses the critical nature of transitioning federal civilians to the private sectors as contractors. It further provides guidance to private contractors on how to limit risks associated with compliance to post-employment and/or revolving door regulations. It provides "key elements" for industry to consider for use to reduce any compliance risks related to post-employment regulations. A major point in the article is the recommendation for industry to establish a compliance program to limit risk associated with post-employment regulations and restrictions. The article provides a compliance outline and instructions for contractors when hiring former government employees. More importantly, the article recommends as a best practice, to obtain an agency ethics opinion as a condition of employment.
6. Office of Government Ethics, ***Advisory Opinion 90x17*** (October 26, 1990) http://oge.gov/ethics_guidance/opinions/advop_files/1990/90x17.txt. This article provides guidance on obtaining procurement official certifications (as a condition of appointment) once the DoD authorization Act for FY91 was signed by the President. The guidance defines what procurement integrity is, the nature of Section 27 of the Office of Federal Procurement Policy Act, definitions, prohibitions and restrictions. It further defines the applicability of Section 27 and cautions persons who may become procurement officials after Dec 1, 1990 that could be subject to post-employment restrictions on June 1, 1991. At the time the article was written only two restrictions

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were identified under Subsection 27(f) (41U.S.C. 423(f)58. They were: 1. Participation in any manner on behalf of a competing contractor in any negotiation leading to an award or modification of a contract for such procurement; or 2. Participate personally and substantially on behalf of the competing contractor in the performance of a contract. A simple note is that the application of post -employment restrictions has come a long way.

7. Citizens for Responsibility and Ethics in Washington (CREW), **Revolving Door**, (January 12, 2009). <http://www.citizensforethics.org/node/36439>. The citizens for responsibility and Ethics in Washington (CREW) reviewed the activities of 24 members of President George W. Bush's cabinet. The report found numerous examples of how former very senior employees used their status in government to gain high level positions in private industry and proceeded to lobby their former agencies. In some instances, these former officials used the power gained while in government to obtain contracts and grants for their new private employers. The investigation based its findings on news reports, websites, press releases and lobbying disclosure forms. The key findings of the investigation were that 17 former cabinet officials held positions with a total of 119 companies; 17 former officials held positions with 65 companies that lobby the federal government; 15 former officials held positions with 40 companies that lobby those officials' former agencies and 5 former officials had founded lobbying firms. Notable examples such as John Ashcroft, Former Attorney General were provided.

8. Other Articles.

- Department of Justice, Post-Employment Restrictions Chart, January 2010, <http://www.justice.gov/jmd/ethics/docs/ptchart.pdf>
- Lieutenant Colonel Richard B. O'Keeffe, Jr., Where There's Smoke ... Who Should Bear the Burden When a Competing Contractor Hires Former Government Employees?, 164 Mil. L. Rev. 1, 22 (2000).
- David Phinney, Defense's Revolving Door: When Managers Join Contractors, Good Oversight Takes a Hit, Auditors Say, Federal Times, Apr. 19, 2004.

⁵⁸ Now codified as 41 U.S.C 2101

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- Dr. Adolfo Santos, [Post-Congressional Lobbying and Legislative Sponsorship: Do Members of Congress Reward Their Future Employers?](#), LBJ Journal of Public Affairs, Vol. 16, Issue 1, Fall 2003, at 56-57.

- Major Kathryn Stone, [The Twilight Zone: Post-government Employment Restrictions Affecting Retired and Former Department of Defense Personnel](#), 142 Mil. L. Rev. 67, at 136-137 (1993).

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Attachment D: Comments on Post-Employment Restrictions from Ethics Survey

BACKGROUND:

The Panel on Contracting Integrity's Subcommittee 10, Recommendations for Change, identified an action for 2009 to 'establish a Department of Defense-wide values-based ethics program.' A contract was awarded to survey a sample of the military and civilian population of the Department and to provide an analysis of the results in a report. The purpose of the survey was to serve as a basis for establishing a values-based ethics culture program in the Department. The survey was not conducted for the purpose of compiling data under Section 833 and the questions were not chosen to coincide with the factors set out in Section 833(b).

The survey was issued online to 248,165 personnel with DoD email addresses which included 100% of the acquisition workforce of approximately 123,500 people with the remainder a random selection of the broader DoD population. The overall response rate was 22.8%.

Participants were provided an opportunity to submit comments. Focus group sessions were also held to obtain verbal feedback. No specific questions or topics for comments were provided. The comments submitted to the online surveys were categorized by the subcommittee according to areas related to ethics. One of those areas is post-government employment. A total of 117 comments were submitted in this area. Some comment examples appear later in this Attachment.

Placing the number of responses in context, the 117 comments represent 2% of total number of 54,596 people who responded to the survey and only .0049% of the total number of 248,165 employees surveyed. The online survey did not include any objective questions on the subject of post-government employment restrictions. The written comments are therefore the only responses on this topic in the survey. Although informative, given the limited sample, it cannot be determined to what extent the comments represent the opinions of the acquisition workforce as a whole.

In summarizing the comments, we have attempted to organize them roughly according to the substance of the concerns that they raised. The summary is subjective because the comments were not solicited according to the Section 833(b) factors, and because many of the comments are general and raise multiple issues. To provide a context for Section 833 analysis, we also attempted to link each category of comments with the Section 833(b) focus area that the Panel felt was most relevant to the concern raised. For example, the Panel felt that "revolving door" concerns were most relevant to Section 833(b) (1)). Finally, we determined that 42 of the comments were either not relevant to any Section 833(b) factor or not clear enough to include in the summary.

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With one or two qualified exceptions, the comments reflect a strongly negative perception about DoD officials leaving government service to work for defense contractors. In some cases, this perception appears to be based on an unclear or incorrect understanding of current post-government employment restrictions (which may also have lead to a perception that ethics restrictions are either selectively enforced or not enforced at all). Other comments appear to place more emphasis on an appearance of impropriety than to the legality of the conduct. Some comments allege post-government employment conduct that, if it occurred, would likely violate current restrictions.

The following chart summarizes the concerns that were reflected in the comments. The brackets show the subsection of Section 833 to which the concern pertained

<u>CONCERN EXPRESSED IN COMMENT</u>	<u>Number of Comments</u>
1. Former DoD Officials Working for a Defense Contractors - “Revolving Door” [Section 833(b)(1)]	42
2. Official Decisions are Influenced by Potential Post-Government Employment [Section 833(b)(1)]	20
3. Contractors Possess Undue Influence/Access [Section 833(b)(1)]	17
4. Ethics Rules are not Clear [Section 833(b)(4)]	2*
Comment Not Relevant to Section 833 or Unclear	42

* Many comments evidenced a lack of clear understanding of the post-government employment restrictions.

SUMMARY OF COMMENTS:

Section 833(b)(1): [current post-employment restrictions] appropriately protect the public interest by preventing personal conflicts of interests and preventing former Department of Defense officials from exercising undue or inappropriate influence on the Department of Defense

1. REVOLVING DOOR: 42 Comments.

The comments appear to derive from a concern that acquisition decisions by DoD officials were influenced by the prospect of post-government employment with the defense contractor.

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It was not clear from many of the comments whether the respondent intended to draw a distinction between employment behind the scenes and engaging in representational activities on behalf of a contractor. In some cases, the comments indicated that the respondents believed that ethics rules flatly prohibited former DoD officials from working for defense contractors. Other comments acknowledged that the practice was not illegal, but raised a strong appearance of impropriety.

Examples:

“In my 25 years of working in DoD, the biggest ethical issue that concerns me is the revolving door of top military officers (Colonels and Generals) retiring one day and showing up the next day a Defense Industry Contractor. The conflict of interest is readily apparent. Either the policy is flawed or it’s not enforced.”

“It amazes me how senior people (mainly military) can go to work for contractors that they had influence on.”

“The biggest ethics problem I see is retired military flag officers immediately joining private industry organizations which THEY had direct influence over as a DoD manager.” (Emphasis in original).

“It is not uncommon to see a high level acquisition person ‘retire’ and then show up at the same meetings they were in charge of only a few weeks before (now as a contractor).”

“The only observed issue is Military retiring and going to work for contractors that were providing material solutions to the programs that the Military personnel were working on.”

The Panel’s analysis of these comments:

Insofar as they relate to representational activities on behalf of a contractor concerning the same particular matter involving specific parties upon which the former employee was involved while a DoD official, the conduct referred to in these comments would likely be prohibited by 18 U.S.C. §207(a), either for the lifetime of the particular matter (personal and substantial involvement), or for two years (supervisory responsibility). Except for officials subject to the Procurement Integrity Act (41 U.S.C. 423)⁵⁹ and/or Section 847 of the NDAA for FY08, current ethics statutes do not prohibit a former DoD official from working behind the scenes for a contractor on the same particular matter on which the former worked while in government service so long as the former official does not pass inside or classified information to the contractor.⁶⁰

⁵⁹ Now codified at 41 U.S.C. 2101-2107

⁶⁰ These statutory provisions are described at Section IV of this report.

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2. INFLUENCES ON DECISION-MAKING (20 Comments).

The comments reflected a perception that senior DoD officials were being influenced by the potential for post-government employment with defense contractors. Most of the comments in this category stated or implied that future employment considerations resulted in self-interested decisions that disadvantaged DoD, either through a reluctance to take measures that may be adverse to prospective employer/contractors, or by actually steering contracts to contractors in the hope of future employment. A number of comments also stated that DoD officials engaged in "featherbedding" by creating contractor jobs for themselves or favored individuals. These concerns were raised more often with regard to military members than to civilian employees.

Examples:

"Sometimes it appears that executives are reluctant to take strong actions which might be adversarial with military contractors. Subsequently those executive retire and take positions with military contractors. Restated: I think executives may be making decisions with an eye to their future employment. maybe not (sic)."

"I routinely see bad decisions that appear to be influenced either by a focus on obtaining the next promotion or post-retirement employment considerations."

"Too many flag/SES and O-6/GS-15 personnel are angling for post-government jobs. Too often, DoD gets a very bad system...and in my cases, the top individuals who approved the contract are now working as consultants for the vendor. The problem is much, much worse among Presidential appointees, who know that they have no job security."

"The good old boy network is alive and well in (organization name). We are pressed to award sole source contracts to their former General Officer friends under the guise of needing their military knowledge."

The Panel's analysis of these comments:

As described in Section IV of this report, the conflicts of interest statute, 18 U.S.C. 208, makes it a crime for DoD and other Executive Branch employees to participate in any official matter they or an entity, such as government contractor with whom they are negotiating for employment, has a financial interest in the matter. The standards of conduct rules also prohibit a government employee from taking official action if a reasonable person would question the employee's ability to be impartial in the matter. These existing rules are designed to prohibit the type of conduct mentioned in these comments. It is not known whether the respondents were speaking from personal knowledge or stating their perceptions in offering these comments. In order for the prohibitions to be enforced, potential conflicts of interest must be reported and investigated. Proving that an actual conflict of interest exists poses a challenge. The simple fact that an employee makes a decision benefiting a contractor that later hires that

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employee is insufficient alone to prove that the decision was improperly influenced by future employment considerations.

3. UNDUE INFLUENCE / ACCESS (17 Comments).

These comments raised concerns that former senior DoD officials representing defense contractors are granted favorable treatment, special access to DoD leaders, and wield undue influence over DoD officials.

Examples:

“Retired military, especially senior officers with access to the admirals and other captains should not have access to return to the base as sales representatives. Their access to decision makers allows for undue pressure on acquisition staff in the solicitation and decision process leading to award.

“My biggest ethical issue is the revolving door for civilian management and military. As soon as they leave they come back as contractors making the most of their personal relationships in the organization. It’s just a blatant revolving door. I have seen it with retired division chiefs, directors, Colonels, etc.”

“The biggest problem in DoD is retired generals being granted favoritism in meeting and discussing issues in privacy with active duty generals. And, being paid dollars as consultants when there is no additional value added.”

The Panel’s analysis of these comments:

It is not clear whether these comments reflect the actual experience of the respondents or their perception. The existing statutory restrictions contained in the one-year cooling-off period for senior officials, and the 18 U.S.C. §207(a) representational restrictions that apply to all former government officials are intended to prevent the type of undue influence on DoD employees described in these comments. As opposed to the blanket one-year cooling-off period, however, the representational restrictions are limited to the same “particular matter involving specific parties”⁶¹and does not prevent all communication between former officials and current DoD employees.

Section 833(b) (4): [current post-employment restrictions] are sufficiently straightforward and have been explained to personnel of the Department of Defense so that such personnel are able to avoid potential violations of post-employment restrictions and conflicts of interest in interactions with former personnel of the Department

⁶¹ This term is described in Section IV of the report.

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[Sec. 833 of Public Law 111-84; NDAA for FY 2010]

4. ETHICS RULES ARE UNCLEAR/ADDITIONAL TRAINING MAY BE NEEDED
(2 Comments)

Although only two comments directly raised this concern, many comments reflected a lack of understanding of the ethics rules, and the belief that certain conduct, such as working for a contractor behind the scenes, or representing the contractor back to the government on a different particular matter, was prohibited. Such conduct is permitted in many cases.

Examples:

“Sometimes clarification and reminding is helpful. There are times when it appears that a conflict of interest exists if a former government civilian/military takes a position with a contractor and vice versa. Clarifying the guidelines for those situations would be very helpful.”

“High ranking officers and civilians often get jobs working for companies they had direct dealings with while employed by DoD yet my ethics training tells me I would not be allowed to do so.”

“I am concerned about the conduct of retired civilian and military personnel after they leave the government. I know there is a period of time when they cannot work in areas where they worked as government employees, but apparently there are loop holes because I see the law violated all the time.”

Section 833(b) (7): ensure that service in the Department of Defense remains an attractive career option.

We have not tried to quantify the comments that fall in this area, but many of the comments reflect a highly negative and cynical tone. Several comments refer to a double standard favoring senior officials and a lack of enforcement of post-government restrictions that appears to contribute to a negative impression among some of the respondents.

Examples:

“DoD Ethic’s guidelines have been written in such a way that senior leadership is exempt from many of the restrictions that are imposed on lower level employees.”

“There is a blatant lack of enforcement of ethics violations for former employees that retire and move to the private defense sector on acquisitions that they were involved with and/or influenced while they were government employees. Examples DOT and DoD.”

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“Ethics is an important item in theory. When someone is caught violating ethics, the world comes down to cover it up, dispel it, or find a scapegoat. I find most ethical concerns in the area of retiring government and military coming back in the workforce as contractors and consultants. Obvious violations are written off and hidden as though there are no concerns.”

The Panel’s analysis of these comments:

Although the comments reflected a perception that post-government ethics restrictions were not being enforced, it is not clear whether the conduct in question actually violated any post-government employment restrictions. Also unclear is the extent, if any, to which this negative perception is due to current post-government employment rules.

POST-EMPLOYMENT RESTRICTION PROPOSALS FROM SURVEY COMMENTS.

Several of the respondents proposed additional post-government employment restrictions. The Panel has compiled the following list of these proposals:

1. No employment of any military officer above O-5 with a company that has a DoD contract.
2. Retired military, especially senior officers, should be prohibited from access to an installation as a sales representative.
3. Former Federal employees should be prohibited from working for a contractor on the same installation where the employee worked.
4. “High level” DoD officials should be prohibited from retiring and immediately working for a contractor.
5. Senior officials who worked in acquisition related positions, particularly Flag officers, should be prohibited from working for a contractor for a period of 2-4 years.
6. Senior management should be prohibited from retiring and working for a vendor with which DoD does business.
7. “Reform will require tight post-government employment restrictions, offset by more generous retirement provisions for restricted personnel.”
8. All acquisition personnel should be prohibited from working for a prime contractor doing business with their former agency for 5 years. (Government support contractors or second tier supplies would be OK).
9. Key contract decision-makers on long term contracts, e.g. ship programs, should be permanently prohibited from working for the contractor that was awarded the contract.

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10. Government officials should be permanently barred from taking a job with a contractor.
11. Upper management and people who can influence acquisition decisions should be prohibited from ever working for any DoD contractor.

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[Sec. 833 of Public Law 111-84; NDAA for FY 2010]

**Attachment E: Questions & Summarized Responses for the Defense
Science Board and the Panel on Contracting Integrity**

Background

Section 813 of the John Warner NDAA for FY07, Public Law 109-364, directed the Department of Defense (DoD) to establish a Panel on Contracting Integrity (Panel) consisting of senior leaders representing a cross-section of the Department. The Panel's purpose is twofold: review progress made by DoD to eliminate areas of vulnerability in the defense contracting system that allow fraud, waste, and abuse to occur, and recommend changes in law, regulations, and policy to eliminate the areas of vulnerability.

Under section 833 of the NDAA for FY 2010, the Panel has been tasked to perform an assessment of the post-employment laws on former DoD personnel. The purpose of the review is to determine whether the current policies adequately protect the public interest, without unreasonably limiting future employment options for former DoD personnel.

To assist us in performing this assessment, we ask the following:

1. In your opinion, do current post-employment restrictions appropriately protect the public interest by preventing personal conflicts of interests and preventing former DoD officials from exercising undue influence on DoD?

Approximately 80% of the respondents stated that the current regulations do appropriately protect the public interest. The remaining 20% believe that the current regulations are too restrictive and prevent good people from being attracted to the government. That 20% believe that the emphasis is on the appearances, as morality cannot be legislated.

2. In your opinion, do current post-employment restrictions appropriately require disclosure by personnel who are accepting employment with DoD contractors involving matters related to their official duties?

Approximately 80% of the respondents stated that the current regulations do appropriately require disclosure by personnel who are accepting employment with DoD. There were no explanations given for the negative replies.

3. In your opinion, do current post-employment restrictions use appropriate thresholds, in terms of salary or duties for the establishment of such restrictions?

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Approximately 60% of the respondents stated that the current regulations use appropriate thresholds, in terms of salary or duties for the establishment of such restrictions. The remaining 40% indicated that the thresholds were arbitrary or restrictive and noted that Congress has no such restrictions.

4. In your opinion, are current post-employment restrictions sufficiently straightforward and explained to personnel clearly enough that all are able to avoid potential violations of post-employment restrictions?

Approximately 70% of the respondents stated that the current regulations are sufficiently straightforward and explained to personnel clearly enough to avoid potential violations of post-employment restrictions. Another 20% believe that the rules were overly complicated and individual guidance was needed from an expert in the regulations. This level of complexity is demonstrated by "the summary reference of 5 laws and executive orders." The remaining 10% did not feel qualified to answer the question,

5. In your opinion, do current post-employment restrictions appropriately apply to all personnel performing duties in acquisition-related activities, such as personnel involved in—

(A) The establishment of requirements;

Approximately 60% of the respondents stated that the current regulations appropriately apply to all personnel performing duties in acquisition-related activities, such as personnel involved in the establishment of requirements. The remaining 40% feel that too little attention is paid to the developers of requirements.

(B) Testing and evaluation;

Approximately 80% of the respondents stated that the current regulations appropriately apply to all personnel performing duties in acquisition-related activities, such as personnel involved in testing and evaluation. The remaining 20% did not feel competent to reply to the question.

(C) The development of policy?

Approximately 98% of the respondents stated that the current regulations appropriately apply to all personnel performing duties in acquisition-related

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[Sec. 833 of Public Law 111-84; NDAA for FY 2010]

activities, such as personnel involved in the development of policy. The remaining respondents believe that the "development of policy" is too broad of a category.

6. In your opinion, do current post-employment restrictions help to ensure that the DoD has access to world-class talent, especially with respect to highly qualified technical, engineering, and acquisition expertise?

Almost 100% of the respondents stated that DoD post-employment restrictions prevent DoD from having access to world-class talent, because: 1) the rules are too restrictive, 2) people are unwilling to divest personal holdings; 3) the ideology of purity is unattainable, and 4) the hypocrisy of government standards proclaimed by current politicians is offensive to many thoughtful people

7. In your opinion, do current post-employment restrictions help to ensure that service in the Department of Defense remains an attractive career option?

Almost 100% of the respondents stated that DoD post-employment restrictions prevent DoD from being an attractive career option.

8. Based on your observations, does the DoD need new or different post-employment restrictions to meet the stated goal of adequately protecting the public interest, without unreasonably limiting future employment options for former DoD personnel?

Almost 100% of the respondents stated that DoD does need new or different post-employment restrictions to meet the stated goal of adequately protecting the public interest, without unreasonably limiting future employment options for former DoD personnel.

Some of the major suggestions were:

- 1) the rules need more flexibility with regard to stockholdings;
- 2) DoD should return to the old definition of "conflict of interest - direct and predictable effect on that financial interest,
- 3) make all times and restrictions the same, and
- 4) rely on personal integrity, not rules.

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9. In your opinion, does the DoD have trouble retaining personnel because of the post-employment restrictions rules?

Approximately 66% of the respondents stated that the current regulations do not present a problem for DoD retaining personnel, 20% did not feel competent to reply to the question, and 14 % responded yes, but without stating the reason for the response.

10. In your opinion, does the DoD have trouble recruiting personnel because of the post-employment restrictions rules?

Approximately 88% of the respondents stated that the current regulations do not present a problem with for DoD recruiting personnel; the other 12% did not feel competent to reply to the question or stated that it depended on the position.

11. In the space below, can you give share any anecdote(s) (positive or negative) that you or your organizations have encountered because of post-employment restrictions?

Some positions have remained vacant for over a year. One person was required to divest too broadly in such stocks as Best Buy and Safeway.

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Attachment F: Observations from Research Support Project for the
U.S. Department of Defense; National Academy of Public
Administration, November 15, 2010. Revised November 24, 2010

**U.S. Department of Defense
Research Support for DoD Review of Post-
Employment Restrictions**

Observations from Research Support Project for the
U.S. Department of Defense

Final Report for DoD Review

Revised November 24, 2010



Overview of Report Contents

- **Project Overview** [*slides 3-7*]
 - Origin of National Academy Research Support Project
 - Role of Academy Panel and Research Approach
 - Research Approach and Timeline
 - Key Research Activities
- **Research Results** [*slides 8-17*]
 - Overarching Areas of Research
 - Observations by Research Area
- **Conclusions** [*slides 15-18*]
 - Major Observations
 - Suggestions for Further DoD Consideration
- **Appendices** [*slides 19-29*]

Project Overview

Origin of Academy Support to DoD

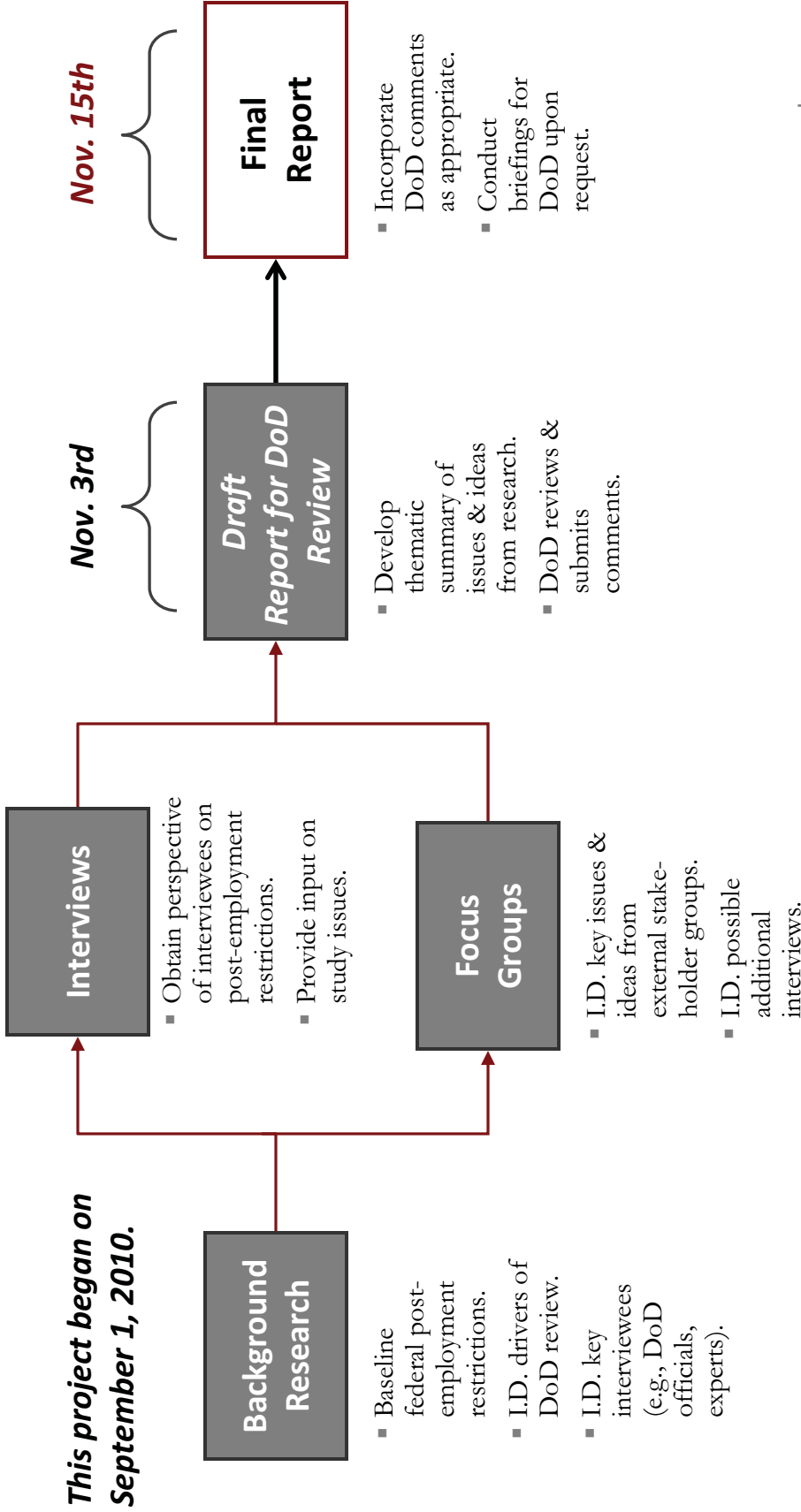
- **The FY 2010 National Defense Authorization Act (the Act) mandated that the Department of Defense Panel on Contracting Integrity (DoD Panel) review policies relating to post-employment restrictions on former DoD personnel.**
 - The Act also directed DoD to engage the National Academy to assess the findings and recommendations of its review. However, this project is strictly limited to research support for the DoD Panel review.
 - The National Academy team worked closely with DoD to identify the best ways to supplement the DoD staff's own research within a limited period of time.
- **This report on the National Academy's research summarizes the broad themes and ideas from the interviews and focus groups & incorporates guidance from expert sources.**
 - This report only presents observations from the National Academy's research. It does not make recommendations or advocate any of the positions presented.
 - The report concludes by identifying areas that DoD may wish to consider further, either as part of the DoD Panel's work or in the future.

Project Overview

Role of Academy Panel and Research Approach

- **This project was overseen by an expert advisory Panel of National Academy Fellows:**
 - Panel members: David Chu, *Panel Chair*; John Hamre; Deidre Lee
 - The Academy study team has drawn upon the guidance of these Fellows, with the Panel acting in an advisory role only.
- **The team has engaged in a mix of research activities:**
 - Conducted interviews with stakeholders and experts
 - Hosted focus groups with external stakeholder groups
 - Reviewed the academic literature and other expert sources [*Note: The Academy’s membership was solicited for references to expert resources on post-employment policies and issues.*]
 - Interviews and focus groups were conducted on a not-for-attribution basis. Data collected was aggregated into general observations. Individual interviewees and focus group respondents are listed in Appendix D

Project Overview Research Approach & Timeline



Consultation with the Academy's Expert Advisory Panel has occurred throughout this period.

Project Overview

Key Research Activities

National Academy Research Activities	Description
<p>Conducted 32 interviews across all intended groups (<i>and made repeated attempts to conduct 10 additional interviews</i>)</p>	<ul style="list-style-type: none"> ▪ Current and former DoD officials referred by the DoD Panel’s staff ▪ Former White House Presidential personnel officials ▪ Expert sources on post-employment restrictions (inside and outside of government), including the Office of Government Ethics, the Government Accountability Office, a former senior DoD ethics official, and a leading non-profit advocacy group ▪ Senior leadership & other CODSIA member representatives ▪ Select group of Academy Fellows in addition to the project Panel members
<p>Hosted 3 focus groups with senior individuals in the defense community</p>	<ul style="list-style-type: none"> ▪ 2 focus groups were conducted with industry members of the Professional Services Council at its October 4th conference in Pennsylvania. ▪ 1 focus group was held at the Academy with respondents recommended by CODSIA member representatives, NCMA, and our interviewees.
<p>Reviewed literature pertinent to policies related to post-employment restrictions</p>	<ul style="list-style-type: none"> ▪ A 2006 report by the Office of Government Ethics that reviewed issues and options related to post-employment restrictions ▪ Recent GAO studies, including its 2008 study on disclosure requirements ▪ A 2005 report by the Revolving Door Working Group, whose members include an array of advocacy groups, including the Project on Government Oversight (which published the foundational report in 2004)

Research Results

Three Overarching Research Areas

- **The National Academy study team organized its research under three broad topics that collectively encompass the 7 issues that Section 833 required the DoD Panel to address in its review.**
 - Protection of the Public Interest (# 1, 2, 3, and 5)
 - Clarity and Communication (#4)
 - Impact on DOD Access to Talent (# 6 and 7)

Research Results (1st Question Posed to DoD Panel) Protection of the Public Interest

Observations	Discussion
<p>1. In general, defense community respondents are satisfied that the public interest is adequately protected.</p>	<ul style="list-style-type: none"> ▪ Recent high-profile cases of corruption are seen as isolated criminal acts by corrupt individuals. Moreover, the fact that they were discovered and prosecuted shows that “the system works.” ▪ Additional post-employment restrictions will not deter such individuals and will simply further limit DoD’s access to the talent it requires for its mission.
<p>2. Some defense community respondents believe that existing post-employment restrictions go beyond what is needed.</p>	<ul style="list-style-type: none"> ▪ They disagree with the “across-the-board” application of restrictions, especially the cooling off period, to employees based solely on authority and pay thresholds. This approach does not address: (1) the differential risk of improper influence presented by the particular responsibilities and scope of authority of different positions; and (2) the risk that restrictions pose to the employment options of former DoD personnel and DoD’s access to talent. ▪ They favor a more targeted and sophisticated approach that focuses on desired policy outcomes and balances the potential risks to the public interest and to the employment options of former DoD personnel and DoD’s access to the best talent. Several interviewees offered suggestions in keeping with such an approach, including: (1) limiting the DoD-wide cooling off restrictions to PAS positions in OSD; (2) imposing tougher restrictions (e.g., a time-limited employment ban) on a limited set of PAS positions when needed, while relaxing restrictions on other PAS positions; (3) providing for alternative employment of departing senior officials in the case of an employment ban (e.g., work in think tanks/FFRDCs during period of ban) that would allow them to earn a living while still working productively in the defense area; (4) reducing the restrictions on those officials who serve less than some minimum time, to make it easier to terminate appointed officials who do not work out. ▪ This approach is complemented by the OGE (2006) recommendation to expand existing waiver authority to include not just communications on scientific and technical subjects, but also communications with former employees who possess “unique knowledge or perspectives in fields such as national security or other fields involving specialized knowledge” (p.17).

Research Results (1st Question Posed to DoD Panel) Protection of the Public Interest (Cont'd)

Observations	Discussion
<p>3. The Revolving Door Working Group* believes that significant gaps in the existing restrictions remain.</p>	<ul style="list-style-type: none"> ▪ The Revolving Door Working Group is concerned with the potential corrupting influence on government officials of lucrative post-employment opportunities with contractors that benefited from their decisions while in government. The Group believes that the allowance for senior officials to provide behind-the-scenes assistance to contractors during their cooling off period poses the most serious risk given its potentially corrupting influence on policy decisions. ▪ The Revolving Door Working Group (2005) has proposed a time-limited ban on the employment of political appointees and SES policymakers by contractors that have significantly benefited from policies formulated by them.
<p>4. The Office of Government Ethics and others have proposed more modest changes.</p>	<ul style="list-style-type: none"> ▪ OGE (2006) recommended against imposing a general employment ban on senior officials, citing concerns about the adverse impact on government recruitment and retention. Instead, it suggested that Congress revisit the Procurement Integrity Act exception that permits former government employees to accept compensation from a contractor's "division or affiliate" if it "does not produce the same or similar products or services" as the entity with which the former official's duties were concerned. ▪ Others have called for a variety of alternative approaches to protecting the public interest, including improved procurement oversight, better enforcement of existing statutes, and expanding disclosure and certification requirements to increase transparency in the procurement process.

*When its 2005 report was published, the Revolving Door Working Group included 15 members: American Corn Growers Association, Center for Corporate Policy, Center for Environmental Health, Center for Science in the Public Interest, Center of Concern/Agriculture Accountability Initiative, Common Cause, Corporate Research Project of Good Jobs First, Edmonds Institute, Government Accountability Project, Institute for Agriculture and Trade Policy, Organization for Competitive Markets, Project on Government Oversight, Public Citizen, Public Employees for Environmental Responsibility, and Revolt of the Elders.

Research Results (2nd, 3rd, & 5th Questions Posed to DoD Panel) Protection of the Public Interest (Cont'd)

Observations	Discussion
<p>5. GAO and the Revolving Door Working Group have called for additional disclosure requirements on DoD contractors and former DoD officials working for DoD contractors.</p>	<ul style="list-style-type: none"> ▪ Senior DoD officials and/or those who have been personally and substantially involved in a procurement in excess of \$10 million are required (1) to disclose their employment plans upon leaving DoD and (2) to submit a formal request to a DoD ethics official for a written opinion regarding applicable post-employment restrictions prior to accepting compensation from a contractor. DoD contractors are not required to disclose information regarding former DoD officials they employ. However, DoD contractors are prohibited from compensating former DoD officials before determining that they have sought and received a written opinion from DoD. ▪ In addition to these statutory requirements, GAO (2008) has recommended that DoD require contractors after a contract is awarded to them (1) to disclose to the contracting officer the names of employees who are former DoD officials in certain categories (e.g., civilian senior executives) who worked on the response to the solicitation; and (2) to certify the compliance of those employees with post-employment restrictions. GAO has further recommended that the DoD require such a mechanism throughout the term of the contract. ▪ The Revolving Door Working Group goes further. It begins by proposing to replace written opinion letters with “binding revolving door exit plans” that specify the programs and projects from which the former employees is banned from working. The former DoD employee and his employer would be required to file reports attesting to the former employee’s compliance with the exit plan. ▪ Respondents generally had few comments on current disclosure requirements, but some industry and government respondents commented that additional disclosure requirements are not needed.

Research Results (2nd, 3rd, & 5th Questions Posed to DoD Panel) Protection of the Public Interest (Cont'd)

Observations	Discussion
<p>6. No significant concern expressed about the appropriateness of pay and authority thresholds <i>per se</i>.</p>	<ul style="list-style-type: none"> ▪ As noted earlier, while some defense community respondents strongly disagreed with the across-the-board application of restrictions solely on the basis of these thresholds, no one expressed significant concern about the appropriateness of existing authority and pay thresholds themselves. ▪ In its review of post-employment restrictions, OGE (2006) discussed several options for setting the pay and authority thresholds for defining <i>senior</i> civilian officials and the trade-offs they would entail. Ultimately, OGE did not recommend any changes to the existing thresholds.
<p>7. No significant concern expressed about the appropriateness of the restrictions applied to personnel performing acquisition-related activities.</p>	<ul style="list-style-type: none"> ▪ However, some DoD officials did comment that members of this group might not be as aware of the restrictions as they need to be.

Research Results (4th Question Posed to DoD Panel) Clarity and Communication

Observations	Discussion
<p>1. Defense community respondents report significant inconsistencies in how DoD applies restrictions to former employees in opinion letters.</p>	<ul style="list-style-type: none"> ▪ This inconsistency is attributed to various factors including ambiguous statutory language and variations in the quality of ethics guidance provided across DoD. ▪ This inconsistency is seen as a risk to former DoD personnel and contractors. ▪ Some defense community respondents expressed concern that smaller companies may be particularly vulnerable because: (1) they rely more heavily on former DoD personnel to navigate the system; (2) they have fewer compliance resources; (3) adverse actions can have a disproportionate impact on their business.
<p>2. The 2-year representation ban was identified as being the most challenging to apply in a clear and consistent manner.</p>	<ul style="list-style-type: none"> ▪ The language of the 2-year representation ban is inherently challenging: “a particular matter which the employee reasonably should have known was actually pending under his or her responsibility within 1 year before the employee left government service.” It combines the difficulty of interpreting the “particular matter,” (a challenging task itself) with the demanding task of identifying all particular matters potentially encompassed by this language.
<p>3. All groups represented in our research reported that ethics guidance varies significantly in quality across DoD.</p>	<ul style="list-style-type: none"> ▪ Respondents noted significant variation in the quality of ethics guidance including: briefings to incoming employees, training, counseling, and ethics guidance letters. ▪ Three possible causes of this variation were cited: (1) DoD has limited central control over the organizational components providing ethics counseling services across the department/ services; (2) differences in the volume of services delivered-- across DoD components, between HQ and the field, and to uniformed military and civilian employees—associated with the relative experience and proficiency of ethics staff; and (3) the relative risk aversion of DoD ethics officials and lawyers within and across DoD components.

Research Results (6th and 7th Questions Posed to DoD Panel) Impact on DoD's Access to Talent

Observations	Discussion
<p>1. Most defense community respondents believe that DoD's ability to attract the most qualified individuals to serve in senior politically-appointed policy-making positions--PAS and non-career SES--has declined significantly over time.</p>	<ul style="list-style-type: none"> ▪ Defense community respondents expressed particular concern about DoD's declining ability to attract mid-career professionals from industry to serve in these senior politically-appointed policy-making positions. ▪ Industry and government respondents generally attribute this decline to a combination of factors that have made service less attractive over time, including: a complex and costly White House clearance process; a hostile and protracted confirmation process (in the case of PAS), financial divestiture requirements; and the "negative atmosphere" surrounding government-industry interchange in recent years; as well as the significant pay cut entailed by public service. Post-employment restrictions are generally seen as an important, but not the most important of these factors. ▪ A 1992 COSEPUP report, issued prior to the expansion of post-employment restrictions in recent years, provides some evidence that post-employment restrictions may be a more significant barrier to recruitment of top scientific, technical, and related management talent for PAS positions. It reported: "According to presidential recruiters as well as scientists and engineers who have been approached by recruiters, the laws restricting post-government employment have become the single biggest disincentive to public service, now that pay levels have been increased substantially" (p. 33). Of particular concern is the potential scope of restrictions on the post-government employment of those serving in PAS positions with broad procurement oversight responsibilities.

Research Results (6th and 7th Questions Posed to DoD Panel) Impact on DoD's Access to Talent (Cont'd)

Observations	Discussion
<p>2. Some defense community respondents believe that post-employment restrictions are becoming a more important factor in the recruitment of career employees in light of changing career patterns.</p>	<ul style="list-style-type: none"> ▪ Most defense community respondents did not comment specifically on the adverse effect of post-employment restrictions on recruiting career employees. ▪ Of those who did, some were either not aware of post-employment restrictions as a factor or thought that other factors were more important. ▪ Some commented that restrictions are becoming a more important factor in light of changing career patterns. For example, younger people are less likely to enter the government with the expectation of staying until retirement, but instead enter with the expectation of staying for a limited period of time and then leaving for opportunities in industry. Therefore, the prospect of post-employment restrictions might deter them from entering government at the beginning of their career or returning to the government in the middle of their career. ▪ Light (1999) presents evidence that younger professionals are more likely to switch sectors (i.e., government, industry, non-profit) during their careers, and discusses the particular challenge this poses for government recruitment and retention.
<p>3. Despite the restrictions, former DoD employees are able to find jobs in the defense industry.</p>	<ul style="list-style-type: none"> ▪ Defense community respondents believe that defense contractors are generally able to hire and effectively utilize former DoD employees, and that former DoD employees are able to find employment in the defense industry.

Conclusions

Major Observations

- 1. In general, defense community respondents are satisfied that existing restrictions adequately protect the public interest.**
 - They view recent high-profile corruption cases as isolated instances of determined criminal acts that further post-employment restrictions will not prevent.
 - Moreover, they are concerned that additional restrictions will only further constrain DoD’s ability to attract talent.
- 2. Some defense community respondents believe that existing post-employment restrictions go beyond what is needed.**
 - They disagree with the across-the-board application of restrictions, especially the cooling off period, solely on the basis of authority and pay thresholds.
 - They favor a more targeted and sophisticated approach that focuses on desired policy outcomes and balances the potential risks to the public interest and to the employment options of former DoD personnel and DoD’s access to the best talent.

Conclusions

Major Observations (Cont'd)

- 3. The Revolving Door Working Group believes that significant gaps in the restrictions remain.**
 - This group believes that the allowance for senior officials to provide behind-the-scenes assistance to contractors during their cooling off period poses the most serious risk given its potentially corrupting influence on policy decisions.
 - It has proposed a time-limited ban on the employment of political appointees and SES policymakers by contractors that have benefited significantly from policies formulated by them.

Conclusions

Major Observations (Cont'd)

- 4. Defense community respondents report significant inconsistencies in how DoD applies post-employment restrictions to former employees in opinion letters.**
 - This inconsistency is seen as a risk to former DoD personnel and to the contractor organizations that may hire them.
 - This inconsistency is attributed to various factors including ambiguous statutory language and variations in the quality of ethics guidance provided across DoD.
- 5. Defense community respondents generally believe that DoD's ability to attract the most qualified individuals to serve, especially in senior appointed policy making positions (i.e., PAS, non-career SES), has declined significantly over time.**
 - Defense community respondents generally attribute this decline to a combination of factors that has made service in such positions less attractive over time. Post-employment restrictions are seen as just one of these factors.

Conclusions

Suggestions for Further DoD Consideration

- **Evaluate the desirability and feasibility of a more targeted approach to post-employment restrictions.**
 - This evaluation might begin by identifying those PAS positions where there is most concern about either strengthening the protection of the public interest and/or improving access to talent. The purpose of this evaluation would be to assess the extent to which a targeted approach might address these concerns, while ensuring that the restrictions are sufficiently straightforward and easy to implement.
- **Conduct further research to identify why DoD’s application of post-employment restrictions to DoD personnel in opinion letters is inconsistent and what can be done to achieve greater consistency.**
 - This might begin with an assessment of the difficulties presented by the 2-year representation ban.
- **Conduct empirical research to determine the characteristics of PAS officials over the past few decades.**
 - This research might collect and analyze existing data on variables such as age and prior employment to assess DoD’s ability to attract mid-career industry professionals over time.

Appendix A

National Academy Officers

- **Kenneth Apfel, *Chair of the Board***
- **Timothy B. Clark, *Vice Chair***
- **Diane M. Disney, *Secretary***
- **John J. Callahan, *Treasurer***
- **Jennifer L. Dorn, *President***

Appendix B

National Academy Panel Member Bios

- **David S. C. Chu**, * **Chair**--President and CEO, Institute for Defense Analyses. Former Senior Fellow, RAND; Under Secretary of Defense for Personnel and Readiness, U.S. Department of Defense. Former positions with RAND Corporation: Vice President, Army Research Division; Director, Arroyo Center; Director, Washington Research Department; Associate Chairman, Research Staff; Economist. Former Assistant Secretary of Defense for Program Analysis and Evaluation, Office of the Secretary of Defense, U.S. Department of Defense; Assistant Director for National Security and International Affairs, Congressional Budget Office.
- **Deidre Lee***--Executive Director, Compliance at Fluor Corporation; Board Member, National Contract Management Association. Former positions include Executive Vice President for Federal Affairs & Operations at the Professional Services Council; Director, Business and Intelligence, Compusearch; Deputy Director of Operations, Federal Emergency Management Agency, Department of Homeland Security; Assistant Commissioner for Integrated Technology Service, General Services Administration; Director, Defense Procurement and Acquisition Policy, Office of the Secretary of Defense; Director, Defense Procurement, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics), U.S. Department of Defense; Administrator, Office of Federal Procurement Policy, U.S. Office of Management and Budget. Former positions with the National Aeronautics and Space Administration: Associate Administrator for Procurement; Executive Officer to the Deputy Administrator; various high level procurement responsibilities, Johnson Space Center.
- **John Hamre***--President and Chief Executive Officer, Center for Strategic and International Studies. Former positions with U.S. Department of Defense: Deputy Secretary of Defense and Under Secretary of Defense (comptroller). Former Professional Staff Member, Armed Services Committee, U.S. Senate; Deputy Assistant Director and Senior Analyst, National Security and International Affairs Division, Congressional Budget Office.

* **Fellow**

Appendix C

National Academy Staff

- **Lena Trudeau**, *Vice President, Academy Studies*
- **Mark Schultz**, *Program Area Director*
- **Jonathan C. Tucker**, *Project Director*
- **Joseph P. Mitchell, III**, *Senior Research Analyst*
- **Anna Slikker**, *Research Associate*
- **Tamika Henderson**, *Intern*

Appendix D

List of Interviewees and Focus Group Participants

Current and Former DoD Officials Referred by DoD Staff

- Elliott Branch, Executive Director, Acquisition & Logistics Management, Office of the Assistant Secretary of the Navy (Research, Development & Acquisition)
- Honorable Brian Detter, Deputy Assistant Secretary of the Navy for Expeditionary Warfare
- Dr. John Foulkes, Director, Test Resource Management Center, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics)
- Honorable Dr. Michael Gilmore, Director of the Office of Testing and Evaluation
- Captain David J. Graff, U.S. Navy (Ret.)
- Honorable Robert Hale, Comptroller, U.S. Department of Defense (*see also* under Fellows)
- Nancy Heimbaugh, Director of Acquisition, Defense Logistics Agency
- Honorable Frank Kendall, Principal Deputy Under Secretary for Assistant Secretary for Acquisition, Logistics & Technology
- Barney Klehman, Director of Contracting for Missile Defense Agency (with Rear Admiral Randall M. Hendrickson, Deputy Director, Missile Defense Agency)
- Honorable Malcolm O'Neil, Lt Gen (Ret.), PhD, Assistant Secretary for Acquisition, Logistics & Technology for Army
- Maj Gen Darryl A. Scott, U.S. Air Force (Ret.), Corporate Vice President Contracts & Pricing, The Boeing Company

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Interviewees and Focus Group Participants (Cont'd)

Former White House Presidential Personnel Officials

- Stephen Herbits, Retired, former Special Assistant to Secretary of Defense Donald Rumsfeld from '76-77; Advisor to Reagan, Bush I and II transition teams; was Special Assistant to the Director, Office of Presidential Personnel in the White House under Chief of Staff Donald Rumsfeld
- Clay Johnson, former Deputy Director for Management at the Office of Management and Budget and former Assistant to the President for Presidential Personnel for George W. Bush
- Ambassador Chase Untermeyer, International Business Consultant, former U.S. Ambassador to Qatar under George W. Bush. Assistant to the President of the United States and Director of Presidential Personnel (January 1989-August 1991)

Expert Resources on Policies Related to Post-Employment Restrictions

- Scott Amey, Esq., General Counsel, Project on Government Oversight (POGO)
- Steve Epstein, Esq., Chief Counsel, Ethics and Compliance, The Boeing Company
- Carolyn Kirby, Assistant Director, Acquisition and Sourcing Management, U.S. Government Accountability Office
- Douglas Larsen, Esq., General Counsel, Fluor
- Richard Thomas, Esq., Associate General Counsel, Office of Government Ethics (with Don W. Fox, Esq., General Counsel and Principal Deputy Director, Office of Government Ethics)

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Interviewees and Focus Group Participants (Cont'd)

Senior Leadership and Other Representatives of CODSIA Member Industry Associations

- Chris Braddock, Senior Director, Procurement Policy, Economic Policy Division, U.S. Chamber of Commerce
- Alan Chvotkin, Executive Vice President and Counsel, Professional Services Council
- Marco Giamberadino, Senior Director, Federal & Heavy Construction Division, The Associated General Contractors of America
- Olga Grkavac, Executive Vice President, Public Sector, Tech America (with Trey Hodgkins, Vice President for National Security & Procurement Policy/Public Sector Group, Tech America)
- Karen Manos, Esq., Partner, Gibson Dunn; Chair, Procurement Policy Committee, National Defense Industrial Association (2009-present)
- Betty McCarthy, Administrative Officer for CODSIA
- Mark Steiner, Senior Policy Director, American Council of Engineering Companies
- Richard Sylvester, Vice President, Acquisition Policy, Aerospace Industries Association

Appendix D Interviewees and Focus Group Participants (Cont'd)

National Academy Fellows

- David Berteau, Senior Adviser and Director of the Defense Industrial Initiatives Group (DIIG), Center for Strategic & International Studies
- Robert Burton, Partner, Venable LLP, Former Deputy Administrator, Office of Federal Procurement Policy, U.S. Office of Management and Budget
- Dr. Jacques Gansler, Director, Center for Public Policy and Private Enterprise, School of Public Affairs University of Maryland
- Honorable Robert Hale, Comptroller, U.S. Department of Defense
- Dr. Steve Kelman, Weatherhead Professor of Public Management, JFK School of Government, Harvard University

Participants in Defense Community Focus Group at National Academy—Oct. 15, 2010

- Whit Cobb, Vice President, Deputy General Counsel, BAE Systems, Inc.
- Lou Crenshaw, (Ret. Admiral), Principal, Grant Thornton
- David Drabkin, Director, Acquisition Policy, Northrop Grumman Corporation
- David Kellogg, President and CEO, Solers, Inc.
- Diann McCoy, Practice Management Executive, ASI Government
- Philip Soucy, Co-President and CEO, Modern Technology Solutions, Inc.
- Bill Tuttle, General, U.S. Army (Ret.), Chairman, Procurement Round Table Participants in Defense Industry Focus Groups at PSC Conference, October 4, 2010

Appendix D

Interviewees and Focus Group Participants (Cont'd)

Participants in Defense Industry Focus Groups at PSC Conference—Oct. 4, 2010

- Tim Cook, Government Relations Director, Alion
- Roger Duke, Senior Vice President, Contracts and Procurement, QinetiQ North America
- The Honorable Dr. John Hillen, President and Chief Executive Officer, Board of Directors, Global Defense Technology & Systems Inc.
- Joel Hinzman, Senior Director, Government Affairs, Oracle
- Joan Hyde, Vice President of Contracts and Pricing, Booz Allen Hamilton
- Carleton Jones, Consultant in the Federal IT Industry, Former President and Vice Chairman of INDUS Corporation
- Palmer Marcantonio, Chief Financial Officer, Gryphon Technologies
- Peter O’Neill, Director of Strategic Initiatives and Legislative Relations, Chenega Corp.
- Terry Raney, Senior Vice-President, Division Group Manager, Business Management Division, CACI
- Michael Shelton, Chairman, EMCOR Government Services
- David Swindle, Executive Vice President, Mission Assurance Federal Services
- Bill Walter, Principal Partner, Goodman & Company
- Moya Williams, Director of Operations, Camber Corp.

Appendix E

List of References

Reports

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- Committee on Science, Engineering, and Public Policy. *Science and Technology in the National Interest: Ensuring the Best Presidential and Federal Advisory Committee Science and Technology Appointments*. Washington, D.C.: National Academy of Sciences et al., 2005.
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- Revolving Door Working Group. *A Matter of Trust: How the Revolving Door Undermines Public Confidence in Government – And What To Do About It*. Washington, D.C.: Revolving Door Working Group, 2005.
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- U.S. General Accounting Office. *Defense Contracting: Post-Government Employment of Former DOD Officials Needs Grater Transparency*. GAO-08-485. Washington, D.C.: May 2008.
- U.S. General Accounting Office. *Former Federal Trade Officials, Laws on Post-Employment Activities, Foreign Representation, and Lobbying*. GAO-10-766. Washington, D.C.: June 2010.
- U.S. Office of Government Ethics. *Report on Executive Order 13490, Ethics Branch Commitments by Executive Personnel* [Executive Order Guidance]. Washington, D.C.: Office of Government Ethics, 2010.
- U.S. Office of Government Ethics. *Report to the President and Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment*. Washington, D.C.: January 2006.

Appendix E

List of References (Cont'd)

Executive Order and Public Laws

- Exec. Order No. 13490, 74 Fed. Reg. 15 (Jan.21, 2009) – ETHICS COMMITMENTS BY EXECUTIVE BRANCH PERSONNEL
- 18 U.S.C. § 207 – RESTRICTIONS ON FORMER OFFICERS, EMPLOYEES, AND ELECTED OFFICIALS OF THE EXECUTIVE AND LEGISLATIVE BRANCHES
- 41 U.S.C. § 423 – RESTRICTIONS ON DISCLOSING AND OBTAINING CONTRACTOR BID OR PROPOSAL INFORMATION OR SOURCE SELECTION INFORMATION
- Requirements for Senior Department of Defense Officials Seeking Employment with Defense Contractors, Pub. L. No 110-181 § 847 (2008). – NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008
- Review of Post-Employment Restriction Applicable to the Department of Defense, Pub. L. No. 111-84 § 833 (2009). – NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010

Appendix E

List of References (Cont'd)

Primers on Post-Employment Restrictions

- Steve Epstein, Judy Kim, Kim Rupert, and Leigh Bradley, Defense Industry Initiative. *Conflicts of Interest: It's a New Playing Field*. Washington, D.C.: Defense Industry Initiative, 2009.
- U.S. Department of Defense, [Revised] *Matrix of Coverage of the Main Restrictions Found in 18 U.S.C. § 207*. Washington, D.C.: Department of Defense, 2010.
- U.S. Department of Defense, *Post-Government Service Employment Restrictions (Rules Affecting Your New Job After DoD), For Civilian Personnel whose rate of basic pay is at or above 86.5% of the rate for Executive Service Level II (§155, 440.50 in 2010) and Flag and General Officers*. Washington, D.C.: Department of Defense, 2010.
- U.S. Department of Defense, *Post-Government Service Employment Restrictions (Rules Affecting Your New Job After DoD), For Military Personnel E-1 through O-6 and Civilian Personnel whose rate of basic pay is less than 86.5% of the rate for Executive Service Level II (less than \$155, 440.50 in 2010)*. Washington, D.C.: Department of Defense, 2010.
- U.S. Department of Defense, *Procurement Integrity Act Restrictions (Rules when you are looking for a new job and rules affecting your new job after you leave)*. Washington, D.C.: Department of Defense, 2010.
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