



INSTITUTE FOR DEFENSE ANALYSES

Effects of Certain Ethics Requirements on DOD Hiring, Retention, and Operations

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Executive Summary

Section 1073 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (the FY 2023 NDAA) required the Secretary of Defense to enter into an agreement with a Federally Funded Research and Development Center (FFRDC) to conduct a study to assess the impact of certain ethics requirements on the recruitment and retention of Department of Defense (DOD) personnel and the ability of the Department to detect, deter, prevent, and redress ethical misconduct. On March 30, 2023, DOD entered into an agreement with the Institute for Defense Analyses (IDA) to conduct the required review.

In accordance with the requirements of section 1073, the IDA review is required to address four “covered ethics requirements”: section 1045 of the FY 2018 NDAA; section 1117 of the FY 2022 NDAA; section 988 of title 10, United States Code (U.S.C.); and section 847 of the FY 2008 NDAA. These provisions address a number of ethics issues—most prominently, post-government employment (PGE) restrictions for senior DOD officials. The IDA review assesses seven major issues with regard to the covered provisions:

1. How the covered provisions are inconsistent or incongruent with statutes and regulations that apply to all executive branch employees;
2. The extent of any confusion or uncertainty in the interpretation of the covered provisions;
3. The extent to which these provisions may affect the ability of the Department to detect, deter, prevent, and redress violations of applicable ethics standards;
4. Whether the removal or alteration of the provisions may adversely affect the ability of the Department to negotiate and effectuate arms-length transactions;
5. How the covered provisions have affected—or are likely to affect—the recruitment and retention of personnel, particularly those with specialized experience or training, by DOD;
6. How sections 1045 and 1117 may affect the ability of the Department to obtain expertise from industry and other groups in support of technology development, supply chain security, and other national security matters; and
7. Whether applying these requirements exclusively to DOD personnel is justified. To this end, IDA engaged in three lines of effort, conducting a legal analysis, a quantitative analysis, and a qualitative analysis.

Lines of Analytic Effort

The IDA legal analysis found that the fundamental purpose of the federal Executive Branch ethics laws and regulations is to ensure that employees conduct themselves in a manner that places the public interest above any private interest. PGE restrictions are generally intended to maintain the public's trust by prohibiting acts "which involve, or may appear to involve, the unfair use of prior Government employment." IDA identified three potential rationales for these restrictions: (1) they can help ensure that personal connections developed during government employment are not used by former employees to unduly influence current employees, (2) they can help ensure the undivided loyalty of current government employees against the risk that they might take actions designed to benefit potential future employers, and (3) they can help to ensure that non-public information obtained during government employment is not improperly used to benefit non-federal entities (NFEs).

IDA also identified three major countervailing considerations that must be weighed against the purposes of the PGE restrictions: (1) the need to ensure that government employees are not unreasonably denied the opportunity for future employment outside the government, (2) the need to ensure that the government can continue to attract and retain needed talent, and (3) the need to ensure that the government is not denied access to the knowledge and expertise accumulated by former employees during their employment. Congress has historically resolved these competing considerations by precluding former executive branch personnel from representing others back to their former agencies on matters on which they worked and by precluding former senior executive branch personnel from representing back to their agencies at all for one to two years.

IDA found section 1045 of the FY 2018 NDAA to be the most problematic of the covered provisions. The restriction on behind-the-scenes support for lobbying included in this provision bears little connection to the core purpose of preventing former officials from exerting improper influence and appears to be an overly broad and ineffective tool for addressing the improper use of non-public information. The restriction on communications with officials outside of DOD extends to a wide range of organizations with which former DOD senior officials are unlikely to have had a prior relationship, providing little basis for denying them potential employment opportunities. These problems are exacerbated by the provision's use of the term "lobbying activities," which includes de minimis and uncompensated participation in support activities that would not trigger registration requirements under the Lobbying Disclosure Act (LDA). Restrictions on behind-the-scenes activities, in particular, have the potential to severely limit the employment opportunities available to departing DOD officials and the Department's access to their knowledge and expertise. These adverse effects have been limited by the fact that the section-1045 prohibition on behind-the-scenes activities, as interpreted by DOD, applies only to activities with respect to non-defense agencies.

In addition, section 1045 makes extensive use of terminology from the LDA that is inconsistent with the long-used and well-understood terminology of executive-branch-wide

PGE statutes and regulations. The use of the LDA term “covered officials” means that only communications with specified executive branch officials are addressed. Consequently, a former official must know the appointment status of the person or persons to whom a communication is directed (or may be directed in the future) to determine whether the communication or supporting activities are prohibited. Similarly, the use of the term “covered matters” means that only four categories of communications are prohibited and that nineteen exceptions are incorporated by reference. A former official must understand the four categories and the nineteen exceptions to assess whether a communication or supporting activities are prohibited.

The IDA quantitative analysis did not find measurable impacts of PGE restrictions on DOD recruitment and retention. IDA was unable to identify any source of quantitative data that could link ethics requirements to military or civilian recruiting or hiring. IDA used DOD administrative data to estimate retention impacts of changes in PGE restrictions, finding no consistent evidence that modified PGE restrictions for the senior-most personnel resulted in a measurable change in retention of military or civilian personnel. For reasons explained in the report, however, the absence of conclusive data does not necessarily mean that the provisions had no impact on recruiting or retention.

IDA also analyzed employers and job titles, using a combination of DOD data, LinkedIn profiles, and records of registered lobbyists. IDA found that former DOD senior officials are employed in a variety of jobs that are likely to vary in the extent to which they require contacting the Department. IDA’s analysis shows that well under one percent of these retired officials are registered lobbyists for top 100 defense contractors. Overall, only about 2 percent work for the top 10 contractors and about one-quarter work for top 100 contractors, while roughly a third work for non-profits, associations, think tanks, FFRDCs, and academic institutions. The largest share—roughly two-thirds—work for other employers, including non-traditional contractors, Limited Liability Corporations (LLCs), and small consulting firms.

The IDA qualitative analysis found that former DOD officials are frustrated by the uncertainty and confusion caused by the language of section 1045 and that DOD ethics officials spend considerable effort trying to help them understand what they can and cannot do under the provision. With respect to former military officers, the qualitative analysis found relatively weak anecdotal evidence that some officers may choose to retire as 2-Stars, at least in part because they did not want to be subject to the longer “cooling-off” period applicable to the 3-Star grade before starting a second career. Interviews provided stronger anecdotal evidence that PGE restrictions have had an adverse effect on the Department’s efforts to recruit civilians for senior positions and for positions requiring specialized knowledge and skills.

Interviewees expressed the view that rare cases of questionable conduct should be balanced against the value that former DOD officials provide the Department. Former DOD officials interviewed expressed a strong commitment to continued service after leaving the Department. Some provide voluntary service on advisory boards, professional associations,

veterans' associations, and non-profits or foundations. Others assist the Department by providing advice as management consultants or through FFRDCs or by participating in training and mentoring programs. Most interviewees believe that they can also continue to serve the Department's interests through paid work. This view extends to work that interviewees see as helping defense contractors provide products and services that better meet the Department's needs.

Former DOD officials working for traditional defense contractors are seen as providing value by serving as an avenue for frank conversation, helping companies understand DOD's priorities and how best to invest their money to meet the Department's needs, and better framing issues for decision by explaining what a product means in military terms. Former DOD officials working for non-traditional contractors are seen as helping the Department identify and access innovative products and technologies from new sources by helping the companies understand who they need to contact; serving as a "translator," helping companies understand what the Department is telling them and vice versa; helping them navigate the maze of government-unique business requirements; and advising them how to modify their products and technologies so that they meet DOD needs.

Major Findings

With regard to the seven major issues reviewed, IDA found the following:

1. **Inconsistency and overlap.** The ethics provisions under review substantially overlap with executive-branch-wide ethics provisions that address the same issues but differ in several significant ways. The differences are particularly acute with regard to section 1045. When compared to laws, rules, and EOs that apply across that executive branch, section 1045 restricts former DOD officials' communications with current government officials outside of the former officials' DOD components; establishes a two-year restriction for the most senior former DOD personnel; prohibits not only communications with current government officials, but also, in some cases, behind-the-scenes activities in support of such contacts; and uses completely different and inconsistent terminology.
2. **Risk of confusion.** The proliferation of ethics provisions that address the same or similar issues, impose somewhat different restrictions, and use slightly different language creates a patchwork of requirements and risks confusion that could undermine compliance and enforcement. This risk is particularly acute regarding section 1045, which introduces terms from the LDA such as "lobbying contacts," "lobbying activities," "covered officials," and "covered matters," which have no direct counterpart in executive-branch-wide ethics laws. Former DOD individuals interviewed by IDA reported that they had difficulty understanding the PGE rules (especially section 1045) and felt it necessary to seek ethics advice from the Department on numerous occasions after leaving office. DOD ethics officials

reported that the section 1045 prohibitions are difficult to explain and do not align well with what most people think of as “lobbying.” The confusion and uncertainty arising from these provisions is likely to produce uneven advice and inequitable results and deter some former DOD officials from engaging in legal and beneficial activities while putting others at risk of inadvertently violating requirements that they do not fully understand.

3. **Impact on detection, deterrence, and redress.** Logically, more stringent PGE constraints, such as an extended cooling-off period, are likely to reduce opportunities for improper influence. Confusing and poorly understood PGE restrictions appear to drive former officials not only from engaging in potentially improper communications, but also from engaging in beneficial forms of conduct. Policymakers must assess whether the added measure of prevention outweighs the cost of limiting employment opportunities for former DOD personnel, restricting the Department’s access to the knowledge and expertise of its former personnel and resulting in an adverse effect on DOD recruitment and retention. However, behind-the-scenes restrictions have minimal detection, deterrence, prevention, and redress benefits because they bear little connection to the core purpose of preventing former officials from exerting improper influence and are an overbroad and ineffective tool for addressing the improper use of non-public information.
4. **Impact on arms-length transactions.** Existing ethics and acquisition requirements provide important safeguards against improper influence in the acquisition system, helping to ensure that the Department’s contracts can be negotiated and executed on an arms-length basis. The ethics provisions under review substantially overlap with longstanding executive-branch-wide ethics provisions that address the same issues and provide similar protections. The defense acquisition system includes other effective safeguards to ensure arms-length transactions, including requirements for higher level reviews for certain procurements and competition-in-contracting requirements, which are effectively enforced through the bid protest process. In light of these other protections, the removal or alteration of the provisions under review is unlikely to have a perceptible impact on the ability of the Department to negotiate and execute contracts on an arms-length basis.
5. **Impact on recruitment and retention.** Individual decisions to accept or to depart from senior positions in the Department appear to be driven primarily by factors such as the desire to serve and family considerations rather than by PGE rules. Available quantitative data does not show a link between PGE legislation and retention for either senior military officers or senior civilians. However, retention data for military officers likely reflects the officer grade structure and

cannot show whether more highly qualified officers decide to retire early, leaving positions to be filled by less-qualified officers. Qualitative data provides relatively weak anecdotal evidence of a link between PGE restrictions and senior military officer retention. On the other hand, qualitative evidence provides relatively strong anecdotal evidence that PGE legislation has been an impediment to the Department's effort to recruit and hire candidates for political and other temporary positions and for positions requiring specialized training and expertise. Even in cases where the Department is able to hire candidates with needed expertise, recusal requirements relative to former employers may limit their usefulness on key issues for a period of time.

6. **Impact on access to expertise.** Former DOD officials play a critical role in connecting the Department to the private sector by helping industry understand the Department's needs and by translating the technologies and capabilities that industry has to offer into terms that the Department can understand. Such assistance can be particularly critical to small businesses and non-traditional contractors who are new to the defense business. While the large contractors would continue to do business with the Department with or without the help of former DOD officials, IDA interviewees stated that many non-traditional contractors would likely never be able to enter the defense market without such assistance. Former DOD officials also add value to advice provided to the Department by management consultants, FFRDCs, and others. IDA's review indicates that the limitation on behind-the-scenes activities is particularly problematic. This restriction appears to have only an attenuated relationship to potentially unethical contact while posing a significant risk of reducing government access to the knowledge and expertise of former DOD officials and more generally to private-sector expertise in support of technology development, supply chain security, and other national security matters.
7. **Application to DOD officials only.** Relatively few government officials in non-defense agencies are called upon to make *acquisition* decisions of a magnitude comparable to those made by senior DOD acquisition personnel, but officials in other agencies often make *regulatory* decisions with a comparable financial impact on private sector entities. These officials, despite the magnitude of their decisions, are not subject to the same PGE restrictions as DOD officials. There does not appear to be a strong reason to treat current and former DOD officials more stringently than officials in other federal agencies who make decisions that have a comparable financial impact. However, policymakers who believe that some or all these restrictions provide a helpful barrier against ethical abuses may reasonably conclude that it is better to apply them to some agencies and some officials than to none at all.

Potential Alternatives

IDA considered a wide range of potential modifications to the provisions under review to address inconsistencies and lack of clarity. Because the development of legislative proposals requires policymakers to weigh competing objectives, this report does not make specific legislative recommendations, but instead discusses the pros and cons of each potential modification.

However, the IDA team did conclude that the uncertainty and confusion caused by section 1045's use of LDA terms such as "lobbying contacts," "lobbying activities," "covered officials," and "covered matters," which have no direct counterpart in executive-branch-wide ethics laws, is particularly problematic. With regard to section 1045, policymakers could take either of two book-end approaches: (1) they could retain the section without change or (2) repeal it outright, accepting or rejecting its collective costs and benefits. The IDA team also identified two potential alternatives for modifying the provision that would preserve most of its benefits, while eliminating most of its costs:

- An amendment that would modify the language of the provision without substantive change to provide greater consistency with the well-defined terminology of longstanding executive-branch-wide standards, and
- An amendment that would modify the language of the provision to provide greater consistency with the well-defined terminology of longstanding executive-branch-wide standards *and* remove the behind-the-scenes restrictions from the provision.

A more far-reaching alternative would harmonize the range of current government officials with whom contact is prescribed by eliminating restrictions on contacts with officials of non-defense agencies and/or officials in DOD components other than the component in which the former official worked. If all these changes were made, section 1045 would differ from section 207 only in the two-year restriction imposed on officers serving in positions at a grade at or above O-9 and their civilian equivalents.

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1. Introduction

Section 1073 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (the FY 2023 NDAA)¹ required the Secretary of Defense to enter into an agreement with a Federally Funded Research and Development Center (FFRDC) to conduct a study to assess the impact of certain post-government ethics requirements on the recruitment and retention of Department of Defense (DOD) personnel and the ability of the Department to detect, deter, prevent, and redress ethical misconduct. On March 30, 2023, DOD entered into an agreement with the Institute for Defense Analyses (IDA) to conduct the required review.

In accordance with the requirements of section 1073, the IDA review is required to address four “covered ethics requirements”: section 1045 of the FY 2018 NDAA; section 1117 of the FY 2022 NDAA; section 988 of title 10, United States Code (U.S.C.); and section 847 of the FY 2008 NDAA.² Appendix A contains a copy of the statutory provisions of section 1073 of the FY 2023 NDAA and the ethics requirements provisions listed in this paragraph.

- Section 1045 prohibits certain former high-ranking DOD officials from engaging in “lobbying activities with respect to the Department of Defense” for a specified period of time after separation or retirement.
- Section 1117 prohibits DOD officials from knowingly participating personally and substantially in any particular matter involving specific parties for whom they have worked in the recent past or with whom they are seeking potential future employment.

¹ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, P.L. 117-263, 136 Stat. 2395, 117th Cong. (2022), <https://www.congress.gov/117/plaws/publ263/PLAW-117publ263.pdf>.

² These statutory provisions have been implemented through Department of Defense Instruction (DODI) 1000.32 and guidance issued by the Standards of Conduct Office (SOCO) of the DOD Office of General Counsel (OGC). For example, Office of General Counsel (OGC)/Standards of Conduct Office (SOCO), “Guidance Regarding Section 1117 of the National Defense Authorization Act for Fiscal Year 2022,” SOCO Advisory Number 22-01 (Washington, DC: Department of Defense, January 11, 2022), SOCO ADVISORY (osd.mil); Office of General Counsel (OGC)/Standards of Conduct Office (SOCO), “Interpretation of ‘Covered Department of Defense Officials’ Under Section 847,” Memorandum (Washington, DC: Department of Defense, April 16, 2014), 2014 SOCO memo clarifying Section 847 2 yr lookback.pdf (osd.mil); Office of General Counsel (OGC)/Standards of Conduct Office (SOCO), “Seeking Employment Restrictions” (Washington, DC: Department of Defense, Rev. January 2024), https://dodsoco.ogc.osd.mil/Portals/102/Documents/PGE%20and%20PI/Toolbox%20-%20PGE-PI/2024%20Seeking%20Employment%20Handout.pdf?ver=oK8CFQgOhzX1ZmOSANU_6w%3d%3d; Office of General Counsel OGC/Standards of Conduct Office (SOCO), “2024 Senior Employee Post-Government Employment Restrictions,” (Washington, DC: Department of Defense, January 2024), <https://dodsoco.ogc.osd.mil/Portals/102/Documents/PGE%20and%20PI/Toolbox%20-%20PGE-PI/2024%20Sr%20PGE%20Restrictions.pdf?ver=QTvlmgJqmmoIfshrEirU6Q%3d%3d>.

- Section 988 prohibits certain senior DOD officials from owning or purchasing publicly traded stock of any of the top 10 entities (i.e., defense contractors) awarded the largest amount of contract funds by DOD in a fiscal year during the five preceding fiscal years.
- Section 847 requires certain DOD officials to request a written ethics opinion on the applicability of post-government employment restrictions before accepting compensation from any defense contractor for a period of two years after leaving the Department.

Each of these provisions overlaps with longstanding executive-branch-wide ethics requirements.

IDA was tasked with assessing seven major issues with respect to the covered provisions:

1. How the covered provisions are inconsistent or incongruent with statutes and regulations that apply to all executive branch employees;³
2. The extent of any confusion or uncertainty in the interpretation of the covered provisions;⁴
3. The extent to which these provisions may affect the ability of the Department to detect, deter, prevent, and redress violations of applicable ethics standards;⁵
4. Whether the removal or alteration of the provisions may adversely affect the ability of the Department to negotiate and effectuate arms-length transactions;⁶
5. How the covered provisions have affected—or are likely to affect—the recruitment and retention of personnel, particularly those with specialized experience or training, by DOD;⁷
6. How sections 1045 and 1117 may affect the ability of the Department to obtain expertise from industry and other groups in support of technology development, supply chain security, and other national security matters;⁸ and
7. Whether applying these requirements exclusively to DOD personnel is justified.⁹

³ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, 1073(a)(2)(A).

⁴ Ibid., section 1073(a)(2)(D).

⁵ Ibid., section 1073(a)(1)(B), section 1073(a)(2)(D)(ii); section 1073(a)(2)(F).

⁶ Ibid., section 1073(a)(2)(G).

⁷ Ibid., section 1073(a)(1)(A); section 1073(a)(2)(C); section 1703(a)(2)(D)(i).

⁸ Ibid., section 1073(a)(2)(E).

⁹ Ibid., section 1073(a)(2)(B).

In addition, IDA was asked to suggest changes to the covered provisions that might further the establishment and maintenance of ethical standards while also supporting the Department's ability to hire and retain personnel and to obtain needed expertise from academia, think tanks, industry, and other non-federal entities.¹⁰

The fundamental purpose of federal ethics laws and regulations is to preserve the public trust by ensuring that executive branch employees conduct themselves in a manner that places the public interest above any private interest. Debate about the appropriate ethics standards for executive branch employees has been particularly pointed with regard to former DOD personnel who go to work for defense contractors. Some public interest advocates argue that the current restrictions are insufficient and that a “revolving door” between DOD and its contractors creates the appearance that those who remain in government are being improperly influenced by their former colleagues.¹¹ Others express the view that these restrictions “have grown out of proportion to public need and to common sense”¹² and undermine the Department's ability to attract and retain the talent that it needs.¹³

To some extent, these competing views arise out of opposing assessments of the defense industry. For those who view the defense industry as “the arsenal of democracy,” providing essential capabilities that underwrite national security,¹⁴ former defense officials who work for contractors are perceived as continuing to serve the national security in a new role. Those who perceive a “military industrial complex” that “often confuses what is in the best financial interests of defense contractors—excessively large Pentagon budgets, endless wars, and overpriced weapon systems—with what is in the best interest of military effectiveness and protecting citizens”¹⁵ find it more difficult to see value to the government in the work that former defense officials perform for contractors.

¹⁰ Ibid., section 1073(a)(2)(H).

¹¹ Project on Government Oversight (POGO), *Brass Parachutes: Defense Contractors' Capture of Pentagon Officials Through the Revolving Door* (Washington, DC: POGO, November 5, 2018), 2, https://s3.amazonaws.com/docs.pogo.org/report/2018/POGO_Brass_Parachutes_DoD_Revolving_Door_Report_2018-11-05.pdf.

¹² National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* (Washington, DC: U.S. Government Publishing Office, January 2023), 21, <https://www.dmi-ida.org/knowledge-base-detail/urgent-business-for-america-revitalizing>.

¹³ Business Executives for National Security, *BENS Expert Panel Review of the Presidential Appointment with Senate Confirmation (PAS) Process: Making Senior Government Service More Attractive* (Washington, DC: BENS, May 2015), 17–20, <https://bens.org/wp-content/uploads/2022/03/Government-Services-Report-May2015.pdf>.

¹⁴ See, for example, Cynthia Cook, “Reviving the Arsenal of Democracy: Steps for Surging Defense Industrial Capacity” (Washington, DC: Center for Strategic and International Studies (CSIS), March 14, 2023), <https://www.csis.org/analysis/reviving-arsenal-democracy-steps-surging-defense-industrial-capacity>.

¹⁵ Project on Government Oversight (POGO), *Brass Parachutes*, 2.

IDA was tasked with performing an independent analysis to assess the types of work former defense officials actually perform after leaving the Department and how those roles are affected by the ethics requirements subject to IDA's review. IDA initiated three major lines of effort to carry out this requirement: a legal analysis, a quantitative analysis, and a qualitative analysis.

- The IDA legal analysis examined each of the four covered ethics requirements and its purposes and history, identified and assessed major differences between these provisions and other ethics statutes and regulations applicable to all executive branch employees, and evaluated areas of potential inconsistency or confusion. The IDA legal analysis included the following five steps:
 - Identify the purposes of the covered provision and countervailing considerations;
 - Identify other provisions of law or regulation that impose similar requirements;
 - Identify major differences between the covered provision and other applicable requirements;
 - Assess each major difference in light of the purposes and countervailing considerations; and
 - Use the analysis to assess the impact of the provision on the seven issues to be addressed.
- The IDA quantitative analysis examined available data on the entities by which senior DOD officials were employed after their departure from federal service and assessed whether that data reflected changes in post-government employment (PGE) or related conduct when the ethics provisions under review came into effect. The quantitative analysis sought to answer four major questions:
 - What impact have PGE restrictions had on the retention of DOD senior officials?
 - What impact have PGE restrictions had on the employment of former DOD senior officials by top defense contractors?
 - How many former DOD senior officials are registered lobbyists for top defense contractors?
 - For whom do former DOD senior officials work and what types of work do they perform?
- IDA used qualitative analysis to add to its understanding of three major issues:
 - With regard to confusion and uncertainty, how well do current and former officials understand the covered provisions, and how hard is it to train and advise them?
 - With regard to recruitment and retention, to what extent do the covered provisions deter prospective DOD employees from accepting positions or drive current employees to leave earlier than they otherwise would?

- With regard to access to expertise and advice, what types of work do former DOD officials perform and to what extent does that work benefit the Department?

The IDA qualitative analysis included interviews with current, retired, and former DOD personnel affected by the ethics requirements under review, as well as individuals responsible for providing legal advice to such personnel, individuals responsible for hiring expert personnel into the Department, and stakeholders outside the Department. The current and former DOD officials interviewed included the following:

- Twenty current or retired military officers (including four 4-Star officers, six 3-Star officers, five 2-Star officers, three 1-Star officers, and two O-6s);
- Eighteen current or former DOD civilians (including seven Presidentially Appointed, Senate-Confirmed (PAS) officials, three non-career Senior Executive Service (SES) officials, and eight career SES officials);
- Five current or former leadership officials, eleven acquisition officials, five intelligence/information technology (IT)/artificial intelligence (AI)/cyber officials, ten resource management officials, and seven officials with other specialties; and
- Twelve agency ethics officials.¹⁶

These interviews were informed by IDA's legal and quantitative analyses and added to the depth of IDA's understanding of legal and quantitative issues. IDA also conducted a day-long workshop with DOD SOCO to better understand the issues faced by agency ethics officials in advising current and former officers and employees of the Department about the covered provisions. This workshop included a PGE briefing similar to the one provided to departing senior DOD officials.

Chapter 2 of this report provides background on the purposes of PGE restrictions and how they are met by existing executive-branch-wide statutes and regulations. Chapter 3 provides the results of the IDA legal analysis (supplemented, as appropriate, by IDA's qualitative analysis), and addresses the first five of the seven major issues that IDA was tasked to address: (1) inconsistency and overlap; (2) uncertainty and confusion; (3) detection, deterrence and redress; (4) impact on arms-length transactions; and (5) application to DOD officials only. Chapter 4 addresses the impact of the covered provisions on DOD recruitment and retention, drawing on the team's quantitative analysis and qualitative assessment. Chapter 5 addresses the final issue, the impact of the provisions on DOD access to expertise, and draws on the quantitative analysis and the qualitative assessment. Chapter 6 identifies potential modifications to the covered provisions. Chapter 7 summarizes IDA's conclusions.

¹⁶ Because all interviews were conducted on a not-for-attribution basis, this report does not include names or other personally identifiable information with regard to the interviewees. Appendix B provides a chronological listing of interviews of current and former DOD officials (without names).

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2. Background

A. Purposes of PGE Requirements

The fundamental purpose of the federal executive branch ethics laws and regulations is to preserve the public trust by ensuring that government officials conduct themselves in a manner that places the public interest above any private interest. However, section 1045 and section 847 impose requirements on the conduct of former government employees, putting them in a category of legislation that is known as a “post-government employment” or “PGE” requirements. Individuals who have already left government service are no longer federal employees and no longer owe the same duty of loyalty as current personnel. Consequently, a different—or at least modified—rationale applies to the imposition of ethics requirements on former government employees.

The PGE rules are generally intended to maintain the public’s trust by prohibiting acts “which involve, or may appear to involve, the unfair use of prior Government employment.”¹⁷ IDA identified four potential rationales for limiting the employment opportunities of former government officials. These include the following:

- Preventing former officials from “cashing in” on service that is supposed to be for the public good;
- Ensuring that the loyalty of current government officials is not undermined by the prospect of future employment;
- Preventing former senior personnel from exerting improper influence on former subordinates and colleagues; and
- Ensuring that non-public government information is not misused by former employees to advantage private employers.

In each case, policymakers must balance the rationale for limiting post-government employment opportunities against potential countervailing government and public interests. IDA identified three potential countervailing interests:

¹⁷ Post-Employment Conflict of Interest Restrictions, *Federal Register* 68, no. 32 (February 18, 2003), 7845, <https://www.govinfo.gov/content/pkg/FR-2003-02-18/pdf/03-3043.pdf>. Final rules implementing the post-employment conflict of interest statute, 18 U.S.C. § 207, published at Post-Employment Conflict of Interest Restrictions, *Federal Register* 73, no. 123 (June 25, 2008), 36168, <https://www.govinfo.gov/content/pkg/FR-2008-06-25/pdf/E8-13394.pdf>.

- The need to ensure that government employees are not denied the opportunity for future employment outside the government;
- The need to ensure that the government can continue to attract and retain needed talent; and
- The need to ensure that the government is not denied access to the knowledge and expertise accumulated by former employees during their employment.

Such balancing requires the use of precise language that clearly defines the conduct that is—and is not—restricted. Consequently, the use of clear and consistent language, while not an objective of the PGE requirements in itself, is essential to achieving the other objectives discussed previously and deterring potentially unethical conduct without needlessly harming the Department’s interests.

1. Preventing “Cashing In”

One potential rationale for imposing limitations on the conduct of former government personnel is a general distaste for the idea that former officials might derive significant financial benefit from service that is supposed to be for the public good. A 2022 *Forbes* article explains as follows:

Most people have heard of Washington’s revolving door, which allows politicians to cash in on their government service by roving between the private and public sectors, leveraging their government connections and know-how “This shows what the revolving door is all about,” says Craig Holman of Public Citizen “People swing through the revolving door to enhance their personal wealth.”¹⁸

Similarly, a 2004 report by the Project on Government Oversight (POGO) asserts that “the vast majority of career civil servants do not use their government jobs as stepping stones to high paying jobs with government contractors, and it demoralizes them to see their supervisors and co-workers do so.”¹⁹

Former DOD officials interviewed by the IDA team acknowledged the attractiveness of generous levels of compensation offered by defense contractors. However, these officials also perceived an element of continuing public service in the work of former DOD officials employed by these contractors, noting the importance of the weapon systems and other equipment provided by contractors in ensuring the strength and effectiveness of the Armed Forces.

¹⁸ Eric Fan, “Revolving-Door Riches: How Obama-Biden Officials Cashed In During The Trump Years,” *Forbes*, June 21, 2022, <https://www.forbes.com/sites/ericfan/2022/06/21/revolving-door-riches-how-obama-biden-officials-cashed-in-during-the-trump-years/?sh=2ee81ead3385>.

¹⁹ Project on Government Oversight (POGO), “The Politics of Contracting” (Washington, DC: POGO, June 29, 2004), 8, https://s3.amazonaws.com/docs.pogo.org/report/2004/POGO-Report-Politics-of-Contracting-all-appendices_2004.pdf.

A general distaste for personal enrichment, at its most extreme, could be used to argue for a complete—or near-complete—prohibition on the employment of former government officials in any field related to their government service. Such a broad restriction, however, would run contrary to other important interests, making it significantly more difficult for the government to attract qualified applicants to public service and for government employees to leave public service. As explained by the Office of Government Ethics (OGE) in a 2006 report to Congress:

No discussion of the purposes of [the PGE laws] would be complete without an analysis of the important countervailing interests that have caused Congress to temper its post-employment restrictions. Chief among these interests is “the government’s objective in attracting experienced and qualified persons to public service.” ... Closely related is the concern not to interfere unnecessarily with the legitimate right of former employees to “move on with their lives” and make a living.²⁰

These concerns are perhaps most acute regarding military service, which is time-limited by expectation and by law (i.e., through time in service and age requirements limiting the tenure of military officers). The Armed Services assure potential recruits that military service will make them more employable, and the federal government expends considerable resources to help veterans match their military experience to potential private sector careers.²¹

The same rationale may be extended to political appointees, who serve at will and whose government careers are generally time-limited by the nature of their appointments and the duration of the administration in which they serve and to career civil servants, who are not indentured for life and who enjoy the same employment freedoms as other Americans. For these reasons, ethics experts tend to dismiss general distaste for personal gain as a compelling rationale for PGE limitations and, instead, endeavor to articulate more focused sources of harm to the public interest and to tailor ethics limitations to address those harms.

2. Ensuring the Loyalty of Current Employees

A second potential rationale for PGE restrictions is to ensure the undivided loyalty of current government employees against the risk that they might take actions designed to benefit potential future employers. As then-OGE Director Stephen D. Potts explained more than thirty years ago, the concern is “that while still employed by the Government, [an employee] may seek to curry

²⁰ Office of Government Ethics, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment* (Washington, DC: OGE, January 2006), 13–14, [https://www.oge.gov/Web/OGE.nsf/0/F3127FD1FD0A2415852585B6005A126D/\\$FILE/fb1bb9d5af124e6ca85c3cab2db6ac582.pdf](https://www.oge.gov/Web/OGE.nsf/0/F3127FD1FD0A2415852585B6005A126D/$FILE/fb1bb9d5af124e6ca85c3cab2db6ac582.pdf).

²¹ See, for example, U.S. Army, “Develop Skills for Life,” <https://www.goarmy.com/skills-and-training.html>; Military OneSource, “Career Path Decide,” About Career Path DECIDE | Military OneSource; U.S. Department of Veterans Affairs, “Careers and Employment,” <https://www.va.gov/careers-employment/>; Department of Labor, “CareerOneStop,” CareerOneStop Veteran and Military Transition Center; Build Your Future (BYF), “Crosswalk: Army Equivalency Alignment,” https://veterans.byf.org/wp-content/uploads/2019/04/Crosswalk-army_BOOK.pdf.

favor and enhance his employment prospects by doing something in his official capacity to benefit that prospective employer.”²²

This rationale goes to the heart of federal ethics laws and regulations, the fundamental purpose of which is to ensure that employees place the public interest above their own private gain. A personal interest in future employment—no less than a personal investment—is a private interest that should not be permitted to undermine the public good. Hence, the federal government has a strong interest in precluding current government employees from participating in decisions that might benefit potential future private sector employers.

An ethics restriction could take either of two approaches to prevent this type of conflict of interest: (1) a restriction on participation in decision making to prevent current government employees from acting with regard to potential future private sector employers or (2) a PGE restriction on future employment, such that those who participate in decision making while in government service cannot be employed by private sector entities affected by their decisions.

The difficulty with the first approach lies in defining the universe of private sector interests covered by the restriction. In theory, virtually any private sector entity could be a potential future employer for any government employee. For this reason, policymakers must balance the need to preclude the involvement of current government employees in decisions affecting potential future employers against the risk that an overly broad restriction could preclude government employees—and hence, the government—from making some types of decisions at all. For this reason, existing executive-branch-wide restrictions preclude current officials from participating only in decisions regarding companies with which they are actively seeking employment.

The difficulty with the second approach is in defining the types of decision making, and the types of participation in such decisions that would preclude future employment. On a daily basis, the government makes an almost infinite number of contracting decisions, including decisions about with whom to contract, for what, for how much, pursuant to what terms and conditions, and how to hold contractors accountable. However, these decisions are just the tip of the iceberg because equally complex decisions about what government priorities to establish (or not to establish), what programs and activities to fund (or not to fund), and what issues to regulate (or not to regulate) and how to regulate them may have an effect on the private sector that is equally significant.

An employment restriction intended to safeguard the loyalty of current employees, if not carefully crafted, could severely restrict their future employment prospects to the extent of making some current employees unemployable in the private sector. Such far-reaching restrictions could

²² *Oversight of the Procurement Integrity Act: Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate*, S. Hrg. 102-59, 102nd Cong. (February 26, 1991), (statement of Stephen D. Potts, Director, OGE), 48, <https://catalog.libraries.psu.edu/catalog/1439328>. Similarly, POGO has stated that PGE requirements are needed to address the risk that government officials will be lenient toward or favor prospective future employers (see Project on Government Oversight (POGO), “The Politics of Contracting,” 7).

have a serious adverse effect on the ability of the government to attract qualified employees and the ability of government employees to leave public service and find gainful employment elsewhere.²³

3. Preventing the Abuse of Connections

A third potential rationale for PGE restrictions is to prevent former government employees from exerting improper influence on former subordinates and colleagues on behalf of non-governmental employers.²⁴ The concern is that current employees, who should be making decisions based entirely on a neutral evaluation of the public interest, could be less than neutral when approached by a former colleague with whom they have a longstanding relationship of friendship, trust, and confidence.

As Senator Elizabeth Warren has stated, former government officials may benefit from easy access to former subordinates and colleagues, giving them a built-in advantage over their competitors:

A preferred strategy is to hire former Pentagon employees to put together the bids and then to present them to their former colleagues in government. After all, if a defense industry staffer used to work in the next cubicle over from a Pentagon acquisitions officer, there's a better chance that the industry staffer can get his phone calls and emails returned. A better chance the industry staffer can schedule a sales pitch. A better chance that the sales pitch will go well. And with all the latest intelligence on what the department wants to fund, the industry staffer who just left the Department of Defense has the best possible chance of turning former friendships into dollar signs for the defense industry.²⁵

The countervailing consideration in this case is the need to ensure that the government is not denied access to the valuable knowledge and expertise of former employees. For example, a government official who is facing a difficult problem might well benefit from the advice of a predecessor or a recently departed expert who had grappled with the same problem in the past. OGE has explained this consideration as follows:

Another interest in avoiding excessive post-employment legislation is that the Government sometimes derives a benefit from communicating with former employees. For instance, there often is an interest in receiving information from former officials about the operations of Government. "The knowledge of an

²³ The potential impact of the covered provisions on government access to talent is discussed in more detail in Chapter 4.

²⁴ *Oversight of the Procurement Integrity Act*, S. Hrg. 102-59, (statement of Stephen D. Potts, Director, OGE), 48.

²⁵ Senator Elizabeth Warren, "Chairing Subcommittee on Personnel, Senator Warren Highlights Need for Ethics Legislation Across Federal Government," April 26, 2023, <https://www.warren.senate.gov/newsroom/press-releases/chairing-subcommittee-on-personnel-senator-warren-highlights-need-for-ethics-legislation-across-federal-government>.

experienced former official may be made to operate against the Government, but it may also contribute to the ends of the Government.”²⁶

For example, NASA [National Aeronautics and Space Administration] has advised OGE that, in order to implement the President’s Vision for Space Exploration, it will be necessary to engage private organizations, such as non-profit research centers, to carry out some of the operations that currently are performed by NASA employees. Many of these private organizations are staffed by former NASA employees, and in many of these cases, the necessary communications would not be limited strictly to scientific and technological subjects.²⁷

Although there is longstanding consensus that certain PGE restrictions are necessary to avoid the potential for abuse of connections by former government officials, before enacting additional restrictions, policymakers must weigh the effectiveness of current and proposed PGE restrictions in balancing the potential for abuse with the government’s need for continued communication. This balancing effort requires the assessment of a series of subordinate questions: Which former officials should be subject to PGE restrictions? With whom should they be prohibited from communicating? What types of communications should be covered? For how long should such restrictions apply?

4. Preventing the Misuse of Inside Information

The final potential rationale for PGE restrictions is to ensure that non-public information obtained during government employment is not abused by former employees to the advantage of their private sector employers.²⁸ This concern has been particularly acute with regard to federal contracting because access to non-public procurement sensitive and proprietary information (known only to select government officials) could give a contractor an unfair competitive advantage. As OGE explained in a 1984 opinion letter, PGE restrictions are intended to preclude “the use or the apparent use of inside information gained about competitors of the new employer Protection from this harm is necessary to the preservation of the integrity of the Government’s contracting process.”²⁹

²⁶ Office of Government Ethics, *Report to the President and to Congressional Committees on the Conflict of Interest Laws*, 14.

²⁷ *Ibid.*, 17–18.

²⁸ *Ibid.*, 12. Also, *Oversight of the Procurement Integrity Act*, S. Hrg. 102-59, (statement of Stephen D. Potts, Director, OGE), 48.

²⁹ Office of Government Ethics, “Letter to Private Attorneys,” November 19, 1984, 2, [https://www.oge.gov/Web/OGE.nsf/0/26BA54D6DAE56AAC852585BA005BEF5A/\\$FILE/0a7087309ff44d15894736a1c1d1c9cc2.pdf](https://www.oge.gov/Web/OGE.nsf/0/26BA54D6DAE56AAC852585BA005BEF5A/$FILE/0a7087309ff44d15894736a1c1d1c9cc2.pdf). In the absence of PGE restrictions, POGO has explained, hiring former government officials “sometimes provides the contractor with an unfair advantage over its competitors due to insider knowledge that can be used to the benefit of the contractor, but to the detriment of the public” (see Project on Government Oversight (POGO), “The Politics of Contracting,” 8). Similar concerns exist with regard to government officials who have access to trade secrets and other confidential business information during their government employment in regulatory, licensing, and oversight roles.

In this case, the countervailing consideration is that not all government information is precluded from disclosure.³⁰ In fact, former government officials are likely to have knowledge about a wide array of government information that is not prohibited from disclosure and the use of which would not be harmful to—and could even be beneficial to—the government. Such information could include non-confidential information of the following types:

- Information about government processes and how they work, including an understanding of the acquisition system and what it requires;
- Information about the products, services, and capabilities that the government needs and the problems that it faces;
- Expertise on issues like DOD data needs, IT systems, and cyber security requirements; and
- Information and expertise on military doctrine, operational concepts, strategic vulnerabilities, operator priorities, deficiencies in existing systems, training practices, logistical requirements, and communication architecture.

Accordingly, policymakers considering additional PGE restrictions must consider the extent to which current laws effectively guard against the improper disclosure of non-public information by former federal personnel. They must also determine whether additional restrictions would better balance the government’s need to protect against the abuse of privileged and confidential non-public information against the risk of cutting off the legitimate flow of specialized information that is beneficial to the government. The extent to which the covered provisions risk cutting off DOD access to needed knowledge and expertise is discussed in more detail in Chapter 5 of this report.

5. The Use of Clear and Consistent Language

The use of imprecise or confusing language in a statute or regulation may lead some to engage in activities that are intended to be prohibited or to avoid activities intended to be permitted. Such language may also undermine enforcement by providing a legal defense to those who fail to comply. As recently as April 2023, in a statement to Congress, the DOD General Counsel explained the need for clarity and consistency in ethics laws as follows:

Clear laws are easy for personnel to understand and follow. Consistent laws fit within the overall statutory framework for regulating ethical conduct within the Executive Branch using common terminology and definitions to prevent confusion.... DOD-specific statutes can introduce unnecessary complexity and confusion, particularly where they introduce terms and definitions that are incongruent with the existing Executive Branch ethics framework, and as a result

³⁰ On the contrary, the Freedom of Information Act (5 U.S.C. section 552) establishes a presumption that government records are available to the public unless there is a specific reason to withhold them (e.g., classified information, proprietary data, source-selection information, trade secrets, and pre-decisional information). See Office of Information Policy (OIP), U.S. Department of Justice, “The Freedom of Information Act, 5 U.S.C. § 552,” Office of Information Policy | The Freedom of Information Act, 5 U.S.C. § 552 (justice.gov).

they may ultimately undermine rather than promote our shared commitment to ethical conduct.³¹

The proliferation of ethics provisions that address the same or similar issues impose slightly different restrictions and use slightly different language creates a patchwork of requirements that are more difficult to understand and comply with than those established by a single, comprehensive set of restrictions that uses consistent language and is consistently applied. The need for clarity and consistency in PGE laws has been recognized by government officials and public interest groups for decades. In a special message to Congress accompanying a government ethics legislative proposal that President Kennedy submitted after taking office, he noted that some existing conflict-of-interest laws had been enacted before 1873, all were enacted without coordination with any of the others, and no two of them used uniform terminology. The President stated:

Although such agency regulation is essential, it cannot be allowed to dissolve into a welter of conflicting and haphazard rules and principles throughout the Government. Regulation of ethical conduct must be coordinated in order to ensure that all employees are held to the same general standards of conduct.³²

Thirty years later, an independent panel reviewing the proliferation of DOD-targeted ethics provisions (that were subsequently pared back by Congress) in 1993, reported:

There has been growing acknowledgment that the current pyramid of post-employment laws facing defense employees is complex and nearly impossible to understand.³³

[These overlapping] restrictions add little of substance to the basic set of Federal post-employment laws, but through their ambiguity and severity contribute significant disincentives to public service.³⁴

A decade later, in 2004, the POGO report again made the case that the overlap and confusion caused by the existing PGE laws was problematic, stating:

Federal conflict of interest and ethics laws have been implemented piecemeal over the past fifty years, and they have become a tangled mess of statutes and regulations as well as exemptions and waivers....To further complicate matters, presidential

³¹ Caroline Krass, “Statement of Caroline Krass, General Counsel, U.S. Department of Defense, Before the Personnel Subcommittee of the U.S. Senate Armed Services Committee,” April 26, 2023, 7–8, <https://www.armed-services.senate.gov/imo/media/doc/04.26.23%20Personnel%20Statement%20-%20Krass.pdf>.

³² The American Presidency Project, “John F. Kennedy: Special Message to the Congress on Conflict-of-Interest Legislation and on Problems of Ethics in Government,” April 27, 1961, Special Message to the Congress on Conflict-of-Interest Legislation and on Problems of Ethics in Government. | The American Presidency Project ([ucsb.edu](https://www.americanpresidencyproject.org)).

³³ Acquisition Law Advisory Panel, “Streamlining Defense Acquisition Laws: Report of the Acquisition Law Advisory Panel to the United State Congress” (Washington, DC: Department of Defense, January 1993), 6-123, <https://www.dmi-ida.org/knowledge-base-detail/streamlining-defense-acquisition-laws>.

³⁴ Ibid., 6-125.

orders and agency directives govern post-government employment as well. In all, government employees struggle with a decentralized system of ethics laws and regulations – a multiple layer system so convoluted that ethics officers and specially-trained lawyers hired to enforce them have exasperatedly pushed for a more simplified system.

The complexity in the revolving door system can cause government employees to unintentionally violate the law, although there also are examples of those willing to flaunt the rules as well. The system has become so complex that honest government employees, as well as designated ethics officers, have a difficult time maneuvering through the applicable employment prohibitions. Without simplification of the system and a model rule of ethical conduct, employees who tried to do the right thing appear as dishonest as former government employees who willfully violated the law. Lost in the mix is an effective mechanism to protect the public interest from being subverted for private gain.³⁵

In short, the use of clear and consistent language is necessary to ensure that the intent of policymakers is actually achieved, with a minimum of unintended adverse effects.

B. Existing Coverage

Section 1045 and section 847 were enacted against the backdrop of a set of longstanding laws and regulations establishing PGE restrictions for all executive branch personnel and otherwise addressing the underlying policy rationales outlined previously. These existing statutes and regulations do not establish a comprehensive ban on post-government employment in a particular field or across all entities related to an employee's government responsibilities (as might be suggested by a general distaste for any personal gain arising out of government service). However, they do address the three more focused purposes of PGE restrictions: (1) ensuring the loyalty of current employees, (2) preventing the abuse of connections, and (3) avoiding the misuse of non-public information.

In each case, the restrictions are balanced in a manner that appears intended to avoid potential negative consequences, such as making it more difficult for the government to attract qualified applicants to public service or denying the government access to the valuable knowledge and expertise of former employees. Moreover, as a result of well-established interpretive regulations and decades of legal advice provided to current and former employees by OGE and agency ethics officials, these government-wide requirements are by now relatively well-understood and consistently applied.

1. Ensuring the Loyalty of Current Employees

Section 208 of title 18, U.S.C., addresses the need for the undivided loyalty of executive branch employees by prohibiting them from participating personally and substantially in matters

³⁵ Project on Government Oversight (POGO), "The Politics of Contracting," 23.

in which they, certain family members, or organizations with which they are closely associated have a financial interest. This provision was amended in 1962 to prohibit a government employee from engaging in actions affecting the financial interest of any person or organization with whom the employee “is negotiating or has any arrangement concerning prospective employment.”³⁶

Subpart F of the executive branch ethics regulations (5 CFR § 2635) further expands this restriction by prohibiting executive branch employees from participating personally and substantially in a matter in which a potential employer has a financial interest, even if the employee’s efforts to seek employment with the potential employer fall short of actual negotiations. Under the definition in 5 CFR § 2635.603(b), an executive branch employee is considered to be “seeking employment” with a non-federal entity (NFE) if the individual has made a communication to the NFE regarding possible employment or has received and not yet rejected a communication regarding possible employment with an NFE.

Taken together, these provisions address the concern that current government employees might seek to curry favor with potential employers, by prohibiting such employees from participating in particular matters in which such employers have a financial interest. The statutory and regulatory language provide a detailed definition of when an NFE is—or is not—considered to be a potential employer, addressing potential concerns that an overly broad requirement could inhibit government decision making.

The executive branch ethics regulations provide multiple examples of the application of this definition, and additional guidance is available in the form of published and unpublished opinions rendered by OGE and agency ethics officials. As a result, the application of the prohibitions in 18 U.S.C. § 208 and Subpart F of 5 CFR § 2635 appear to have been clearly communicated and should be well-understood.

2. Preventing the Abuse of Connections

a. Ethics provisions

Section 207 of title 18 U.S.C., first enacted in 1962, addresses the potential for improper influence by former government officials among their former colleagues and subordinates by placing a set of restrictions on communications between current and former officials. Among these restrictions are the following:

- Section 207(a)(1) establishes a lifetime ban on representing any NFE to the government in connection with a particular matter involving specific parties on which that employee

³⁶ The restriction now applies to any matter in which the employee or “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....” See Acts Affecting a Personal Financial Interest, 18 U.S.C. § 208, <https://www.law.cornell.edu/uscode/text/18/208>.

worked personally and substantially while in government. This ban remains in effect for the lifetime of the particular matter.

- Section 207(a)(2) establishes a two-year ban on representing any NFE to the government on any particular matter involving specific parties that was under an employee's official responsibility in the one year before leaving government.
- Section 207(c) establishes a one-year "cooling-off" period for senior government officials (including military general and flag officers (GOFOs) as well as most members of the SES), barring all representational communications or appearances on behalf of any NFE before their former departments or agencies (or relevant components thereof).
- Section 207(d) establishes a two-year "cooling-off" period for very senior government officials (primarily Cabinet officials), barring representational communications or appearances on behalf of any NFE before any person in their former departments or agencies, or with any Executive Schedule official (generally, a Senate-confirmed, Presidential appointee) anywhere in the Executive Branch.

In recent years, these statutory provisions have been supplemented by a series of Executive Orders (discussed in Chapter 3) that place additional restrictions on political appointees, including the most senior government officials.

The "cooling-off" periods required by sections 207(c) and (d) are designed to safeguard against the improper influence that former senior officials may be able to exert with former colleagues and subordinates, by imposing a complete prohibition on "representational contacts" by such former officials for a specified period of time after they leave office. The theory is that a former official who is prohibited from contacting former colleagues and subordinates will not be in a position to exercise improper influence over them.

Lower-level officials who are not subject to these "cooling-off" provisions are covered by the broadly applicable but more narrowly constructed communication and appearance restrictions in sections 207(a)(1) and (a)(2). These provisions apply to all executive branch employees (including senior officials) but limit communications only with regard to specified matters—matters in which the employee participated personally and substantially (207(a)(1)) or that fell under the employee's responsibility (207(a)(2)). The theory is that lower level officials are likely to exercise less influence than their more senior colleagues, so the broader prohibitions are unnecessary.

Taken together, these provisions address the broad range of potential abuse by former senior officials who are understood to exert the most influence among their former colleagues and subordinates and the most obvious opportunities for potential abuse by lower level officials. At the same time, they avoid completely cutting off the government from the knowledge and expertise of its former employees by permitting non-representational communications, by cutting off most

representational communications for only a specified period of time and by covering only the most senior officials with the broadest prohibitions.³⁷

The executive branch ethics regulations addressing post-employment conflict of interest restrictions provide multiple examples of the application of these restrictions,³⁸ and additional guidance is available in the form of published and unpublished opinions by OGE and agency ethics officials. These provisions have been consistently interpreted over a period of more than forty years and are well understood by the agency ethics officials who advise departing executive branch personnel. As a result, the application of these restrictions appears to have been clearly communicated and should be well-understood.

b. Acquisition provisions

Because of the magnitude of the interests at stake, the defense acquisition process includes significant additional measures to ensure arms-length transactions and to safeguard against improper influence. Major decisions at all stages of the process must be documented in writing and approved by higher authorities. Even the Department's most urgent requirements, identified on the battlefield and needed to save lives, go through a formal approval process before they are funded and the contracting process can begin.³⁹ For larger acquisitions, additional checks on the process include independent analyses of alternatives, independent price analyses, contract pricing audits, and independent operational testing and evaluation.

To avoid even the appearance of impropriety, senior acquisition officials tend to meet with defense contractors only in carefully controlled circumstances, when they meet at all. This tendency is so strong that one recent Deputy Secretary of Defense found it necessary to dispel the "myth" that senior acquisition officials are not permitted to meet with contractor representatives at all:

³⁷ The question concerning which senior officials should be covered by "cooling-off" requirements has been a long and contentious one. OGE explained in 2006:

It always has been difficult, however, to define the class of employees who have sufficient influence to warrant this broad restriction. While there always has been broad consensus that personnel paid according to the Executive Schedule (generally Senate-confirmed Presidential appointees) should be covered, Congress and the executive branch have wrestled with the question of which other senior executives should be covered by section 207(c).

Office of Government Ethics, *Report to the President and to Congressional Committees on the Conflict of Interest Laws*, 19.

³⁸ Post-Employment Conflict of Interest Restrictions, 5 CFR Part 2641, <https://www.law.cornell.edu/cfr/text/5/part-2641>.

³⁹ Department of Defense, "Rapid Fulfillment of Combatant Commander Urgent Operational Needs and Other Quick Action Requirements," DOD Directive 5000.71 (Washington, DC: Office of the Under Secretary of Defense of Acquisition and Sustainment, October 18, 2022), <https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodd/500071p.pdf>; Department of Defense, "Urgent Capability Acquisition," DOD Instruction 5000.81 (Washington, DC: Office of the Under Secretary of Defense of Acquisition and Sustainment, December 31, 2019), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/500081p.PDF>.

While there certainly may be occasions where a senior leader needs to meet with industry representatives, it is always best to ensure that meetings are held at the lowest appropriate level relative to the topic and purpose of the meeting. This helps to avoid an appearance of “special access” or “favoritism,” as well as negating any perception that the boss favors a particular entity. Additionally, when senior leaders meet with industry, they should consider having appropriate members of their staff present, particularly if there is an ongoing procurement or other sensitive matter....⁴⁰

The defense acquisition process is widely viewed as a “highly risk-averse, compliance-based process with a checklist mentality that has become unduly cumbersome,”⁴¹ but the bureaucratic requirements that weigh down the process also serve to insulate it against improper influence.

The procurement process, in which proposals are evaluated and award decisions are made, is the most heavily safeguarded of all. The Competition in Contracting Act (CICA) provides that sole-source contracts may be awarded only in narrowly prescribed circumstances and that all such awards must be justified and approved in writing at a level commensurate with the estimated value of award.⁴² Regulations concerning competitive awards establish strict requirements that govern the solicitation of proposals and their evaluation based on factors specified in the solicitation.⁴³ Depending on the type of procurement, contracting officials may conduct limited written or oral communications with offerors but must do so in a manner that ensures no offeror receives an unfair competitive advantage.⁴⁴ Source-selection decisions are made by technically qualified source-selection authorities, assisted by source-selection evaluation boards and source-selection advisory boards.⁴⁵ The identity of the officials participating in high-dollar decisions is often confidential to

⁴⁰ Department of Defense, “Engaging with Industry,” Memorandum, Attachment A, “DOD Myth-Busters – Communications with Industry” (Washington, DC: Deputy Secretary of Defense, March 2, 2018), https://dodsoco.ogc.osd.mil/Portals/102/engaging_with_industry_policy.pdf.

⁴¹ *Department of Defense Authorization for Appropriations for Fiscal Year 2016 and Future Years Defense Program: Hearing Before the Committee on Armed Services, United States Senate*, S. Hrg. 114-204, Pt. 3, 114th Cong. (March 11, 25; April 22, 2015) (statement of Hon. Heidi Shyu, then-Assistant Secretary of the Army for Acquisition, Logistics, and Technology), 165, <https://www.congress.gov/114/chr/CHRG-114shrg99481/CHRG-114shrg99481.pdf>.

⁴² Use Of Procedures Other Than Competitive Procedures, 10 U.S.C. § 3204, U.S.C. Title 10 - ARMED FORCES (govinfo.gov).

⁴³ Planning and Solicitation Requirements, 10 U.S.C. section 3206, U.S.C. Title 10 - ARMED FORCES (govinfo.gov).

⁴⁴ Competitive Proposals, 20 U.S.C. section 3303.

⁴⁵ Department of Defense, “Department of Defense Source Selection Procedures,” Memorandum (Washington, DC: Office of the Under Secretary of Defense, August 20, 2022), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000740-22-DPC.pdf>.

safeguard against efforts at improper influence.⁴⁶ After an award decision is made, unsuccessful offerors are entitled to a debriefing on the basis for the decision.⁴⁷

Most importantly, any bidder or offeror can protest any aspect of a procurement that it believes is inconsistent with acquisition laws and regulations. Protests can be filed with the agency at no cost, with the Government Accountability Office (GAO) for a nominal fee, or with the United States Court of Federal Claims (USCFC).⁴⁸ A bid protest can challenge any aspect of a procurement that is seen as being unfair, including biased requirements, inappropriate sole-source awards, failure to follow award criteria, and even improper influence in the award process. Indeed, it appears that because of the incentives for a disappointed bidder or offeror to identify and protest flaws in the process, improper influence is considerably more likely to be addressed through the bid protest process than through inspector general investigations or law enforcement mechanisms for enforcing statutory and regulatory ethics requirements. Moreover, the likelihood of a protest and the financial risk involved in being excluded from a competition or determined ineligible for award serves as a significant deterrent to members of industry.

3. Avoiding the Misuse of Inside Information

Section 207 is intended not only to prevent the exercise of improper influence by former government employees, but also to forestall the improper use of non-public information to benefit NFEs.⁴⁹ The theory is that former officials will find it difficult to use non-public information to benefit their new employers if they are prohibited from communicating with their former agencies on behalf of such employers during the period when that information is most likely to be relevant. This view has been criticized by advocates of stronger measures who have pointed out that non-public information could be used to provide “behind-the-scenes” assistance to new employers, circumventing the need for direct communication with the federal government.⁵⁰

Section 207 does not stand alone in its role of protecting non-public government information from improper disclosure. For example,

⁴⁶ Army Federal Acquisition Regulation Supplement (AFARS): “The identity of the SSA shall be considered procurement sensitive and shall not be disclosed to anyone who has not signed a non-disclosure agreement for that RFP / acquisition. See Army Federal Acquisition Regulation Supplement (AFARS), “Source Selection Team Roles & Responsibilities,” section 1.4, November 15, 2023, <https://www.acquisition.gov/afars/1.4-source-selection-team-roles-responsibilities>.

⁴⁷ Contracts: Planning, Solicitation, Evaluation, and Award Procedures, 10 U.S.C. § 2305(b)(5).

⁴⁸ Procurement Protest System, 31 U.S. Code Subchapter V, <https://www.law.cornell.edu/uscode/text/31/subtitle-III/chapter-35/subchapter-V>.

⁴⁹ “By far, the two most commonly cited rationales for promulgating the post-employment statutes were preventing the misuse of non-public information and preventing the use of undue influence by former officials. The centrality of these twin purposes has been recognized in various legislative materials, private studies, and judicial and administrative opinions, since 1872.” See Office of Government Ethics. *Report to the President and to Congressional Committees on the Conflict of Interest Laws*, 12.

⁵⁰ *Ibid.*, 12–13.

- The Trade Secrets Act, enacted in 1948, establishes criminal penalties for the unauthorized disclosure of a wide range of non-public business information obtained by current and former government employees during their government employment.⁵¹ The Trade Secrets Act stands alongside other federal and state laws prohibiting the unauthorized disclosure of non-public business information.⁵² Together, these laws appear to provide strong legal protections against the disclosure by former government officials of non-public information provided to the government by NFEs.
- The Procurement Integrity Act, enacted in 1988 and revised significantly in 1997, prohibits current and former government employees from disclosing contractor bid or proposal information or source-selection information obtained during their government employment.⁵³ Bid and proposal information includes data on contractor costs, manufacturing processes, operations and techniques, and any other confidential information so marked by the contractor.⁵⁴ Source-selection information includes source-selection, cost, and technical evaluation plans, evaluations, reports, rankings, and determinations prepared by the government during a procurement.⁵⁵

These information safeguards are supplemented by dozens of other statutes, regulations, directives, and guidance documents addressing the disclosure of sensitive information to defense contractors.⁵⁶ Other procurement laws, regulations, and procedures provide additional safeguards

⁵¹ For example, the Trade Secrets Act, by its terms, prohibits the disclosure of information that “... concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association....” See Disclosure of Confidential Information Generally, 18 U.S. Code § 1905, <https://www.law.cornell.edu/uscode/text/18/1905>.

⁵² For example, Theft of Trade Secrets, 18 U.S. Code § 1832, <https://www.law.cornell.edu/uscode/text/18/1832>; Defense Trade Secrets Act of 2016, P.L. 114-153, 130 Stat. 377, 114th Cong. (May 11, 2016), <https://www.govinfo.gov/content/pkg/PLAW-114publ153/pdf/PLAW-114publ153.pdf>; and Trade Secrets (Uniform Trade Secrets Act), trade secret | Wex | US Law | LII / Legal Information Institute (cornell.edu).

⁵³ Prohibitions on Disclosing and Obtaining Procurement Information, 41 U.S. Code § 2102, <https://www.law.cornell.edu/uscode/text/41/2102>.

⁵⁴ Definitions, 41 U.S. Code § 2101 (2101(2)), <https://www.law.cornell.edu/uscode/text/41/2101>.

⁵⁵ *Ibid.*, 2101(7).

⁵⁶ See Under Secretary of Defense for Acquisition, “Compendium of Laws, Regulations, Directives and Instructions Regarding the Disclosure of Data in the Department of Defense,” September 1988, in *Oversight of DOD’s Management of Inside Information in the Acquisition Process: Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate*, S. Hrg. 101-20, 101st Cong. (February 24, 1989), 187–258, *Oversight of DOD’s Management of Inside Information in the Acquisition ... - United States. Congress. Senate. Committee on Governmental Affairs. Subcommittee on Oversight of Government Management - Google Books*.

for the contracting process.⁵⁷ Key provisions include a statutory requirement for the recusal of a government official participating in a federal agency procurement action who becomes engaged in employment discussions with a bidder or offeror on that action⁵⁸ and another prohibiting certain former procurement officials from accepting compensation from contractors to whom they have awarded contracts.⁵⁹ Together, these provisions appear to provide strong legal protections against the improper disclosure of government procurement information by former government officials.

These and other protections are limited to specific categories of non-public information, the potential disclosure of which has been determined by policymakers to be particularly harmful to the public interest. They may not, for example, cover the disclosure of internal, pre-decisional government information, such as budget information, that may be of great interest to government contractors. 5 CFR § 2635.703 prohibits federal employees from using *any* non-public government information to further private interests, but there is no parallel, across-the-board prohibition on such disclosures by former government employees. As a result, it is possible that there may be gaps in the protection of some non-public government information that is not covered by existing laws.⁶⁰

At the same time, however, a broad and poorly defined prohibition on the disclosure of confidential government information by former officials would risk chilling the flow of information that is not and should not be protected from disclosure. As explained in more detail in Chapter 5 of this report, former federal officials can provide significant value to the government by sharing with NFEs what they know about government processes and how these processes work, as well as the products, services, and capabilities that the government needs. Consequently, the

⁵⁷ See, for example,

Basis of Award and Rejection, 10 U.S Code § 3301, <https://www.law.cornell.edu/uscode/text/10/3301>.

The Competition in Contracting Act: Full and Open Competition, 41 U.S. Code § 3301, <https://www.law.cornell.edu/text/41/3301>.

Federal Acquisition Regulation: Oral Presentations, 48 CFR§ 15.102, <https://www.law.cornell.edu/cfr/text/48/15.102>; Exchanges with Industry Before Receipt of Proposals, 48 CFR § 15.201, <https://www.law.cornell.edu/cfr/text/48/15.201>; Exchanges with Offerors After Receipt of Proposals, 48 CFR § 15.306, <https://www.law.cornell.edu/cfr/text/48/15.306>.

Department of Defense. “Department of Defense Source Selection Procedures” (use of Source Selection Evaluation Boards and Source Selection Advisory Boards).

⁵⁸ Actions Required of Procurement Officers When Contacted Regarding Non-Federal Employment, 41 U.S. Code § 2103, <https://www.law.cornell.edu/uscode/text/41/2103>.

⁵⁹ Prohibition on Former Official’s Acceptance of Compensation from Contractor, 41 U.S. Code § 2104, <https://www.law.cornell.edu/uscode/text/41/2104>.

⁶⁰ For example, OGE guidance on section 5 CFR § 2635.703 provides the following example:

An employee of the Army Corps of Engineers is actively involved in the activities of an organization whose goals relate to protection of the environment. The employee may not, other than as permitted by agency procedures, give the organization or a newspaper reporter non-public information about long-range plans to build a particular dam.

See Use of Non-public Information, 5 CFR § 2635.703, <https://www.law.cornell.edu/cfr/text/5/2635.703> It is not clear that the employee would be prohibited from making the same disclosure after leaving federal employment.

defined scope and well-tested definitions in existing laws and regulations governing the disclosure of non-public information by former government officials may provide important protections against government overreach.

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3. Legal Analysis

A. Summary

This chapter addresses five of the statutory objectives of the reporting requirement in section 1073 of the FY 2023 NDAA, providing the basis for IDA’s assessment of (1) how the ethics requirements under review are inconsistent or incongruent with statutes and regulations that apply to all executive branch employees; (2) the risk of uncertainty and confusion in the interpretation of the requirements; (3) the extent to which these provisions may affect the ability of the Department to detect, deter, prevent, and redress violations of applicable ethics standards; (4) whether the removal or alteration of the provisions may adversely affect the ability of the Department to negotiate and effectuate arms-length transactions; and (5) whether the application of these requirements exclusively to DOD personnel is justified. The primary method used to address these issues is a detailed legal analysis of the ethics requirements embedded in the provisions reviewed. This analysis examines each provision in the context of the history, scope, and underlying purposes of longstanding statutes and regulations that apply to all executive branch employees. Where appropriate, the legal analysis is supplemented by information gathered through IDA’s qualitative analysis.

The legal analysis conducted by the IDA team, as described below, reached the following conclusions:

- Inconsistency with longstanding ethics requirements
 - Section 1045 serves essentially the same purposes as executive-branch-wide post-government employment representational restrictions set forth in 18 U.S.C. § 207(c), Executive Order (EO) 13989, and 5 CFR Part 2641 but does so in a manner that is inconsistent with these other provisions. Section 1045 differs from the executive-branch-wide provisions in that it applies only to former DOD officials, restricts communications with current government officials outside the components in which the former officials served, extends restrictions from one year to two years for the most senior DOD personnel, and prohibits not only communications with current government officials, but, in some cases, behind-the-scenes activities in support of such contacts. The limitation on behind-the-scenes activities is the most problematic difference since this restriction appears to have only an attenuated relationship to potentially unethical contact while posing a significant risk of reducing government access to talent and to the knowledge and expertise of former DOD officials. The restriction on communications with officials outside of DOD extends to a wide range of organizations with which former DOD senior officials

are unlikely to have had a prior relationship, providing little apparent basis for denying them potential employment opportunities.

- Section 1117 serves essentially the same purposes as 18 U.S.C. § 208, EO 13989, and 5 CFR Part 2635, which impose recusal requirements on current officials across the executive branch. Section 1117(a)(1) differs from executive-branch-wide provisions requiring a government employee’s recusal from matters related to former employers in that it imposes a two-year recusal requirement in lieu of the one-year requirement that would otherwise apply. Section 1117(a)(2) does not appear to differ significantly from executive-branch-wide provisions regarding recusal applicable to organizations with which a current government employee is seeking future employment.
- Section 988 requires high-ranking DOD officials to divest ownership interests in the top 10 defense contractors. While there are no executive-branch-wide statutory or regulatory provisions that parallel the requirements of section 988, the Senate Armed Services Committee (SASC) imposes an identical requirement on senior DOD officials who are subject to Senate confirmation. Section 988 has a broader coverage than the SASC requirement, in that it also applies to 1- and 2-Star GOFOs (who are not subject to Senate confirmation to particular positions) and to career and non-career SES, Senior Level (SL), and Senior Technical (ST) employees (who are not subject to Senate confirmation at all) if they serve in designated acquisition positions.
 - Section 847 requires current and former senior DOD officials who participated personally and substantially in certain high-value acquisitions or served in key acquisition positions to obtain a written ethics opinion before accepting compensation from a defense contractor. Although there are no parallel statutory or regulatory requirements applicable to the executive branch as a whole, longstanding executive branch ethics rules encourage current and former employees to seek advice on post-government employment and other ethics issues from agency ethics officials.
- Risk of confusion
 - Section 1045 uses language from the Lobbying Disclosure Act (LDA), which appears to be a poor fit for an ethics requirement. In particular, terms such as “lobbying contacts,” “lobbying activities,” “covered officials,” and “covered matters” have no direct counterpart in executive-branch-wide ethics laws. Former DOD individuals interviewed by IDA reported that they had difficulty understanding the PGE rules (especially section 1045) and felt it necessary to seek ethics advice from the Department on numerous occasions after leaving office. DOD ethics officials reported that the section 1045 prohibitions are difficult to

explain and do not align well with what most people think of as “lobbying.” The confusion and uncertainty arising out of this language is likely to produce uneven advice and inequitable results, deterring some former DOD officials from engaging in legal and beneficial activities, while putting others at risk of inadvertently violating requirements that they do not fully understand.

- Section 1117 uses terminology that differs in small but significant ways from the terminology of longstanding executive-branch-wide ethics statutes and regulations. In particular, section 1117 uses a slightly different list of past employment relationships to trigger a recusal requirement for new DOD employees, uses different terminology to describe the types of matters from which recusal is required, and uses a different date to begin the recusal. These distinctions in language do not appear to be the result of significant policy differences, but, when layered, they make the resulting restrictions difficult to interpret without the assistance of an attorney. Several former government officials interviewed by the IDA team indicated that they frequently sought the advice of government ethics counsel on these and similar issues and that the answers that they received were not always consistent.
- Impact on detection, deterrence, prevention, and redress
 - Expanded restrictions
 - Post-government employment restrictions generally seek to prevent improper influence by precluding a range of potential conduct that may include activities that are beneficial and inimical to the interests of the government. Logically, lengthening the duration of a restriction or otherwise expanding such a requirement is likely to reduce opportunities for improper influence. However, confusion or uncertainty caused by such restrictions’ use of inconsistent, incongruent, or poorly defined language could have a negative impact on prevention and redress. Policymakers must assess whether any added measure of prevention outweighs the cost of prohibiting activities beneficial to the government and to former DOD personnel by restricting the flow of information and limiting future employment opportunities and determine the cost of any resulting impact on DOD recruitment and retention. On balance, IDA cannot say that the decision to extend the PGE “cooling-off” period to two years for the most senior DOD officials was unreasonable. However, the possibility of an adverse effect on retention and access to expertise should be considered in any decision on whether to further extend the limitation.

- Section 1045 includes a restriction on behind-the-scenes activities that does not appear to offer a significant benefit for the detection, deterrence, prevention, and redress of ethical violations. It also includes a restriction on communications to executive branch officials outside of DOD that extends to officials and matters for which there appears to be little risk of ethical violations. Moreover, the language that is used to impose these restrictions is poorly defined and inconsistent or incongruent with terms used in government-wide ethics statutes and regulations. The confusion and uncertainty caused by this language is likely to have a negative impact on prevention and redress of such violations. For these reasons, these restrictions, as written, may not provide a detection, deterrence, prevention, and redress benefit that is commensurate with their costs.
- Section 1117 establishes a requirement for DOD personnel to recuse themselves from particular matters involving their former employers for two years after starting work at the Department in lieu of the one-year recusal period that would otherwise be applicable. The longer recusal period could preclude some new DOD officials from participating in significant decisions, potentially rendering them less effective in their government positions. However, this provision may also prevent potential improper conduct or the perception of improper conduct based on ties and affinities that last for more than one year. Policymakers must determine whether any potential reduction in the effectiveness of current officials is merited by the precatory effect of this provision.
- Section 847 requires covered DOD officials and potential defense contractor employers to obtain ethics opinions to ensure that they are fully informed of applicable ethics restrictions before they enter an employment relationship. In addition, section 847 ensures that a written record of the advice is provided to the official and the contractor, making it difficult for the official or the contractor to claim ignorance of the law. The drafters of this requirement were careful to tailor it to officials who serve in specific positions involved in acquisitions above a specific threshold. By putting the potential employer and the potential employee in a strong position to take steps in advance to avoid potential violations of the ethics laws, this provision likely has a positive effect on detection, deterrence, and prevention of such violations.
- Impact on arms-length transactions
 - The ethics provisions under review substantially overlap with longstanding executive-branch-wide ethics provisions that address the same issues and provide similar protections. In addition, federal and DOD acquisition laws and regulations contain stringent procedural requirements to ensure arms-length transactions. The CICA provides that sole-source contracts may be awarded

only in narrowly prescribed circumstances and that these awards must be justified and approved in writing at a level commensurate with the estimated value of the award. Regulations governing competitive awards establish strict requirements governing the solicitation and evaluation of proposals based on factors specified in the solicitation. Depending on the type of procurement, contracting officials may conduct limited written or oral communications with offerors but must do so in a manner that ensures no offeror receives an unfair competitive advantage. Additionally, higher level reviews are required for many procurements based upon dollar value and other factors. The identity of source-selection officials in larger procurements is often confidential to safeguard against efforts at improper influence. Most importantly, a disappointed bidder or offeror can protest any aspect of a procurement that it believes is inconsistent with acquisition laws and regulations, to include where that entity believes that a competitor has received non-public information that would provide an unfair competitive advantage. Protests can be filed with the agency at no cost, with the GAO for a nominal fee, or with the USCFC. Indeed, it appears that because of the incentives for disappointed bidders or offerors to identify and protest flaws in the process, improper influence is considerably more likely to be addressed through the bid protest process than through inspector general investigations or law enforcement mechanisms. The likelihood of a protest and the financial risk of being excluded from a competition or determined ineligible for award also serve as a significant deterrent to improper conduct in the contracting process.⁶¹ In light of these protections, the removal or alteration of the provisions under review is unlikely to have a perceptible impact on the ability of the Department to negotiate and execute contracts on an arms-length basis.

- Application exclusively to DOD personnel
 - Each of the ethics provisions under review applies exclusively to current and former DOD personnel—not to the personnel of other executive branch agencies. Some senior DOD officials are called upon to make many decisions that have a significant impact on contractor finances. The sheer magnitude of public dollars at issue and the purposes to which that funding will be put require particular attention to the impartiality and integrity of DOD personnel to whom these decisions are entrusted. Although relatively few officials of non-defense agencies are called upon to make acquisition decisions

⁶¹ This self-interest is reflected in contractor policies to promote compliance with PGE restrictions. See United States Government Accountability Office, *Post-Government Employment Restrictions: DOD Could Further Enhance its Compliance Efforts Related to Former Employees Working for Defense Contractors*, GAO-21-104311 (Washington, DC: U.S. GAO, September 2021), 21–26, <https://www.gao.gov/assets/gao-21-104311.pdf>.

of the same magnitude,⁶² officials in other agencies are frequently called upon to make regulatory decisions that have an equal or greater financial impact on regulated industries and the public. Moreover, the enduring, long-term relationships between regulators and regulated industries would appear to require a level of attention to the issues of undivided loyalty, improper influence, and improper use of non-public information that is similar to that needed in the relationships between DOD acquisition officials and the defense industrial base. Although there does not appear to be a strong reason to treat current and former DOD officials differently from officials employed by other federal agencies, policymakers who believe that these restrictions provide a helpful barrier against ethical abuses may reasonably conclude that it is better to apply them to some agencies and some officials than to none at all.

B. Section 1045

Section 1045 of the FY 2018 NDAA prohibits certain former high-ranking DOD officials from engaging in “lobbying activities with respect to the Department of Defense” for a specified period of time after separation or retirement. The provision includes the following:

- A two-year prohibition, applicable to officers who retire at a grade of O-9 or higher and their civilian equivalents; and
- A one-year prohibition, applicable to officers who retire in a grade of O-7 or O-8 and their civilian equivalents.

“Lobbying activities with respect to the Department of Defense” are defined to mean the following:

- Lobbying contacts and other lobbying activities with covered executive branch officials with respect to DOD; and
- lobbying contacts with covered executive branch officials in DOD.

The terms “lobbying contacts,” “lobbying activities,” and “covered executive branch officials” are defined by reference to the LDA of 1995⁶³ and are discussed Section B.1.

⁶² Other federal agencies, such as the National Nuclear Security Administration, NASA, the Department of Veterans Affairs, and the Coast Guard sometimes award very large contracts. However, none does so with the frequency of DOD. In FY 2023, DOD accounted for 61 percent of all contract dollars awarded. The Departments of the Army, Navy, and Air Force each independently awarded more contract dollars than any non-defense agency. See HigherGov, “Record \$765B in Federal Contracts Awarded in 2023,” Special Report, January 17, 2024, <https://www.highergov.com/reports/765b-federal-gov-contract-awards-2023/?ref=os>.

⁶³ See Lobbying Disclosure Act of 1995, P.L. 104-65, 109 Stat. 691, 104th Cong. (1995), <https://lobbyingdisclosure.house.gov/lda.pdf>; Lobbying Disclosure Act of 1995 as Amended Through P.L. 117-268, Enacted December 27, 2022, <https://www.govinfo.gov/content/pkg/COMPS-902/pdf/COMPS-902.pdf>; and An Act To Make Revisions in Title 5, United States Code, as Necessary to Keep the Title Current, and to Make

Section 1045 differs significantly in four major areas from the longstanding executive-branch-wide provisions in 18 U.S.C. § 207(c) and EO 13989, which impose similar limitations: (1) the range of former government officials covered by the limitation, (2) the range of current government officials with regard to whom contacts and supporting activities are limited, (3) the duration of the limitation, and (4) the nature of the activities that are limited. In addition, section 1045 uses language from the LDA, which increases the risk of uncertainty and confusion because it is a poor fit for an ethics requirement.

The balance of this section addresses the history and background of section 1045, the four major policy differences between section 1045 and longstanding executive-branch-wide provisions, and the potential for uncertainty and confusion.

1. History and Background of Section 1045

Although the formal legislative history of section 1045 is relatively thin,⁶⁴ the provision is best understood in its historical context. In particular, the enactment of section 1045 followed the promulgation of a series of EOs over a period of roughly 25 years. These EOs imposed similar restrictions on political appointees in the Executive Branch. Each of these EOs was intended to address the perception that departing political appointees were exercising improper influence by “lobbying” their former colleagues and subordinates in the Executive Branch. Each sought to address this problem, like section 1045, by prohibiting such lobbying activities for a specified period of time.

EO 12834, issued by President Clinton on January 20, 1993, established PGE restrictions for senior political appointees. It required senior political appointees to pledge that they would “not, within five years after the termination of my employment as a senior appointee in any executive

Technical Amendments to Improve the United States Code, P.L. 117-286, 136 Stat. 4196, 117th Cong. (2022), <https://www.congress.gov/117/plaws/publ286/PLAW-117publ286.pdf>.

⁶⁴ The Senate report on the original provision provides only a skeletal description of the language:

“The committee recommends a provision that would apply a 2-year limitation on certain officers and civilian employees of the Department of Defense from engaging in any lobbying activity with respect to issues involving the Department of Defense.” See National Defense Authorization Act for Fiscal Year 2018, Report to Accompany S. 1519, S. Report 115-125, 115th Cong. (2017), 231, <https://www.congress.gov/115/crpt/srpt125/CRPT-115srpt125.pdf>.

The only change to the provision that was made in conference was to split the two-year Senate-proposed limitation into two separate limitations. As explained in the statement of managers accompanying the conference report, the final language includes the following:

“A 2-year limitation on officers at the O–9 or higher level and their civilian grade equivalents of the Department of Defense from engaging in any lobbying activity with respect to the Department of Defense, and a similar 1-year limitation on officers at the O–7 and O–8 level and their civilian counterparts.” See National Defense Authorization Act for Fiscal Year 2018, Conference Report to Accompany H.R. 2810, H.R. Report 115-04, 115th Cong. (2017), 921, <https://www.congress.gov/115/crpt/hrpt404/CRPT-115hrpt404.pdf>.

The statement of managers includes no further explanation of the provision or elaboration on its purpose or intent.

agency in which I am appointed to serve, lobby any officer or employee of that agency.”⁶⁵ Because there was no effective definition of “lobbying” in federal law at the time, the EO included its own:

“Lobby” means to knowingly communicate to or appear before any officer or employee of any executive agency on behalf of another (except the United States) with the intent to influence official action ⁶⁶

The definition also included six enumerated exceptions. EO 12834 was rescinded by President Clinton on December 28, 2000, and President Bush chose not to replace it with a similar EO applicable to his political appointees.

Potential restrictions on lobbying by former government officials became an issue in the 2008 Presidential campaign, during which the major candidates of both parties pledged to institute strict new prohibitions. The Democratic candidate, then-Senator Barack Obama, pledged that if he were elected, “no political appointee will be able to lobby the Executive Branch after leaving government service during the remainder of the administration.”⁶⁷ The Republican nominee, Senator John McCain, who later authored section 1045, went a step further, calling lobbyists “birds of prey” and promising, if elected to enforce a *lifetime* ban on lobbying for members of his Administration.⁶⁸

On January 21, 2009, President Obama issued EO 13490, establishing ethics requirements for appointees entering and leaving his Administration. In accordance with the campaign commitment, EO 13490 required political appointees to pledge that, on leaving office, they would

- Abide by the restrictions in 18 U.S.C. § 207(c) (if applicable) for two years after separating from government, rather than the one year required by statute; and
- Not lobby any covered executive branch officials for the remainder of the Administration.

The EO defined the term “lobby” to mean “act as a registered lobbyist” under the LDA of 1995⁶⁹ (which had not been enacted when the Clinton EO was issued). The term “covered executive branch official” was also defined by reference to the LDA.⁷⁰ While some were concerned that the prohibitions in the EO would discourage former (and prospective) senior officials from registering under the LDA, the linkage of the definitions to the well-defined group

⁶⁵ Executive Order 12834, “Ethics Commitments by Executive Branch Appointees,” *Federal Register* 58, no.13 (January 20, 1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12834.pdf>.

⁶⁶ Ibid.

⁶⁷ “Obama Team Announces New Rules on Lobbyists,” *NBC News*, November 11, 2008, <https://www.nbcnews.com/id/wbna27665871>.

⁶⁸ Jonathan Martin and Mike Allen, “McCain Calls Lobbyists ‘Birds of Prey,’” *Politico*, August 20, 2008, <https://www.politico.com/story/2008/08/mccain-calls-lobbyists-birds-of-prey-012678>.

⁶⁹ Lobbying Disclosure Act of 1995, P.L. 104-65, 109 Stat. 695; Definitions, 2 U.S. Code § 1602 (1602(10)), <https://www.law.cornell.edu/uscode/text/2/1602>.

⁷⁰ Definitions, 2 U.S. Code § 1602 (1602(3)), <https://www.law.cornell.edu/uscode/text/2/1602>.

of registered lobbyists made restrictions relatively easy to understand and apply. Unlike the Clinton EO, President Obama's EO 13490 was not withdrawn at the end of his Administration and continued to apply to Obama appointees after he left office in 2017.

During the 2016 Presidential campaign, the Republican nominee, Donald Trump, pledged to “drain the swamp” in Washington, DC.⁷¹ As a part of this pledge, Mr. Trump promised that he would ban senior executive branch officials from lobbying for five years after leaving office and “close all the loopholes that former government officials use by labeling themselves consultants and advisors when we all know they are lobbyists.”⁷²

On January 28, 2017, President Trump issued EO 13770, which superseded the Obama EO and imposed a new pledge on incoming political appointees.⁷³ In accordance with the campaign commitment, EO 13770 required political appointees to pledge that, upon leaving office, they would not engage in “lobbying activities” (as defined in the LDA) with respect to their former agencies for a period of five years after the termination of employment with the Administration⁷⁴ and with respect to any covered executive branch official or non-career SES appointee for the duration of the Administration.⁷⁵

The application of the pledge to those who engage in “lobbying activities” rather than to the narrower category of those who register as lobbyists under the LDA (covered by the Obama EO) appears to have been intended to carry out the campaign promise to “close loopholes” that were said to have allowed former government officials to avoid legal requirements “by labeling themselves consultants and advisors when we all know they are lobbyists.” However, the use of the term disaggregated longstanding LDA definitions, introducing new uncertainty into the question of what activities were covered by the prohibition. Although there is a readily available list of registered lobbyists, there is no defined universe of those who have engaged in lobbying activities. Indeed, as discussed below, the LDA uses this term in a manner that does not distinguish between significant activities and insignificant activities.

Section 1045 was drafted shortly after⁷⁶ the issuance of the Trump EO and adopts many of the terms used in that EO. The restrictions in section 1045 cover a shorter period of time and a

⁷¹ Trevor Hughes, “Trump Calls to ‘Drain the Swamp’ of Washington,” *USA Today*, October 18, 2016, <https://www.usatoday.com/story/news/politics/elections/2016/2016/10/18/donald-trump-rally-colorado-springs-ethics-lobbying-limitations/92377656/>.

⁷² Isaac Arnsdorf, Josh Dawsey, and Daniel Lippman, “Will ‘Drain the Swamp’ Be Trump’s First Broken Promise?” *Politico*, December 22, 2016, <https://www.politico.com/story/2016/12/trump-drain-swamp-promise-232938>.

⁷³ Executive Order 13770, “Ethics Commitments by Executive Branch Appointees,” *Federal Register* 82, no.22 (February 3, 2017): 9333–9338, <https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02450.pdf>.

⁷⁴ *Ibid.*, section 1.1.

⁷⁵ *Ibid.*, section 1.3.

⁷⁶ National Defense Authorization Act for Fiscal Year 2018, S.1519, 115th Cong. (2017–2018): The Senate bill, including the provision that was enacted into law as section 1045, was reported out of the Senate Armed Services

larger set of officials than the restrictions in EO 13770. Like the EO, however, section 1045 prohibits former officials from engaging in “lobbying activities” with respect to “covered executive branch officials.” Also, like the EO, section 1045 defines “lobbying activities” and “covered executive branch officials” by reference to the LDA. As a result, much of the same uncertainty and potential for confusion that was injected into the application of post-employment restrictions by EO 13770 was codified into law in section 1045.

President Trump revoked EO 13770 on his last day in office. On January 20, 2021, President Biden issued EO 13989, which established post-employment restrictions for political officials in his Administration.⁷⁷ EO 13989 required political appointees to pledge that, upon leaving office, they would agree to the following:

- Abide by the restrictions in 18 U.S.C. § 207(c) (if applicable) for two years rather than the one year required by statute;⁷⁸
- Not “lobby any covered executive branch officials or non-career Senior Executive Service appointee ... for the remainder of the Administration or 2 years following the end of my appointment, whichever is later”;⁷⁹ and
- In the case of appointees to senior positions, not “materially assist others in making communications or appearances that I am prohibited from undertaking myself by (a) holding myself out as being available to engage in lobbying activities in support of any such communications or appearances; or (b) engaging in any such lobbying activities.”⁸⁰

The post-government employment restrictions in EO 13989 were similar to those in earlier EOs but appear to have addressed much of the potential confusion and uncertainty caused by the introduction of LDA references. In particular,

- The provision extending the limitation in 18 U.S.C. § 207(c) referenced the well-understood terms of longstanding statute.
- The provision prohibiting “lobbying” of covered executive branch officials introduced terms from the LDA but ensured clarity by limiting its coverage of “lobbying” to the activities of registered lobbyists.
- The provision prohibiting “lobbying activities” sought to address potential loopholes in much the same manner as the Trump EO and section 1045 but clarified that only

Committee on July 10, 2017. See National Defense Authorization Act for Fiscal Year 2018, Report to Accompany S. 1519. S. Report 115-125.

⁷⁷ Executive Order 13989, “Ethics Commitments by Executive Branch Appointees,” *Federal Register* 86, no. 22 (January 25, 2021): 7029–7035, <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01762.pdf>.

⁷⁸ *Ibid.*, section 1.4.

⁷⁹ *Ibid.*, section 1.6.

⁸⁰ *Ibid.*, section 1.5.

lobbying activities that provide “material assistance” would be covered. OGE has advised that material assistance means “providing substantive assistance but does not include providing background or general education on a matter of law or policy based upon an individual’s subject matter expertise....”⁸¹ This caveat appears to address the problem that the term “lobbying activities” covers a wide range of potential actions without regard to their significance.

However, section 1045 was not amended after the issuance of EO 13989, leaving the LDA references that had been incorporated from EO 13770 unchanged. As a result, the clarified language in the new EO is of limited assistance to departing DOD officials, who remain subject to the uncertainty and confusion caused by the manner in which section 1045 references the terms of the LDA. Indeed, officials who are covered by the EO and by section 1045 must now be aware of two different uses of the term “lobbying activities,” each covering a different scope of activities with regard to a different set of agency officials.

2. Evaluation of Major Changes to Existing Coverage

a. The range of former officials covered

The major policy difference in the range of former officials covered by section 1045, section 207(c), and EO 13989 is that section 1045 applies only to former DOD officials, while the other two provisions apply to former officials across the Executive Branch. Section 1045 was likely limited to former DOD officials for jurisdictional reasons associated with its enactment as a part of the FY 2018 NDAA.⁸²

The strongest policy rationale for a unique PGE restriction applicable only to former DOD officials is that the Department is a unique federal agency, which acquires more than \$400 billion in products and services from contractors every year—roughly as much as all other federal agencies combined. As a result, some senior DOD officials are called upon to make many policy, budget, requirements, and acquisition decisions that can have a multi-million dollar (and even multi-billion dollar) impact on contractor finances. The far-reaching financial impact of these decisions raises the specter of potential abuses by the officials who are called upon to make them.

The contrary argument is that officials in other federal agencies are called upon to make decisions with a financial impact on NFEs at least as great as those made by DOD officials. While billion-dollar contract decisions may be less frequent in other federal agencies, officials in such

⁸¹ Emory A. Rounds, III, “Post-Government Employment Guidance on Executive Order 13989 (The Ethics Pledge),” Legal Advisory LA-22-07 (Washington, DC: United States Office of Government Ethics (OGE) November 14, 2022), 5, LA-22-07.pdf (oge.gov).

⁸² EO 13989 applies only to civilian political appointees, while section 1045 and section 207(c) apply to military and civilian officials and to political and career civilians. The narrower coverage of the EO lends significance to discrepancies between the restrictions in section 1045 and those in section 207(c), even in areas where the section 1045 restrictions are similar to those in the EO.

agencies are frequently called upon to make regulatory decisions (or non-decisions) that can have a multi-million dollar (or multi-billion dollar) financial impact on regulated industries. Moreover, the enduring, long-term relationships between regulators and regulated industries would appear to raise the same potential post-employment concerns about undivided loyalty, improper influence, and non-public information as the relationships between DOD acquisition officials and the defense industrial base. Although a handful of high-profile incidents involving former DOD personnel have attracted the attention of Congress and the public, it appears that DOD officials are no more likely to be prosecuted for conflict-of-interest violations than officials of other federal agencies.⁸³

Only a relatively small percentage of the senior officials covered by section 1045 are likely to participate in the Department's largest acquisition decisions. Other covered officials may participate in acquisition decisions of a magnitude comparable to those made in non-defense agencies or may not have any role in the defense acquisition system. Section 847 of the FY 2008 NDAA and section 988 of the FY 2020 NDAA—two of the other of the provisions under review—limit their coverage to DOD personnel either serving in senior or acquisition positions or participating in large procurements, but section 1045 does not include a similar limitation. As a result, former senior DOD officials are covered by the section 1045 restrictions without regard to whether they participate in decisions of an appropriate magnitude to justify such coverage.

If the restrictions in section 1045 are considered to be a helpful barrier against improper influence in government decision-making processes, there is a good argument that it is better to apply these provisions to some agencies and some officials than to none at all. However, regardless of whether the provisions are well-constructed, applying section 1045 restrictions only to former DOD officials could put the Department at a recruiting disadvantage and even lead some senior DOD officials to seek employment elsewhere in the federal government before leaving federal service. The desired outcome depends on a balance between the value derived by application of the restrictions to at least some senior officials against the risk that DOD could lose access to talent because of the way in which it is singled out by the provision.

b. The range of current government officials with whom contact is limited

There are three major differences between section 1045 and 18 U.S.C. § 207(c) with regard to the range of current officials with whom contact is restricted:

- Section 1045 places restrictions on communications between former senior DOD officials and certain current officials in *any* executive branch agency (as long as those communications are “with respect to” DOD). By contrast, section 207 limits

⁸³ According to annual surveys published by OGE, of the federal employees who have been prosecuted under the criminal conflict of interest statutes and other statutes roughly 35 percent (39 of 113) were DOD employees. Office of Government Ethics, “Conflict of Interest Prosecutions (by Year),” [https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys+\(by+Year\)](https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys+(by+Year)). DOD employs roughly 700,000 civilians and 1.3 members of the active-duty military, compared to roughly 1.4 million non-defense federal civilian employees.

communications with senior officials in any executive branch agency only where the communication is made by a former cabinet-level appointee (such as the Secretary of Defense).⁸⁴

- Section 1045 places restrictions on communications between former senior DOD officials and certain current officials in *any DOD component*. By contrast, section 207(c) restricts communications between former senior executive branch officials and current officials in the agency component in which they served. Section 207(d) restricts communications by a former cabinet-level appointee with officials in their former agency, regardless of component, as well as restricting communications with any DOD component by Senate-confirmed, Presidentially appointed officials in the Executive Branch (this includes roughly sixty-five DOD positions).⁸⁵
- Section 207(c) places restrictions on communications between former senior DOD officials and *any* current official in the relevant DOD component or components. By contrast, section 1045 only restricts contacts with “covered executive branch officials” – generally, PAS officials, Non-Career SES, Schedule C appointees, and GOFOs.

Complicating the situation, two of the three post-government employment limitations in EO 13989 reference 18 U.S.C. § 207(c) and carry the same limitations on their applicability, but the third—the restriction on acting as a registered lobbyist—applies to contacts with covered officials anywhere in the Executive Branch of government.

The rationale for applying post-government employment restrictions to communications with current personnel in all DOD components and across all federal agencies is that senior DOD officials are often called upon to address cross-cutting issues that require working with other DOD components and other federal agencies. Indeed, the Department participates in and has established multiple councils, working groups, and cross-functional teams to address such issues. DOD officials who participate in this work naturally build ties with colleagues in other DOD components and other federal agencies during their employment. As with any personal relationship, there is a risk that these ties could be abused by former government officials in an effort to exercise improper influence.

The contrary argument is that few DOD employees have significant contact with more than a handful of other federal agencies. Even contacts with other DOD components are not likely to be extensive, except at the highest levels. Consequently, a limitation on post-government employment communications with all federal agencies and all DOD components includes in its scope a wide range of people and organizations with which the former government employee is unlikely to have had a prior relationship. As a result, a broader array of potential employment

⁸⁴ Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches, 18 U.S. Code § 207 (207(d)), <https://www.law.cornell.edu/uscode/text/18/207>.

⁸⁵ Restrictions on Former Officers, Employees, and Elected Officials, 18 U.S. Code § 207 (207(h)); Separate Agency Components, 5 CFR § 2641.302, <https://www.law.cornell.edu/cfr/text/5/2641.302>.

opportunities would be denied to former officials and a broader swath of the Department and the federal government would be limited in its access to the knowledge and skills those former officials bring to bear. The question for policymakers is whether there is sufficient evidence of abuse of inter-agency and cross-departmental relationships to merit these potential adverse effects.

c. The duration of the limitation

The restrictions in 18 U.S.C. § 207(c) apply to covered officials for a period of one year following their separation or retirement from federal service. EO 13989 imposes a two-year restriction on communications covered by section 207(c) and communications by registered lobbyists but only a one-year limitation on providing behind-the-scenes assistance. Section 1045 applies differently to DOD personnel of different grades:

- For 3- and 4-Star GOFOs and their civilian equivalents, the restriction in section 1045 extends for two years from retirement or separation.
- For 1- and 2-Star GOFOs and their civilian equivalents, the restriction in section 1045 extends for one year.

Thus, the major change in duration of coverage imposed by section 1045 is the extension of communication restrictions from one year to two years for 3- and 4-Star GOFOs and to career civilians in comparable pay grades who are not covered by the EO.

The rationale for applying a two-year prohibition to 3- and 4-Star military officers and their civilian equivalents is that these senior military and civilian officials are likely to retain personal ties with and may continue to exert a significant influence over former subordinates for more than a year after their departure from office. Indeed, the career-long ties developed by military leaders and senior career civilians may be less perishable than those of some political appointees covered by EO 13989, whose influence may dissipate at the end of an Administration. A representative of a public interest group interviewed by the IDA team noted that one year “was never long enough to get rid of those connections” and eliminate the risk of improper influence.⁸⁶

The primary countervailing consideration is that a two-year limitation is likely to deny a broader range of employment opportunities to former government officials. Some companies that may be willing to “wait out” a one-year communication restriction by temporarily assigning former officials to limited duties are likely to balk at a two-year cooling-off period. To the extent that the communications restricted are potentially harmful in nature, this deterrent effect may be viewed as a benefit. However, a two-year communication restriction could also cut off government access to the valuable knowledge and expertise of former senior military and civilian officials for the more extended period.

⁸⁶ Interview, November 8, 2023.

One former DOD official told the IDA team that the two-year restriction under section 1045 “completely torpedoed” his employment prospects.⁸⁷ Two others asserted that some 2-Star GOFOs were likely to retire, rather than to seek and accept a 3-Star position that would carry with it a longer “no contact” requirement.⁸⁸ Another group of former officials stated that the government was losing relevant expertise and knowledge as a result of the longer cooling-off period. These officials also asserted that the longer period allows expertise to expire, which can be detrimental in the current, rapidly changing security environment.⁸⁹

On the other hand, several former senior DOD leaders view the two-year requirement as a reasonable standard with which they willingly complied. “I didn’t blink when they went from one year to two years,” one retired 4-Star officer told IDA, saying that he understood the need for the restriction: “We’ve had some defense folks who’ve gone directly into the lobbying business, and that’s a huge [appearance problem].”⁹⁰

For these reasons, the appropriate resolution of this issue depends in significant part on policymakers’ understanding of the types of communications in which former officials are likely to engage. If these communications are viewed as exclusively harmful in nature, a two-year restriction may be appropriate. If, on the other hand, such communications are likely to include information that is helpful to the Department, a two-year restriction may be more problematic. In either case, a “cooling-off” period of some length appears to serve an important purpose in helping to preserve public confidence in the functioning of the Department. Based upon available data, IDA cannot say that the decision to establish a longer, two-year limitation for the most senior DOD officials was unreasonable. However, the possibility of an adverse effect on retention should be considered in any decision on whether to extend the limitation further.

d. The nature of the activities that are limited

Section 207(c) restricts representational communications or appearances on behalf of an NFE by former government officials but does not place any limitation on behind-the-scenes support to the communications or representations of others. EO 13989 covers some behind-the-scenes activities—but only those that “materially assist” the communications of others.⁹¹

By contrast, section 1045 potentially covers a broad swath of behind-the-scenes activities, prohibiting former officials from engaging in “lobbying activities with respect to the Department

⁸⁷ Interview of former DOD civilian, November 20, 2023.

⁸⁸ Interview of retired 2-Star, November 23, 2023; interview of retired 3-Star, November 21, 2023.

⁸⁹ Interview of former DOD civilian, November 14, 2023; interview of former 1-Star, November 12, 2023; interview of former PAS official, December 7, 2023.

⁹⁰ Interview, January 2, 2024.

⁹¹ Executive Order 13989, “Ethics Commitments by Executive Branch Appointees,” section 1.5.

of Defense.”⁹² Lobbying activities are defined in accordance with the LDA⁹³ to mean “lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.”⁹⁴ Unlike the EO, this language includes *any* lobbying activity, without regard to whether the activity is material in nature.

The scope of supporting work covered by the term “lobbying activities” is potentially extensive because the LDA uses this term as a part of a set of integrated definitions that consider lobbying activities on a collective basis, in a manner that includes significant activities and insignificant activities. By severing the term from its use in the LDA, section 1045 effectively eliminates any threshold of significance from its coverage. The term “lobbying activities” has two major purposes in the LDA:

- The term serves as one basis for determining who is required to register as a lobbyist. The LDA defines a lobbyist as an individual who is paid by a client to make lobbying contacts, “other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services” provided to the client.⁹⁵ Lobbyists who spend less than a specified monetary amount on lobbying activities are not required to register. The 20 percent and the monetary thresholds require a collective assessment of all activities undertaken, without regard to the significance of any individual activity.
- The term provides a basis for assessing the dollar amount of lobbying costs to be disclosed. The LDA requires that reports by registered lobbyists include “a good faith estimate of the total expenses that the registrant and its employees incurred in connection with lobbying activities ...”⁹⁶ This estimate also requires a collective assessment of all activities undertaken, including activities that could be either significant or insignificant.

In each case, the threshold for registration as a lobbyist and for reporting lobbying income is a measure of the overall time or cost of all lobbying activities undertaken, establishing significance on a cumulative basis rather than on the basis of the materiality of any specific activity. Hence, the term “lobbying activities,” by design, includes significant and insignificant activities.

⁹² The impact of this restriction has been limited in effect because, as interpreted by the Department, the section 1045 prohibition on the full range of lobbying activities applies only to non-defense agencies. As a result, former DOD officials covered by the provision are still permitted to provide “behind-the-scenes” support to communications with their former colleagues and subordinates at DOD. See Office of General Counsel OGC/Standards of Conduct Office (SOCO), “2024 Senior Employee Post-Government Employment Restrictions.”

⁹³ National Defense Authorization Act for Fiscal Year 2018, P.L. 115-91, 131 Stat. 1283, 115th Cong. (2017), section 1045(c)(2), 131 Stat. 1556, <https://www.congress.gov/115/plaws/publ91/PLAW-115publ91.pdf>.

⁹⁴ Definitions, 2 U.S. Code § 1602 (1602(7)).

⁹⁵ Ibid, § 1602(10).

⁹⁶ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 698 (section 5(b)(4)).

In the run up to enactment of the LDA, Congress struggled with how to define the threshold at which lobbying activities required registration. Initial legislative drafts excluded from registration individuals whose “lobbying activities are incidental to, and not a significant part of” their overall work for the same client. This was first replaced by a 10 percent test⁹⁷ and then by the 20 percent test in the final legislation.⁹⁸ Further, because the purposes of the LDA militated in favor of broad coverage, the term “lobbying activities” has an open-ended definition: “lobbying contacts and efforts in support of such contacts, *including* preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.” The “including” phrase in the definition is not limiting. Lobbying activities also include other efforts in support of lobbying contacts that are not specifically listed. For example, the legislative history suggests that costs of “lobbying activities” include “general overhead costs (rent, utilities, salaries of non-professional support staff, etc.)” and costs of “media, printing, postage, expense reimbursements and other costs” associated with the organization’s lobbying activities.⁹⁹

Likewise, guidance issued by the Secretary of the Senate and the Clerk of the House of Representatives takes a broad view of “lobbying activities”: “Generally, if work such as reporting or monitoring occurs at a time when future lobbying contacts are contemplated, such reporting and monitoring should be considered as a part of planning or coordinating of lobbying contacts, and therefore included as ‘lobbying activity.’”¹⁰⁰ An organization that conducts significant lobbying activities might choose to include “the entire budget or expenses (whichever the organization

⁹⁷ To provide for the disclosure of lobbying activities to influence the Federal Government, and for other purposes, as introduced in the Senate by Senator Carl Levin, February 1993, (providing that “[t]he term ‘lobbyist’ means any individual who is employed or retained by another for financial or other compensation to perform services that include lobbying contacts, other than an individual whose lobbying activities are only incidental to, and are *not a significant part of*, the services provided by such individual to the client.”)(emphasis added) (see Lobbying Disclosure Act of 1993, S. 349, 103rd Cong. (February 4, 1993), 9–10 (section 3(10)), <https://www.govinfo.gov/content/pkg/BILLS-103s349is/pdf/BILLS-103s349is.pdf>. This definition was included in the bill passed/agreed to in the Senate and referred to the House of Representatives on May 11, 1993. In March 1994, an amendment passed/agreed to and engrossed in the House revised the definition of “lobbyist” in to read “The term ‘lobbyist’ means any individual who is employed or retained by a client for financial or other compensation for services that include one or more lobbying contacts, other than an individual whose lobbying activities constitute *less than 10 percent* of the time engaged in the services provided by such individual to that client.” (emphasis added) (see Lobbying Disclosure Act of 1994, S. 349 Amendment, 103rd Cong. (March 24, 1994), 14–15 (section 3(11)), <https://www.govinfo.gov/content/pkg/BILLS-103s349eah/pdf/BILLS-103s349eah.pdf>. This same “less than 10 percent” standard was retained S. 1060, as introduced in the Senate by Senator Carl Levin on July 21, 1995 (see Lobbying Disclosure Act of 1995, S. 1060, 104th Cong. (July 21, 1995), 13 (section 3(11)), <https://www.govinfo.gov/content/pkg/BILLS-104s1060pcs/pdf/BILLS-104s1060pcs.pdf>).

⁹⁸ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 697 (section 4(b)(4)(A)); Definitions, 2 U.S. Code § 1602 (1602(10)).

⁹⁹ Lobbying Disclosure Act of 1995, Report to Accompany H.R. 2564, H.R. Report 104-339 Part 1, 104th Cong. (1995), section 5(b)(4), 19, <https://lobbyingdisclosure.house.gov/HReport104-339.pdf>.

¹⁰⁰ Office of the Clerk, U.S. House of Representatives, “Lobbying Disclosure Act Guidance,” Effective January 1, 2008, Last Revised February 28, 2021, 7, <https://lobbyingdisclosure.house.gov/ldaguidance.pdf>.

believes in good faith is closer to the actual amount) of its Washington office” to avoid the need to establish a detailed tracking system.¹⁰¹

Moreover, section 1045 has placed a cloud over activities that are not even covered by the LDA and would not trigger registration as a lobbyist. In particular, while the LDA defines “lobbyist” as a person who is retained by a client “for financial or other compensation,” the term “lobbying activities,” standing alone, includes no element of compensation. DOD has taken the position that section 1045 does not prohibit uncompensated activities, because the definition of “lobbying contact” refers to a communication “on behalf of a client” and a client is defined as a person who “employs or retains another person for financial or other compensation.” However, some former DOD officials who volunteer for non-profits or participate without compensation in veterans’ service organizations, military officers’ associations, and other similar organizations have expressed concern that they may be subject to restrictions under section 1045 and state that they have curtailed their volunteer activities as a result.

The potential adverse effects of this broad scope have been limited, however, by the fact that the section 1045 prohibition on behind-the-scenes activities, as interpreted by the Department,¹⁰² applies only to activities with respect to non-defense agencies.

Trying to ascertain the rationale for covering behind-the-scenes activities in a post-employment lobbying restriction is difficult. Of the three basic objectives of the PGE rules, it appears that only the concern about misuse of non-public information could be addressed by a limitation on such activity—and then only in “edge” cases (discussed in greater detail below):

- **Personal connections.** The premise for concern about the misuse of personal connections is that a government official might be less than neutral when approached by a former colleague with whom he or she has a relationship of friendship, trust, and confidence. It is difficult to see how this concern could be triggered by behind-the-scenes activities. Unless the currently serving official is aware of what his or her former colleague wants—a knowledge that would be impossible without direct communication or reference of some kind (both of which are already prohibited by section 207 and its implementing regulations)—improper influence would not seem to be a possible result. A limitation on activities that materially support the communications and appearances of others could serve as an additional safeguard against indirect communications (such as a statement along the lines of “tell so-and-so that I said this was a good idea”). However, section 207 already prohibits such indirect communications.¹⁰³

¹⁰¹ Ibid., 18.

¹⁰² Office of General Counsel OGC/Standards of Conduct Office (SOCO), “2024 Senior Employee Post-Government Employment Restrictions,” 6.

¹⁰³ The prohibition on indirect communication applies if it is clear from the circumstances that the communication or information comes from the former employee, even if the former government employee’s name is not mentioned. The government-wide ethics regulations provide the following example:

- **Undivided loyalty.** The premise for concern about the undivided loyalty of current employees is that the prospect of future employment by an NFE might lead an employee to take action designed to benefit the NFE. It is difficult to see how the prospect of being asked to perform behind-the-scenes lobbying activities in the future would lead current DOD officials to curry favor with outside parties any more than the prospect of any other (permissible) form of post-government employment or compensation.
- **Inside information.** The premise for this concern is that non-public information obtained during government employment could be abused by former employees to create an advantage for their private sector employers. A prohibition on participation in preparation and planning activities could be seen as addressing the potential misuse of non-public information by former DOD senior military and civilian officials. As discussed previously, however, existing law already prohibits the disclosure or use of specific categories of non-public information such as bid and proposal information and proprietary information. Where such restrictions do not apply and disclosure is not prohibited, on the other hand, communications based on the unique knowledge and expertise of former officials could be beneficial to the government.¹⁰⁴
- **Edge cases.** The hardest case may be an “edge” case, in which a former government official uses knowledge gained through government employment to help shape a government relations strategy while remaining invisible to his or her former colleagues. Although the disclosure of such information is not prohibited and does not directly harm the government, its use for this purpose could provide an advantage to one competitor at the expense of others. On the other hand, not all competitive advantages are improper, and it is not clear that obtaining a better understanding of what the government needs and wants by hiring former employees who may possess that information should be considered to be improper. Participation in this kind of

A former employee established a small government relations firm with a highly specialized practice in certain environmental compliance issues. She prepared a report for one of her clients, which she knew would be presented to her former agency by the client. The report is not signed by the former employee, but the document does bear the name of her firm. The former employee expects that it is commonly known throughout the industry and the agency that she is the author of the report. If the report were submitted to the agency, the former employee would be making a communication and not merely confining herself to behind-the-scenes assistance, because the circumstances indicate that she intended the information to be attributed to herself.

Permanent Restriction on Any Former Employees’ Representations to United States Concerning Particular Matter in Which the Employee Participated Personally and Substantially, 5 CFR § 2641.201 (2641.201(d), Example 5), <https://www.law.cornell.edu/cfr/text/5/2641.201>.

¹⁰⁴ The potential benefits of government access to the knowledge and expertise of former employees are discussed in greater detail in Chapter 5.

strategizing is permitted under 18 U.S.C. § 207¹⁰⁵ but may constitute prohibited “lobbying activities” under section 1045 and EO 13989.

On the other hand, a broad limitation on behind-the-scenes support could have an adverse effect on covered DOD officials and on the Department. First, an expanded behind-the-scenes limitation could significantly expand the scope of potential employment that is denied to former officials who are covered by the provision. Second, individuals who are aware of the limitations may be less likely to accept senior DOD positions, which could affect the Department’s access to needed talent. Finally, by prohibiting former senior officials from contributing even anonymously to materials submitted to the Department, such a limitation could restrict the Department’s access to needed knowledge and expertise.

Multiple interviewees told IDA that these impacts would be seriously detrimental to the Department. For example:

- A former PAS official told IDA, “It’s insane. I would be unable to do so many things that I can go back in my mind on that helped the government as well as the industry partner.”¹⁰⁶
- A former career SES official stated, “I’d be unemployable. You’re basically telling people if you take that step, you’re not employable and you’re depriving the federal government of the expertise that they built and grew.”¹⁰⁷
- A retired 3-Star explained, “To deprive the country the experience of these people and the decades of expertise in acquisition and operations is a mistake. They’re out there because they’re patriots and they’ve given their life to this and this is what they know.”¹⁰⁸

The issue for policymakers is how much concern attaches to the use of non-public information gained through government employment to help shape lobbying strategies, and how to weigh that concern against the risk of reducing government access to talent and to the knowledge and expertise of former government officials.

¹⁰⁵ The government-wide ethics regulations provide the following example:

A Government employee administered a particular contract for agricultural research with Q Company. Upon termination of her Government employment, she is hired by Q Company. She works on the matter covered by the contract, but has no direct contact with the Government. At the request of a company vice president, she prepares a paper describing the persons at her former agency who should be contacted and what should be said to them in an effort to increase the scope of funding of the contract and to resolve favorably a dispute over a contract clause. She may do so.

Permanent Restriction on Any Former Employees’ Representations, 5 CFR § 2641.201 (2641.201(d), Example 3).

¹⁰⁶ Interview, November 30, 2023.

¹⁰⁷ Interview, December 1, 2023.

¹⁰⁸ Interview, December 4, 2023.

3. Areas of Potential Inconsistency and Confusion

DOD ethics officials and former DOD senior officials interviewed by IDA broadly agreed that the language of section 1045 is opaque and complex, adding a significant burden on those who seek to comply with the PGE requirements and those charged to train and advise them.

Former DOD senior officials interviewed by IDA reported that they had difficulty understanding the PGE rules (especially section 1045) and felt it necessary to seek ethics advice from the Department on numerous occasions after leaving office. For example, one former PAS official told IDA, “My biggest frustration is just the lack of clarity and the lack of consistency.”¹⁰⁹ A second stated, “There is so much ambiguity. I would inevitably have to make a phone call [to DOD ethics officials] and say let me give you an example and you tell me what I can do and can’t do.”¹¹⁰ A retired 3-Star added, “So many things have piled on top of each other ... there’s exceptions to this and then there’s been additions ... this is still so confusing ... for the love of God, just spell it out. You know, in one place. One document where we can read and say, here are your restrictions.”¹¹¹

DOD ethics officials told IDA that explaining and applying the section 1045 requirements requires a disproportionate amount of time and effort, compared to other ethics statutes and regulations. One interviewee stated that “there’s a lot of overlapping definitions and some of the definitions are not clear.”¹¹² A second estimated that “95 percent of [my] engagement with former DOD officials is on follow-up questions fleshing out the meaning of section 1045.”¹¹³ A third stated, “These days, about 50 percent of what I do after senior officials retire is to answer their questions on what work they can and cannot do. ‘Can I go to a meeting? Can I go to this conference? Can I make this phone call? Can I have a social conversation with a general officer with whom I’ve been friends for years?’”¹¹⁴

Much of the confusion and uncertainty surrounding section 1045 arises out of section 1045’s use of terms and concepts drawn from the LDA—terminology and concepts that are inconsistent with the well-understood terminology of longstanding executive-branch-wide PGE statutes and regulations. While the purpose of the PGE statutes and regulations is to address activities of former government officials that could raise questions about the integrity of government processes, the purpose of the LDA was to enhance “public awareness of the efforts of paid lobbyists to influence

¹⁰⁹ Interview, November 21, 2023.

¹¹⁰ Interview, November 21, 2023.

¹¹¹ Interview, November 9, 2023.

¹¹² Interview, November 20, 2023.

¹¹³ Interview, November 22, 2023.

¹¹⁴ Interview, November 27, 2023.

the public decisionmaking process in both the legislative and executive branches of the Federal Government.”¹¹⁵

The LDA required lobbyists or the organizations employing them to register with the Secretary of the Senate and the Clerk of the House of Representatives for each lobbying client¹¹⁶ and to file quarterly reports thereafter,¹¹⁷ including a list of issues on which they lobbied for that client¹¹⁸ and a good faith estimate of the income or expenses generated by their lobbying activities.¹¹⁹ The LDA repealed and replaced the old Federal Regulation of Lobbying Act (FRLA),¹²⁰ which was largely viewed as ineffective and burdensome. Congress enacted the LDA to remedy its precursor’s “unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose.”¹²¹

Importantly, while the FRLA covered only lobbying directed at the legislative branch, the LDA sought to establish parity between the two branches by extending coverage to the legislative and the executive branches. As the Senate Governmental Affairs Committee explained in 1993:

The bill seeks to avoid loopholes in the existing lobbying disclosure laws by covering the full range of lobbying activities, without regard to which branch of government is being lobbied. The Committee believes that this coverage is both necessary and current with the current practice of many lobbyists, who frequently lobby both the legislative and executive branches.¹²²

At the same time, however, the Committee recognized that communications with the executive branch were more various and more complex than communications with the legislative branch, including not only efforts to lobby senior executive branch officials on matters of policy, but also less consequential communications with lower ranking officials on routine matters of all kinds. As the Committee explained, many communications with executive branch officials should not be covered by this bill, because “they are routine in nature, they are inherently confidential,

¹¹⁵ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 691; Findings, 2 U.S. Code § 1601 (1601(1)), <https://www.law.cornell.edu/uscode/text/2/1601>.

¹¹⁶ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 696; Registration of Lobbyists, 2 U.S. Code § 1603 (1603(A)(1)), <https://www.law.cornell.edu/uscode/text/2/1603>.

¹¹⁷ Lobbying Disclosure Act of 1995 as Amended Through P.L. 117-268, 8; Reports by Registered Lobbyists, 2 U.S. Code 1604 (1604(a)), <https://www.law.cornell.edu/uscode/text/2/1604>.

¹¹⁸ Lobbying Disclosure Act of 1995 as Amended Through P.L. 117-268, 7; Reports by Registered Lobbyists, 2 U.S. Code 1604 (1604(b)(2)).

¹¹⁹ Lobbying Disclosure Act of 1995 as Amended Through P.L. 117-268, 9; Reports by Registered Lobbyists, 2 U.S. Code 1604 (1604(b)(3) and (4)).

¹²⁰ The Federal Regulation of Lobbying Act of 1946, P.L. 79-601, 60 Stat. 841, 79th Cong. (1946); 2 U.S. Code § 261 to 270 Repealed by Lobbying Disclosure Act of 1995, P.L. 104-65, section 11(a).

¹²¹ Findings, 2 U.S. Code § 1601 (1601(2)).

¹²² The Lobbying Disclosure Act of 1993, S. Rept. 103-37, 103rd Cong. (1993), 27–28.

they are already subject to formal procedural safeguards, or because there is already a separate public record of the proceedings involved.”¹²³

Consequently, Congress devoted considerable energy to defining the types of communications with executive branch officials that seemed most comparable to lobbying of the legislative branch and merited the application of lobbying registration and periodic reporting requirements. While the LDA applies to communications with virtually any legislative branch official, including all elected officials and all congressional staff, it applies only to communications with six enumerated categories of “covered executive branch officials.” Also, while the PGE statutes and regulations apply to any communications that are intended to influence persons in a covered agency, the LDA includes nineteen categories of communications that are assessed not to amount to “lobbying.”

Although these distinctions may be helpful for a public disclosure bill that requires registered lobbyists only to disclose the general scope of their activities, they have proven extremely problematic when applied to assess whether a specific action is or is not prohibited in the PGE context. There are four specific areas in which section 1045 introduces confusion and uncertainty: (1) the use of LDA terms “lobbying contacts” and “lobbying activities” to define prohibited conduct, (2) the use of LDA definitions to identify what types of communications are prohibited, (3) the use of the LDA term “covered executive branch officials,” and (4) the absence of definitive guidance on the interpretation of the LDA. Each of these issues is addressed in Subsections 3.a–3.d.

a. “Lobbying contacts” and “lobbying activities”

The LDA defines a “lobbyist” as “any individual who is employed or retained by a client for financial or other compensation, who provides services to that client that include more than one lobbying contact, *and* whose “lobbying activities” (as defined in 2 U.S.C. § 1602(7)) constitute at least 20 percent of the individual’s time in services for that client over any three-month period.”¹²⁴ The coverage of section 1045 is *not* limited to “lobbyists” who are required to register under the LDA, however.

Rather, section 1045(c) defines prohibited “lobbying activities with respect to the Department of Defense”—a phrase used throughout the statute—to mean

- “*Lobbying contacts and other lobbying activities* with covered executive branch officials with respect to the Department of Defense”; and

¹²³ The Lobbying Disclosure Act of 1993, S. Rept. 103-37, 29; Lobbying Disclosure Act of 1995, H.R. Report 104-339 Part 1, 14.

¹²⁴ Lobbying Disclosure Act of 1995 as Amended Through P.L. 117-268, 5; Definitions, 2 U.S. Code § 1602 (1602(10)).

- “*Lobbying contacts* with covered executive branch officials ... in the Department of Defense.”¹²⁵

Section 1045(c) defines the terms “lobbying contacts” and “lobbying activities” by reference to the definitions in the LDA.

As defined in the LDA, the term “lobbying contact” means any oral, written, or electronic communication to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to the subjects enumerated at 2 U.S.C. § 1602(8)(A).¹²⁶ 2 U.S.C. § 1602(8)(B) goes on to list nineteen specific communication types and subjects that are excepted from the definition of “lobbying contact.” The LDA’s legislative history endorses these exceptions “because they are not lobbying at all, they are routine in nature, they are inherently confidential, they are subject to formal procedural safeguards, or because there is already a separate public record of the proceedings involved.”¹²⁷

“Lobbying activities” are defined in the LDA as lobbying contacts and any efforts in support of such contacts, including preparation and planning activities, research, and other background work that is intended, at the time it is performed, for use in lobbying contacts, and coordination with the lobbying activities of others.¹²⁸ The term “lobbying activities” has two major purposes in the LDA:

- It serves as one component of the definition of a “lobbyist.” A lobbyist is someone who makes more than one lobbying contact on behalf of a client, supported by significant “lobbying activities.”
- The term also provides a basis for the complete disclosure of lobbying costs. The LDA’s legislative history makes clear that one of the primary purposes of the LDA was

¹²⁵ Although the President and Vice President are included in the list of “covered executive branch officials” promulgated by the LDA in 2 U.S.C. § 1602(3), they are specifically exempted from the 1045(c)(2) definition of “covered executive branch officials ... in the Department of Defense.” This exemption is logical and has no effect on the application of the statute.

¹²⁶ Lobbying Disclosure Act of 1995 as Amended Through P.L. 117-268, 2–3; Definitions, 2 U.S. Code § 1602 (1602(8)(A)). The subjects of communications that meet the definition of a “lobbying contact” include the formulation, modification, or adoption of federal legislation (including legislative proposals) or of a federal rule, regulation, or EO; the administration or execution of a federal program or policy, including a contract, grant, loan, permit, or license; or the nomination or confirmation of a person for a position subject to confirmation by the Senate.

¹²⁷ Lobbying Disclosure Act of 1995, H.R. Report 104-339 Part 1, 14.

¹²⁸ Lobbying Disclosure Act of 1995 as Amended Through P.L. 117-268, 2–3; Definitions, 2 U.S. Code § 1602 (1602(7)). See also Office of the Clerk, U.S. House of Representatives. “Lobbying Disclosure Act Guidance,” 4 (definition of Covered Executive Branch Official).

to avoid the pitfalls of the previous FRLA¹²⁹ by ensuring the disclosure of the full range of lobbying-related costs.¹³⁰

DOD ethics officials told IDA that incongruity between the anti-lobbying focus of section 1045 and the representational bans imposed by 18 U.S.C. § 207—which has been in effect for more than forty years and is generally well-understood—makes it significantly more difficult for people to understand and apply section 1045 for themselves.¹³¹ DOD ethics officials stated that the confusion begins with use of the phrase “Prohibition on Lobbying Activities” in the title of section 1045. One ethics official stated the following:

Although every senior official retiring or separating from DOD seems to know something about the ‘cooling-off’ period that begins once they leave DOD, most have no intention of becoming a registered lobbyist. This makes them think—at least initially—that section 1045 is not something they need to be concerned about. I have to explain that ‘lobbying’ is not what our senior officials traditionally think of. As discussed in 1045, it is far more expansive ... and it has nothing to do with particular matters on which the individual worked while in DOD.¹³²

A second ethics official added the following:

Lobbying is a bit of a misnomer ... a kind of red herring. When you start talking about 1045, the minute you say “lobbying,” the light turns off. It’s like, I’m not going to be a lobbyist. I’m not lobbying. I’m not working for a lobbyist. That’s not what I’m doing.¹³³

Said another, “we have to explain, look, you’ve got this word lobbying, but that’s not what we’re talking about here.”¹³⁴

Reliance on the LDA’s definitions of “lobbying contacts” and “lobbying activities” and the way in which these two terms relate to one another—definitions and terms that can require a determination of applicability on a case-by-case basis and were never intended to circumscribe conduct deemed “off-limits” to former DOD senior officials—create a level of complexity in the interpretation and application of section 1045 found in no other part of executive-branch-wide ethics laws and regulations. In addition, unlike most ethics laws and rules applicable executive-branch-wide, neither the agency in which the former official worked or the specific duties he or she performed while in government service have any bearing whether a the former DOD official’s conduct constitutes a “lobbying contact” or “lobbying activity” prohibited under section 1045.¹³⁵

¹²⁹ The Federal Regulation of Lobbying Act of 1946, P.L. 79-601, section 308(a).

¹³⁰ Lobbying Disclosure Act of 1995, H.R. Report 104-339 Part 1, 3–5.

¹³¹ Interview, November 22, 2023.

¹³² Interview, December 1, 2023.

¹³³ Interview, November 22, 2023.

¹³⁴ Interview, November 22, 2023.

¹³⁵ Except, of course, that by its terms, section 1045 applies only to former DOD senior officials.

The complexity introduced by these terms renders it extremely difficult for former DOD senior officials to determine for themselves what they may and may not do in any given PGE situation.

b. Prohibited communications

The longstanding government-wide restrictions on PGE contacts set forth in 18 U.S.C. § 207 have been defined and interpreted over a period of years and appear to be relatively well-understood by agency ethics officials and by the officers and employees whom they advise. In general, the one-year cooling-off period required by section 207(c) applies to any representational communication or appearance before an official's former agency on behalf of another person or entity on *any* issue, regardless of the subject matter. There are seven exceptions to this rule:

- Acts done in carrying out official duties on behalf of the United States or the District of Columbia, or as an elected official of a State or local government¹³⁶;
- Acts done in carrying out official duties as an employee of an agency or instrumentality of a state or local government, or of an accredited institution of higher education, a hospital, or medical research organization, if the communication or appearance is on behalf of such government or organization¹³⁷;
- Appearances or communications on behalf of an international organization in which the United States participates, *if* the Secretary of State certifies in advance that the activity is in the interests of the United States¹³⁸;
- Communications providing special knowledge, *if* no compensation is received for the information¹³⁹;
- Communications made solely for furnishing scientific or technological information, if such communications are made under procedures acceptable to the executive branch department or agency concerned¹⁴⁰;

Testimony under oath, or statements required to be made under penalty of perjury, except that a person who is subject to a “lifetime ban” with regard to a “particular matter” under provisions of 18 U.S.C. § 207(a) may not, in the absence of a court order, serve as an expert witness in that matter for any person or entity except the United States¹⁴¹; and

¹³⁶ Restrictions on Former Officers, Employees, and Elected Officials, 18 U.S. Code § 207 (207(j)(1)(A)). Section 207(j)(1)(B) exempts acts authorized by the Indian Self-determination and Education Assistance Act.

¹³⁷ *Ibid.*, 207(j)(2).

¹³⁸ *Ibid.*, 207(j)(3).

¹³⁹ *Ibid.*, 207(j)(4).

¹⁴⁰ *Ibid.*, 207(j)(5).

¹⁴¹ *Ibid.*, 207(j)(6)(A).

- Communications or appearances made solely on behalf of a candidate, and authorized campaign committee, or a political party by a person who is employed by that candidate, committee, or party.¹⁴²

Rather than relying on these established definitions and exceptions, section 1045 incorporates by reference the definitions and exceptions used in the LDA. In particular, the LDA defines a “lobbying contact” as any oral, written, or electronic communication to a covered official on behalf of a client with regard to

- The formulation, modification, or adoption of Federal legislation (including legislative proposals);
- The formulation, modification, or adoption of a Federal rule, regulation, Executive Order, or any other program, policy, or position of the United States Government;
- The administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
- The nomination or confirmation of a person for a position subject to confirmation by the Senate.¹⁴³

Moreover, the LDA includes nineteen separate “exceptions”—types of contacts and matters that are excluded from the definition of “lobbying contacts.”¹⁴⁴ Among these nineteen exceptions¹⁴⁵ are the following:

- “Communications made by ‘public officials’ acting in their official capacity.”¹⁴⁶ The legislative history of the LDA indicates Congress’s belief that “Federal, State, and local officials participate in a single system of government which requires that they maintain a close, working relationship. For this reason, public officials at one level of government should not be required to register as lobbyists when they express their views to public officials at another level of government.”¹⁴⁷ The legislative history cautions that although this exception covers communications by public officials themselves, it does not apply to outside lobbyists who are not themselves government officials but are acting on behalf of such officials.¹⁴⁸ Further, although the definition of

¹⁴² Ibid., 207(j)(7).

¹⁴³ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 692–693; Definitions, 2 U.S. Code § 1602 (1602(8)(A)).

¹⁴⁴ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 693; Definitions, 2 U.S. Code § 1602 (1602(8)(B)).

¹⁴⁵ All nineteen LDA exceptions are detailed on the chart in Appendix C.

¹⁴⁶ Lobbying Disclosure Act of 1995, H.R. Report 104-339 Part 1, 14; Definitions, 2 U.S. Code § 1602 (1602(8)(B)(i)).

¹⁴⁷ Lobbying Disclosure Act of 1995, H.R. Report 104-339 Part 1, 14.

¹⁴⁸ Ibid.

“public official” includes a group of governments acting together as an international organizations (e.g., the World Bank),¹⁴⁹ it does not include an official employed by a college or university¹⁵⁰ or public utility.¹⁵¹

- Communications made by representatives of media organizations¹⁵² and communications made by an individual in speeches, articles, or through any other mass communication medium, such as a blog.¹⁵³
- Requests for meetings or for the status of an action are excepted as ministerial communications, provided there is no attempt to influence a covered official.¹⁵⁴
- Information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information.¹⁵⁵
- Required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a federal contract, grant, loan, permit, or license.¹⁵⁶
- A communication made in response to a notice in the *Federal Register* or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications.¹⁵⁷
- Communications made on behalf of an individual with regard to that individual’s benefits, employment, or other personal matters involving only that individual.¹⁵⁸ This exception does not apply to any communication involving proposed private relief legislation that is discussed with covered executive branch officials or covered legislative branch officials other than the individual’s elected member of Congress.¹⁵⁹

¹⁴⁹ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 695; Definitions, 2 U.S. Code § 1602 (1602(15)(F)); Lobbying Disclosure Act of 1995 as Amended Through P.L. 117-268, 5–6 (definition of a Public Official).

¹⁵⁰ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 695; Definitions, 2 U.S. Code § 1602 (1602(15)(A)(i)).

¹⁵¹ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 695; Definitions, 2 U.S. Code § 1602 (1602(15)(A)(iii)).

¹⁵² Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 693; Definitions, 2 U.S. Code § 1602 (1602(8)(B)(ii)).

¹⁵³ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 693; Definitions, 2 U.S. Code § 1602 (1602(8)(B)(iii)).

¹⁵⁴ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 693; Definitions, 2 U.S. Code § 1602 (1602(8)(B)(v)).

¹⁵⁵ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 693; Definitions, 2 U.S. Code § 1602 (1602(8)(B)(viii)).

¹⁵⁶ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 693; Definitions, 2 U.S. Code § 1602 (1602(8)(B)(ix)).

¹⁵⁷ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 693; Definitions, 2 U.S. Code § 1602 (1602(8)(B)(x)).

¹⁵⁸ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 694; Definitions, 2 U.S. Code § 1602 (1602(8)(B)(xvi)).

¹⁵⁹ Ibid.

- Individual disclosures pursuant to a whistleblower, Inspector General, or similar statute.¹⁶⁰

A handful of these LDA exceptions are similar to, or overlap with, the seven exceptions in 18 U.S.C. § 207 (especially with regard to communications made in an official governmental capacity), but, even in these cases, the LDA and 18 U.S.C. § 207 use different language and require different procedures. Applying LDA terms and exceptions to section 1045 means that senior DOD officials must be aware not only of the relatively simple definition of prohibited communications and the seven exceptions in section 207, but also of the four categories of covered communications and nineteen exceptions incorporated by reference in section 1045 to determine whether a specific post-government communication or “behind-the-scenes” supporting activity is prohibited.

c. “Covered executive branch officials”

18 U.S.C. § 207 also makes plain to whom its representational bans apply: to the entirety of the executive and judicial branches of government or to the entirety of the agency in which the former official served, depending on the rank of the former official. Importantly, for 18 U.S.C. § 207, the rank of the current agency officer or employee to whom the communication is directed is immaterial. There is no requirement to ascertain the grade or appointment status of the individual before whom a communication or appearance will be made. Also, although representational communications and appearances are prohibited, behind-the-scenes preparatory and supporting “activities” are not. 18 U.S.C. § 207 establishes a simple, comprehensible standard—on which a former DOD official can guide future conduct and against which that official’s compliance can be assessed and enforced.

By contrast, section 1045 applies to “lobbying contacts” and “lobbying activities” with “covered executive branch officials,” as defined in the LDA.¹⁶¹ The LDA defines the term “covered executive branch officials” as follows:

- “The President and Vice President of the United States;
- An officer or employee in the Executive Office of the President;
- Any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive Order (generally PAS);
- Any member of the uniformed services whose pay grade is at or above the grade of O-7 under section 201 of title 37, U.S.C.; and

¹⁶⁰ Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 694; Definitions, 2 U.S. Code § 1602 (1602(8)(B)(xvii)).

¹⁶¹ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, P.L. 117-263, Stat. 2773 (section 1045(c)(3)).

- Any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5, U.S.C. [Schedule C appointees].”¹⁶²

The limited list of executive branch officials covered by the LDA is a consequence of the difficult balancing act undertaken by the drafters of that statute: to provide parallel treatment of the legislative and executive branches by ensuring the disclosure of significant lobbying activities undertaken with senior executive branch officials while distinguishing those contacts and activities from the plethora of routine communications undertaken on a daily basis with lower ranking executive branch officials. Although this balance may make sense for a registration and disclosure statute like the LDA, it has proven difficult to apply in the context of a statute barring particular PGE actions.

By using the LDA terminology, section 1045 puts every former DOD official in the difficult position of needing to know to whom a specific communication is addressed (or may be addressed) and the appointment status of that person to determine whether engaging in the communication or supporting “behind-the-scenes” activities is prohibited. Without knowing the appointment status of the proposed recipient of a communication, a former DOD senior official cannot determine whether the recipient is “a covered executive branch official.” Determining to whom the communication is directed—or with whom it may be shared in the ordinary course of business—may be particularly difficult when a former official engages only in preparatory and supporting activities and does not personally engage in the communication.

The application of the “covered person” definition to “behind-the-scenes” support for a meeting illustrates the particular difficulty of determining whether the prohibition applies. Avoiding a section 1045 violation may require a former DOD senior official to ascertain that no “covered executive branch official” will participate in a proposed meeting before the former DOD official can prepare others to attend or otherwise support the meeting. For example, a former DOD official would not be permitted to draft talking points for a meeting with Department of Commerce officials if a “covered executive branch official” will participate in a meeting—a determination that may be difficult to make at the time the talking points are being prepared.

Adding section 1045’s prohibitions to those of 18 U.S.C. § 207 leads to incongruous results. Section 1045 requires overlaying an agency- or government-wide representational ban with prohibitions based on the status of the individual with whom a former DOD senior official may be meeting and speaking. Section 1045 not only prohibits communications permitted by 18 U.S.C. § 207, but it also permits communications that 18 U.S.C. § 207 precludes—requiring former DOD officials to understand and apply a complex set of inconsistent requirements. For example, section 1045 permits former officials to submit information in writing to DOD if requested by a covered executive branch official and to participate in communications compelled by federal

¹⁶² Lobbying Disclosure Act of 1995, P.L. 104-65, Stat. 691–692; Definitions, 2 U.S. Code § 1602 (1602(3)).

contracts. Both actions are strictly prohibited under section 207, creating the potential for former DOD personnel to inadvertently violate the criminal restriction imposed by section 207.

In the words of a DOD ethics official interviewed by IDA:

In 1045, we're looking at a statute that references something completely outside of the ethics construct. We've applied ethics statutes for more than forty years, they're very well known, and they provide bright lines. These statutes have been interpreted over time by the Office of Government Ethics and the Department of Justice. But when you layer in section 1045, even those bright lines get blurred. So the mindset is, well, I better just not talk to anybody in DOD for one or two years because I just don't want to cross any lines.¹⁶³

d. The absence of definitive guidance on the interpretation of the LDA

The complexity and confusion discussed previously are exacerbated by the absence of definitive guidance on the interpretation of the LDA.

The Ethics in Government Act of 1978,¹⁶⁴ as amended, created the OGE to provide “overall direction of executive branch policies related to preventing conflicts of interests on the part of officers and employees of any executive [branch] agency”¹⁶⁵ OGE, an independent executive branch agency in its own regard, provides oversight of Designated Agency Ethics Officials (DAEOs) in more than 130 departments and agencies across the Executive Branch, including DOD.

First enacted in the Bribery, Graft, and Conflicts of Interest Act of 1962,¹⁶⁶ 18 U.S.C. § 207 was expanded by the Ethics in Government Act of 1978. Congress explained that it found “too much ambiguity, confusion, inconsistency, and obscurity” in the existing conflict of interest laws” and was, therefore, “especially conscious of the matter of clarity of language and terminology” in amending the provision.¹⁶⁷ The Ethics Reform Act of 1989 again amended 18 U.S.C. § 207 to

¹⁶³ Interview, November 22, 2023.

¹⁶⁴ Ethics in Government Act of 1978, P.L. 95-521, 92 Stat. 1824–1867, 95th Cong. (October 1978), <https://www.congress.gov/95/statute/STATUTE-92/STATUTE-92-Pg1824.pdf>; Ethics in Government, 5 U.S. Code Chapter 131 (5 U.S. Code §§ 13121–13126), <https://www.law.cornell.edu/uscode/text/5/part-IV/chapter-131>.

¹⁶⁵ Ethics in Government Act of 1978, P.L. 95-521, Stat. 1862; 5 U.S.C. § 13122(a) (see <https://www.law.cornell.edu/uscode/text/5/13122>).

¹⁶⁶ Bribery, Graft, and Conflicts of Interest Act, P.L. 87-849, 76 Stat. 1119–1126, 87th Cong. (October 23, 1962), <https://www.congress.gov/87/statute/STATUTE-76/STATUTE-76-Pg1119.pdf>.

¹⁶⁷ Public Officials Integrity Act of 1977: Report of the Committee on Governmental Affairs, S. Report 95-170, 95th Cong. (1977), 31–33, quoted in Katherine Stone, “The Twilight Zone: Post-Government Employment Restrictions Affecting Retired/Former Department of Defense Personnel,” April 1993, 21, <https://apps.dtic.mil/sti/pdfs/ADA456703.pdf>.

make it the “single, comprehensive, post-employment statute applicable to executive and legislative branch personnel who leave Government service.”¹⁶⁸

OGE regulations at 5 CFR Part 2641¹⁶⁹ provide implementing guidance and practical examples of PGE rules in practical application on which DAEOs can rely dispositively. In addition, OGE provides DAEOs with training, educational, and networking opportunities in ethics matters and maintains a large repository of OGE and Department of Justice (DOJ) advisories and opinions interpreting the statute.¹⁷⁰

Its purview over and vast experience in interpreting 18 U.S.C. § 207 notwithstanding, OGE has no commensurate jurisdiction or familiarity regarding the LDA. The organization to which DOD would ordinarily turn for assistance and training in the interpretation and application of ethics laws and rules has neither the authority nor the experience to guide DOD’s implementation of section 1045 of the NDAA for FY 2018.

Rather, the LDA vests in the Secretary of the Senate and the Clerk of the House of Representatives the duty to “provide guidance and assistance on lobbying registration and reporting requirements of this Act and develop common standards, rules, and procedures for compliance with this Act”.¹⁷¹ The Secretary and Clerk have, from time to time, jointly issued written guidance on LDA registration and reporting requirements. However, even the most recent iteration of this guidance, dated February 2021, is of limited utility in the interpretation of section 1045. The Secretary and the Clerk do not have the force of law, and the guidance is not binding on the United States Attorney for the District of Columbia—charged to enforce the LDA¹⁷²—“or any other part of the Executive Branch.”¹⁷³ Rather, the guidance serves only to “inform the public as to how the Secretary and Clerk intend to carry out their responsibilities under the LDA.”¹⁷⁴ Readers are instructed that “any questions, comments, and suggestions should be directed to the Senate Office of Public Records and the House Legislative Resource Center.”¹⁷⁵

The limited role of the Secretary and Clerk is the result of historical factors that are constitutional and political. In 1994, an early version of the LDA, including strong oversight and

¹⁶⁸ Ethics Reform Act of 1989, P.L. No. 101-194, 103 Stat. 1716, 101st Cong. (1989), Stat. 1716–1724, (sections 101 and 102), <https://www.govinfo.gov/content/pkg/STATUTE-103/pdf/STATUTE-103-Pg1716.pdf>.

¹⁶⁹ Post-Employment Conflict of Interest Restrictions, 5 CFR § 2641.

¹⁷⁰ OGE Advisories are available at <https://www.oge.gov/web/oge.nsf/Legal%20Research%20Search%20Collection?OpenForm>.

¹⁷¹ Lobbying Disclosure Act of 1995. P.L. 104-65, 698; Disclosure and Enforcement, 2 U.S. Code § 1605 (1605(a)(1)). <https://www.law.cornell.edu/uscode/text/2/1605>.

¹⁷² Office of the Clerk, U.S. House of Representatives, “Lobbying Disclosure Act Guidance,” 2; Disclosure and Enforcement., 2 U.S. Code § 1605 (1605(b)).

¹⁷³ Office of the Clerk, U.S. House of Representatives, “Lobbying Disclosure Act Guidance,” 2.

¹⁷⁴ Ibid.

¹⁷⁵ Office of the Clerk, U.S. House of Representatives, “Lobbying Disclosure Act Guidance,” 1 (footnote 1), 30.

enforcement provisions, passed both Houses of Congress. The conference report on the bill failed in the Senate after it was filibustered at the end of the 103rd Congress, in part because of First Amendment concerns raised by the enforcement provisions.¹⁷⁶ A modified version of the bill was taken up in the 104th Congress.¹⁷⁷ The new bill, ultimately enacted in law, removed the objectionable enforcement provisions and replaced them with a requirement to register and file reports with the Secretary of the Senate and the Clerk of the House of Representatives.¹⁷⁸

The greatest impact of this change is that the absence of an independent policymaking, oversight, and enforcement system translates into a void of binding guidance interpreting the LDA. In short, the LDA does not provide the Secretary or the Clerk authority to write substantive regulations, issue definitive opinions on, or enforce the LDA,¹⁷⁹ much less provide guidance on the application of LDA terminology to former DOD senior officials or DOD ethics officials in the context of section 1045 of the FY 2018 NDAA.¹⁸⁰

¹⁷⁶ Lobbying Disclosure Act of 1994, Conference Report on S. 349, H.R. Report 103-750, 103rd Cong. (1994). Text of the conference report is printed in House proceedings of the Congressional Record, September 26, 1994, pages 25733–25754. Second cloture motion on the conference report not invoked in the Senate by Yea-Nay Vote: 55-42 (see Congressional Record, October 7, 1994, 28774-28775).

¹⁷⁷ Lobbying Disclosure Act of 1995, S.1060 and H.R. 2564, 104th Cong. (1995–1996).

¹⁷⁸ The legislative history of S.1060 and H.R. 2564 reflects that the Department of Justice expressed constitutional concerns about the role the new bill accorded the Secretary and the Clerk. A letter from Andrew Foiss, Assistant Attorney General, to the Honorable Henry Hyde, Chairman, Committee on the Judiciary, House of Representatives, November 7, 1995, asserted (see Lobbying Disclosure Act of 1995, H.R. Report 104-339 Part 1, 27):

The bill provides that lobbyists would need to file disclosure statements with the Secretary of the Senate and the Clerk of the House of Representatives. If these officials determined that a lobbyist's statement did not comply with the law, they would notify the lobbyist. If the lobbyist did not correct the deficiency to their satisfaction, they could forward the matter to the United States Attorney for the District of Columbia, who could bring an action for civil file. See §§ 4–7, S. 1060. The bill would define a civil offense consisting of the knowing failure to remedy a defective filing within 60 days after notice of such defect by the Secretary of the Senate and the Clerk of the House of Representatives. See § 7(2).

This arrangement would raise serious constitutional problems. Congress may not provide for its agents to execute the law. *Bowsher v. Synar*, 478 U.S. 714, 726, 733–34 (1986); see also *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991). Here, in contrast to the current law that gives agents of Congress the responsibility only to collect and publish information, see 2 U.S.C. §§ 261–70, the bill would provide that an action for one type of civil offense could be initiated against a lobbyist only if the congressional agents, pursuant to their interpretation of the statute, issued a notice finding the lobbyist's filing to be deficient. The Secretary of the Senate and the Clerk of the House of Representatives thus would be performing executive functions of *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976) (executive functions include giving “advisory opinions” and making “determinations of eligibility for funds and even for federal elective office itself”), even though Congress may vest such functions only in officials in the executive branch.

¹⁷⁹ Office of the Clerk, U.S. House of Representatives, “Lobbying Disclosure Act Guidance,” 1 (Section 1 – Introduction).

¹⁸⁰ Particularly given that most former DOD senior officials will never be subject to the LDA's requirement to register as a lobbyist.

The use of LDA terms that have no direct counterpart in executive-branch-wide ethics laws and regulations creates undesirable complexity in the application and interpretation of section 1045. This complexity attaches to section 1045 standing alone and when applied to former DOD officials in conjunction with the longstanding regime of PGE laws and regulations applicable to all executive branch officials. This complexity is detrimental in two respects:

- It creates potential confusion (and the risk of an inadvertent violation) for former DOD senior officials who must abide by all applicable restrictions.
- It imposes an administrative burden on DOD ethics officials, who must not only interpret and apply these inconsistent restrictions in as consistent a framework as is feasible, but also must develop programs to train, counsel, and guide the officials to whom the law applies.

C. Section 1117

Section 1117 of the FY 2022 NDAA prohibits DOD officers and employees from knowingly participating personally and substantially in any particular matter involving specific parties in two situations: (1) one based on past association and (2) one based on a potential future employment relationship. In particular, a serving DOD officer or employee is prohibited from participating in a matter if one of the following is a party to or represents a party to that matter:

- An organization for which the currently serving DOD officer or employee served as an employee, officer, director, trustee, or general partner in the past two years, or
- An organization with which the officer or employee is seeking employment.

Section 1117 has been interpreted by the Department to apply to all DOD civilian and military personnel, including enlisted personnel.¹⁸¹ Further, section 1117 contemplates the waiver of its recusal requirement on a case-by-case basis. Under the provision, an agency designee may authorize an officer or employee whose participation in a matter is otherwise prohibited by the law to participate in the matter upon a determination that, considering all relevant circumstances, the interest of the government in the individual's participation outweighs the concern that a reasonable person could question the integrity of the agency's programs and operations.¹⁸²

The requirements of section 1117, on their face, are consistent with the principles established in the executive-branch-wide ethics rules—in particular, the principle that “Employees shall act impartially and not give preferential treatment to any private organization or individual.” Section 1117 (like similar requirements already in law) appears to be intended to safeguard this principle by precluding DOD employees from acting in circumstances in which they might be

¹⁸¹ Office of General Counsel (OGC)/Standards of Conduct Office (SOCO), “Guidance Regarding Section 1117.”

¹⁸² National Defense Authorization Act for Fiscal Year 2022, P.L. 117-81, 135 Stat. 1541, 117th Cong. (2021), Stat. 1955 (section 1117(b)), <https://www.congress.gov/117/plaws/publ81/PLAW-117publ81.pdf>.

subject to inappropriate influence or conflicts of interest due to past or potential future relationships.¹⁸³

The balance of this section describes longstanding executive-branch-wide provisions that address the same issues as section 1117 and evaluates the three major ways in which section 1117 differs from those provisions: (1) it applies only to current and former DOD officials, (2) it imposes a two-year recusal requirement rather than a one-year requirement on DOD officials for matters involving past employers, and (3) it uses different terminology from government-wide standards on a number of issues.

1. Existing Coverage and Background

Several longstanding provisions of statute, regulation, and EO are designed to address the same purposes as, and circumstances similar to section 1117.

The executive-branch-wide conflict of interest law at 18 U.S.C. § 208(a) prohibits a currently serving government employee from participating in a particular matter in which the employee, the employee's "spouse, minor child, general partner, organization in which [the employee] is serving as officer, director, trustee, general partner or employee, or any person or organization with whom [the employee] is negotiating or has an arrangement concerning prospective employment has a financial interest."¹⁸⁴ Application of the law may be waived on a case-by-case basis if the employee's financial interest is "too remote or inconsequential to affect the integrity of the services of Government officials,"¹⁸⁵ as set forth in OGE regulations.

OGE regulations, which are applicable executive branch wide, include additional limitations on a government employee's actions affecting former associations and a limitation grounded in seeking future employment. In particular,

- 5 CFR § 2635.502¹⁸⁶ provides that a government employee should refrain from participating in a particular matter in which the employee knows a person with whom the employee or a close family member has a covered relationship is a party to or represents a party to the matter. In this context, a "covered relationship" includes a relationship with a person for whom, within the last year, the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee or for whom the employee's spouse, parent, or dependent child is serving or seeking to serve in such capacity.

¹⁸³ However, one interviewee told the IDA team that restrictions on employees based on past relationships have been so broadly interpreted by some DOD lawyers that senior officials are unable to participate even in general decisions (e.g., budget deliberations) that might impact a former employer, effectively denying the Department access to the officials' expertise.

¹⁸⁴ Acts Affecting a Personal Financial Interest, 18 U.S. Code § 208 (208(b)(1)).

¹⁸⁵ Ibid., 208(b)(2).

¹⁸⁶ Personal and Business Relationships, 5 CFR § 2635.502, <https://www.law.cornell.edu/cfr/text/5/2635.502>.

- 5 CFR § 2635.604¹⁸⁷ prohibits a government employee from participating personally and substantially in a particular matter that the employee knows has a direct and predictable effect on the financial interests of a prospective employer with whom the employee is “seeking employment.”

These government-wide ethics standards were designed to ensure that federal employees preserve the public trust by limiting their participation in matters under circumstances very similar to those later addressed by section 1117.

Finally, EO 13989 addresses potential conflicts of interest based on former associations in the case of political appointees. It requires civilian political appointees to abstain from participating in any particular matter involving specific parties, including regulations and contracts, that is directly and substantially related to a former employer or former clients for a period of two years from the date of their appointment.¹⁸⁸ It defines “directly and substantially related to my former employer or former clients” as “matters in which the appointee’s former employer or former client is a party or represents a party.”¹⁸⁹

2. Evaluation of Major Changes to Existing Coverage

Early versions of section 1117 differed materially from the government-wide standards set forth in 18 U.S.C. § 208(a) and the executive-branch-wide limitations imposed by 5 CFR part 2635, and EO 13989. As initially drafted, for example, section 1117 would have required all DOD personnel to be recused for four years from matters involving former employers *and their competitors*, with no provision for waiver. In its final form enacted by Congress and signed by the President, however, the provision was modified to align more closely with existing law and regulation.¹⁹⁰

Nonetheless, several significant differences remain between section 1117 and the ethics standards otherwise applicable to the whole of the executive branch—most notably, in that section 1117 (1) applies only to current and former DOD officials, (2) imposes a two-year recusal requirement rather than a one-year requirement on DOD officials for matters involving past employers, and (3) uses different terminology from government-wide standards on a number of issues. The first two issues are addressed in this section. The third is addressed in the following section, which addresses areas of potential uncertainty and confusion.

¹⁸⁷ Recusal While Seeking Employment, 5 CFR § 2635.604, <https://www.law.cornell.edu/cfr/text/5/2635.604>.

¹⁸⁸ Executive Order 13989, “Ethics Commitments by Executive Branch Appointees,” 7029 (section 1.2).

¹⁸⁹ *Ibid.*, 7031 (section 2(m)).

¹⁹⁰ Office of General Counsel (OGC)/Standards of Conduct Office (SOCO), “Guidance Regarding Section 1117,” 1.

a. The range of officials covered

The major difference in the range of officials covered by section 1117 as compared to 18 U.S.C. § 208(a), 5 CFR part 2635, and EO 13989 is that section 1117 applies only to DOD officials, while the other provisions apply to personnel government wide (section 208(a)), to officials across the Executive Branch in its entirety (5 CFR part 2635), and to political appointees across the Executive Branch (EO 13989). Section 1117 was likely limited to DOD officials for jurisdictional reasons associated with its enactment as a part of the FY 2018 NDAA.

The strongest policy rationale for a unique limitation applicable only to DOD officials is that the Department is a unique federal agency, which acquires well over \$400 billion in products and services from contractors every year, which is significantly more than all other federal agencies combined.¹⁹¹ As a result, senior DOD officials are called upon to make many policy, budget, requirements, and acquisition decisions that can have a multi-million-dollar (and even multi-billion dollar) impact on contractor finances, including contractors with which the official was once associated or with which the official may be seeking future employment. The far-reaching financial impact of these decisions warrants attention to potential financial conflicts of interest on the part of officials who are called upon to make them.

The contrary argument is that officials in other federal agencies are called upon to make decisions with a financial impact on NFEs at least as great as those made by DOD officials. While billion-dollar contract decisions may be less frequent in other federal agencies, officials in such agencies are frequently called upon to make regulatory decisions (or non-decisions) that can have a multi-million-dollar (or multi-billion dollar) financial impact on regulated industries. Moreover, the enduring, long-term relationships between regulators and regulated industries would appear to raise the same concerns about undivided loyalty as the relationships between DOD acquisition officials and the defense industrial base. As noted previously, although a handful of high-profile incidents involving former DOD personnel have attracted the attention of Congress and the public, it appears that DOD officials are no more likely to be prosecuted for conflict-of-interest violations than officials of other federal agencies.

If the restrictions in section 1117 are considered to be a helpful barrier against improper influence in government decision-making processes, there is a good argument that it is better to apply these provisions to some agencies and some officials than to none at all. To the extent that the restrictions are duplicative, the added confusion created by overlapping provisions with inconsistent language would appear to be counterproductive. Regardless of whether the provisions are well-constructed, however, application of section 1117 restrictions only to former DOD officials could put the Department at a recruiting disadvantage and even lead some senior DOD officials to seek employment elsewhere in the federal government. The desired outcome depends on a balance between the value derived by application of the restrictions to at least some officials

¹⁹¹ In FY 2023, DOD awarded a total of \$470 billion in contracts. Civilian agencies awarded a collective total of \$295 billion in contracts. See HigherGov, “Record \$765B in Federal Contracts Awarded in 2023.”

against the risk that DOD could lose access to talent because of the way in which it is singled out by the provision.

Other policy differences between section 1117 and the executive-branch-wide provisions are specific to the two prongs of section 1117: addressing past associations and potential future employers.

b. Length of recusal period based on past associations

With regard to past associations, section 1117 differs from the executive-branch-wide limitations in 5 CFR §2635.502 in that section 1117(a)(1) establishes a two-year period of recusal for matters involving past employers, which is double the one-year period in 5 CFR § 2635.502.¹⁹² The longer period of recusal addresses a concern expressed by some that significant ties and potential bias based on past employment relationships and other close professional affiliations may continue for more than just a year. Others take a contrary view, that senior DOD officials are loyal to the Department and are unlikely to be influenced by prior relationships and affiliations.

The longer recusal period could preclude new DOD officials from participating in significant decisions ordinarily vested in the position that they hold, rendering them less effective in their performance of government duties. The Department has developed screening procedures to identify issues in which an official's former employer may have an interest and to ensure that such officials do not participate in their resolution. Because DOD attorneys and senior officials are sensitive to appearance concerns, some recusals may have been extended to matters that are not covered by the strict terms of the statute.

Two former senior DOD officials interviewed by the IDA team expressed the view that the lengthened recusal period was detrimental to the interests of the Department because it precluded them from participating in the Department's deliberations with regard to issues on which they were more experienced and better informed than their colleagues. In each case, the former official indicated that the recusal requirement had been interpreted to exclude them not only from contracting decisions and other particular matters, but also from broader discussions of policy and funding matters in which their former clients or employers might have had an interest.¹⁹³

Because section 1117 applies only to people and organizations with which the currently serving DOD official had an outside employment relationship or similar affiliation within the past two years, it is not likely to impact the vast majority of DOD active duty military and civilian personnel who spend a career in the government and do not have any such outside affiliations.

¹⁹² EO 13989 applies a two-year restriction on an executive-branch-wide basis and mandates recusal, but this restriction applies only to political appointees. In addition, the restriction in the EO begins on the appointment date of the covered official, while the recusal periods of section 1117 and 5 CFR § 2635.502 begin on the last date of the employment relationship.

¹⁹³ Interview of former Army official, November 21, 2023; interview of former OSD official, December 1, 2023.

The longer recusal period is likely to affect several types of DOD personnel who are new to government, come into government for a limited period of time, or serve on a part-time basis. These personnel could include the following:

- Political appointees who come into the government for a limited period of time,¹⁹⁴
- Reserve Component military officers,¹⁹⁵
- Civilian highly qualified experts (HQEs),¹⁹⁶
- Other civilian term employees,¹⁹⁷
- Participants in rotational programs designed to provide DOD officials experience in the private sector,¹⁹⁸ and
- Personnel with specialized experience who are new to Government service.

The last two groups, in particular, could include individuals with expertise important to the Department in fields such as software and cyber. As a result, section 1117 may have the effect of depriving the Department of the knowledge and expertise of currently serving DOD officials with regard to a broad array of matters—including expertise in support of technology development, supply chain security, and other national security matters—for an extended period. The issue for

¹⁹⁴ At present, the impact of the two-year limitation in section 1117 on these individuals is likely to be limited because they are already covered by a similar two-year recusal requirement in EO 13989. Although the EO defines “former employer” as a person for whom the appointee served as an employee or in other capacities in the two years before the date of appointment to a government position, the EO’s recusal period extends for two years from the date of such appointment. By contrast, section 1117’s two-year recusal begins on the date on which the DOD official’s relationship with the “former employer” terminated. The Clinton, Obama, Trump, and Biden Administrations issued EOs addressing post-government employment issues. It is not possible to know, however, whether a future administration will impose such an EO or how such an EO might differ from EO 13989.

¹⁹⁵ 1- and 2-Star officers in the reserve components frequently serve on a part-time basis, holding jobs in the private sector at the same time that they serve in military positions. A reserve officer is prohibited by 18 U.S.C. section 208 from participating in any matter involving an outside employer for as long as they remain an employee. In a case where a reserve officer moves to a new employer and retains no financial ties with the former employer, however, section 208 would no longer prohibit participation in matters involving the former employer. Consequently, reserve officers may be adversely impacted by statutory recusal requirements and similar ethics provisions. During one of IDA’s interviews, the interviewee was aware of several 1- and 2-Star reserve officers who “got in trouble” because of failure to comply with PGE-related ethics requirements (Interview, December 5, 2023).

¹⁹⁶ See Attracting Highly Qualified Experts, 5 U.S. Code § 9903, <https://www.law.cornell.edu/uscode/text/5/9903>. HQEs and term employees generally have limited decision-making authority. Nonetheless, allowing such short-term employees to participate in particular matters involving their past employers is probably not good practice—especially since these past employers may also be future employers.

¹⁹⁷ See Temporary and Term Employment, 5 CFR Part 316, <https://www.cornell.law.edu/cfr/text/5/part-316>.

¹⁹⁸ The application of these requirements to programs that are designed to broaden the experience and expertise of DOD employees could also be problematic. These programs include congressional initiatives, such as the public-private talent exchange under 10 U.S. Code § 1599g, and DOD initiatives, such as the Secretary of Defense Executive Fellows program. See Assistant Secretary of Defense for Readiness, “Force Education and Training,” <https://prhome.defense.gov/Readiness/Organization/FET/SDEF/>.

policymakers is whether this impact is justified by concerns about continuing ties and potential biases based on past relationships.

3. Areas of Potential Uncertainty and Confusion

Section 1117 has the same purpose as section 208 and related regulations but uses slightly different terminology. The differences in language and approach fall into three broad categories: (1) the nature of employment-related relationships triggering recusal from DOD matters, (2) the types of matters from which recusal is required, and (3) the point at which the recusal period begins.

With regard to the nature of employment-related relationships triggering a forward-looking requirement for recusal on the part of an individual entering service with DOD, section 1117 and executive-branch-wide ethics provisions enumerate slightly different lists of past employment relationships. In particular, section 1117 requires the incoming DOD official's recusal from participating personally and substantially in a particular matter involving specific parties where an organization with whom the DOD officer or employee served is a party to or represents a party to the matter.¹⁹⁹ Section 1117 defines "organization" (to include trade organization) as one in which a DOD officer or employee served as an employee, officer, director, trustee, or general partner. By contrast, 5 CFR § 2635.502 requires recusal from particular matters involving specific parties to which a person with whom the employee had a covered relationship is a party to or represents a party to the matter.²⁰⁰ Under this regulation, an executive branch employee has a "covered relationship" with a "person" for whom they served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee within the past year. The two provisions differ in that section 1117 does not extend to organizations in which an employee served as an agent, attorney, consultant, or contractor, thus, creating two different standards that govern former employer recusals for current DOD personnel.

With regard to the types of matters from which recusal is required, the different terminology of section 1117, 18 U.S.C. § 208, and 5 CFR § 2635.502 is particularly confusing. In particular,

- Section 1117 requires the incoming DOD official's recusal from participating personally and substantially in a particular matter involving specific parties where an *organization* with which the DOD officer or employee served is a party to or represents a party to the matter.²⁰¹ Section 1117 defines "organization" (to include trade organization) as one in which a DOD officer or employee served as an employee, officer, director, trustee, or general partner. By contrast, 5 CFR § 2635.502 requires recusal from "particular matters involving specific parties to which *a person with whom the employee had a 'covered relationship'* is [a party to] or represents a party to the

¹⁹⁹ National Defense Authorization Act for Fiscal Year 2022, P.L. 117-81, Stat. 1995 (section 1117(a)(1)).

²⁰⁰ Personal and Business Relationships, 5 CFR § 2635.502 (2635.502(a)).

²⁰¹ National Defense Authorization Act for Fiscal Year 2022, P.L. 117-81, Stat. 1995 (section 1117(a)(1)).

matter.”²⁰² Under this regulation, any executive branch employee has a “covered relationship” with a “person” for whom they served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee within the past year. The two provisions differ in their references to an “organization” with which the DOD official served previously (section 1117) and a “person” with whom the official served (5 CFR § 2635.502(a)).

- Section 1117 requires the official’s recusal from “any particular matter involving specific parties” where an organization with which the DOD officer or employee is “seeking employment” is a party to or represents a party to the matter.²⁰³ 18 U.S.C. § 208(a) and related regulations require an executive branch official’s recusal from a “*particular matter* that has a direct and predicable effect on the *financial interests* of a prospective employer with whom the employee is seeking employment (emphasis added).²⁰⁴ 5 CFR § 2635.604 prohibits a government employee from participating personally and substantially in a particular matter that the employee knows has a direct and predictable effect on the financial interests of a prospective employer with whom the employee is “seeking employment.” These provisions differ from section 1117 in that section 1117 refers to recusal from a “particular matter involving a specific party,” a relatively narrow set of proceedings involving the legal rights of specific parties.²⁰⁵ 18 U.S.C. § 208 and 5 C.F.R. § 2635.604 require recusal in the case of a particular matter predictably affecting the financial interests of a prospective employer.²⁰⁶ This latter standard encompasses a far broader set of activities and may extend even to policymaking and rulemaking that could have causal effect on another’s financial interests.

The standard in section 1117 for prospective employer recusals is narrower in that it applies only to particular matters involving specific parties, while section 208 and the executive-branch-wide regulations apply to all particular matters that could affect the financial interests of the prospective employer regardless of whether the potential employer is a party or represents a party to the matter. As OGE has explained, the phrase “particular matter involving specific parties” is deliberately narrow, covering only proceedings involving the legal rights of specific parties, such as contracts, grants, licenses, investigations, and litigation. By contrast, the term “particular

²⁰² Personal and Business Relationships, 5 CFR § 2635.502 (2635.502(a)).

²⁰³ National Defense Authorization Act for Fiscal Year 2022, P.L. 117-81, Stat. 1995 (section 1117(a)(2)).

²⁰⁴ Acts Affecting a Personal Financial Interest, 18 U.S. Code § 208 (208(a)); Recusal While Seeking Employment. 5 CFR § 2635.504 (2635.604(a)).

²⁰⁵ For the definition of a “Particular Government matter involving a specific party,” see Definitions, 5 CFR § 2637.102 (2637.102(a)(7)), <https://www.govinfo.gov/content/pkg/CFR-2001-title5-vol3/pdf/CFR-2001-title5-vol3-sec2637-102.pdf>.

²⁰⁶ For the definitions of “direct and predictable effect” and “particular matter,” see Disqualifying Financial Interests, 5 CFR § 2635.402, <https://www.law.cornell.edu/cfr/text/5/2635.402> sections 2635.402(b)(1) and 2635.402(b)(3), respectively.

matter” is broader and includes any discrete matter that focuses on an identifiable class of persons, including policymaking and rulemaking. This broader category of cases is referred to as “particular matters of general applicability.”²⁰⁷ As a result, the executive-branch-wide standards would preclude a DOD official from engaging in rulemaking that would impact the financial interests of a discrete and identifiable class of contractors that includes the contractor with which the employee is seeking employment, but section 1117 would not. Similarly, the executive-branch-wide standards would preclude participation in a budget decision that impacts the financial interest of a contractor with whom the employee is seeking employment, even though the contractor is not a party to the matter, whereas section 1117 would not.

Section 1117 specifically states that the limitations that it imposes are “in addition to the prohibition set forth in section 208.” Consequently, in cases in which only one set of limitations applies, the conduct is still prohibited. Because the categories of coverage are incongruent, however, covered officials need to be aware of both restrictions.

Finally, the two provisions differ regarding the duration of the recusal period for incoming employees. Section 1117 requires an incoming DOD official’s recusal for a period of two years from the last day on which the new official held a covered employment relationship with a non-federal entity.²⁰⁸ By contrast, 5 CFR section 2635.502 establishes the recusal period as one year from the date the official last served in a “covered position.”²⁰⁹

These distinctions in language do not appear to be the result of significant policy differences. When layered, however, the slightly different uses of terminology make the resulting restrictions difficult to interpret without the assistance of an attorney. Several former government officials interviewed by the IDA team indicated that they frequently sought the advice of government ethics counsel on these and similar issues and that the answers that they received were not always consistent. In at least some cases, the advice appeared intended to minimize risk by avoiding all potential gray areas, including conduct that did not seem to be prohibited by the applicable standards.²¹⁰

²⁰⁷ Robert Cusick, “Particular Matter Involving Specific Parties,” “Particular Matter,” and “Matter,” Memorandum 06 x 9 (Washington, DC: Office of Government Ethics, October 4, 2006,” 3, 7, [https://www.oge.gov/web/oge.nsf/News+Releases/C096A6E1D3448F38852585BA005BED08/\\$FILE/06x9_.pdf](https://www.oge.gov/web/oge.nsf/News+Releases/C096A6E1D3448F38852585BA005BED08/$FILE/06x9_.pdf).

²⁰⁸ National Defense Authorization Act for Fiscal Year 2022, P.L. 117-81, Stat. 1995 (section 1117(a)(1)).

²⁰⁹ Personal and Business Relationships, 5 CFR § 2635.502 (2635.502(b)(iv)).

²¹⁰ The DOD SOCO in the OGC has developed two tables that illustrate the complexity in interpretation and application that result from of layering these section 1117 and executive-branch-wide regulations set forth in 5 CFR and from parallel restrictions imposed by the President’s Ethics Pledge, promulgated in EO 13989. These charts are included in Appendix D.

D. Section 988

In 2019, Congress enacted 10 U.S.C. § 988, which created a new statutory divestiture requirement applicable to certain senior DOD personnel.²¹¹ Section 988 of the FY 2020 NDAA prohibits a DOD covered official from owning or purchasing publicly traded stock of any of the ten entities awarded the most amount of contract funds by DOD in a fiscal year during the five preceding fiscal years.²¹² Section 988 defines DOD “covered officials” as follows:²¹³

- DOD civilian political appointees confirmed by and with the advice and consent of the Senate, and
- DOD personnel serving in key acquisition positions (as designated by the Secretary of Defense or the Secretary of the Military Department concerned):
 - Military GOFOs and
 - Civilian employees in a SES, SL, or ST position.

The contractor stock ownership and purchase prohibition in section 988 provides for two exceptions:²¹⁴

- If the aggregate value of the “top 10” contractor stock held by the covered official and the official’s spouse and minor children before or after purchase (in the case of a purchase) does not exceed the de minimis threshold under 5 CFR § 2640.202(a)(2)²¹⁵—presently defined as not to exceed \$15,000 in valuation.

If a stock is purchased and owned as part of an Excepted Investment Fund (EIF) (e.g., a widely held investment fund such as a mutual fund, regulated investment company, pension or deferred compensation plan, or other investment fund)²¹⁶ or a mutual fund.

On its face, section 988 is designed to ensure that senior DOD political appointees, as well as senior military and civilian personnel serving in key acquisition positions and their family members, do not hold financial interests that could be affected by the DOD official’s decisions involving major defense contractors.

The balance of this section describes statutes, regulations, and legislative guidance that are designed to address the same issues as section 988 and evaluates the major ways in which

²¹¹ Prohibition on Ownership or Trading of Stocks in Certain Companies by Certain Officials of the Department of Defense, 10 U.S. Code § 988, <https://www.law.cornell.edu/uscode/tect/10/988>.

²¹² National Defense Authorization Act for Fiscal Year 2020, P.L. 116-92, 133 Stat. 1198, 116th Cong. (2019), Stat. 1560 (section 988(a)), <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>.

²¹³ Ibid, section 988(c).

²¹⁴ Ibid., 988(b).

²¹⁵ Exemptions for Interests in Security, 5 CFR § 2640.202, <https://www.law.cornell.edu/cfr/text/5/2640.202>.

²¹⁶ Ibid., 988(c)(2): “The term ‘Excepted Investment Fund’ means a widely-held investment fund described in section 102(f)(8) of the Ethics in Government Act of 1978 (5 U.S.C. App.).”

section 988 differs from that otherwise applicable guidance: it applies to a different category of officials, and it uses slightly different terminology.

1. Existing Coverage and Background

None of the statutes of government- or executive-branch-wide application generally prohibits employees from holding or acquiring any financial interests,²¹⁷ but the divestiture requirements in section 988 parallel divestiture requirements imposed by the SASC through the confirmation process for senior civilian and military nominees.

Section 18 U.S.C. § 208(a) prohibits federal government employees from participating personally and substantially in their government capacity in a particular matter in which, to their knowledge, they, their spouse, their minor child, general partner, and organization in which they are serving as officer, director, trustee, general partner, or employee has a financial interest.²¹⁸ The law and related regulations at 5 CFR § 2635.402(a), provide for the grant of a waiver on a case-by-case basis. Section 18 U.S.C. § 208(a) and related regulations provide that a conflict of interest can be addressed either through voluntary divestiture of the financial interest at issue or recusal from the government decision or matter by which that financial interest could be affected.

In addition, divestiture may be directed by an agency under 5 CFR § 2635.403, which provides, “[a]n employee shall not acquire or hold any financial interest that he is prohibited from acquiring or holding by statute, by agency regulation issued in accordance with paragraph (a) of this section, or by reason of an agency determination of substantial conflict.” 5 CFR § 2635.403(a) authorizes agencies to prohibit or restrict the acquisition or holding of financial interests (or a class of them) by agency employees or a category of agency employees and their spouses and minor children based on a determination that the acquisition or holding of such financial interests would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered. If the prohibition is extended to the spouses and minor children of employees, a direct connection must exist between the prohibition and the efficiency of the service. It is on this authority that the Food and Drug Administration (FDA) prohibits its employees from holding financial interests in businesses that the agency regulates.²¹⁹

5 CFR § 2635.403(b) also empowers an agency to prohibit or restrict an individual employee from acquiring or holding a financial interest (or class of same) based on the agency designee’s determination that such interests would

²¹⁷ Disqualifying Financial Interests, 5 CFR § 2635.402 (2635.402(a) Note).

²¹⁸ Acts Affecting a Personal Financial Interest, 18 U.S. Code § 208 (section 208(a)).

²¹⁹ Prohibited Financial Interests Applicable to Employees of the Food and Drug Administration, 5 CFR § 5501.104, <https://www.law.cornell.edu/cfr/text/5/5501.104>.

- Require the employee’s disqualification from matters so central or critical to the performance of their official duties that the employee’s ability to perform his or her duties would be materially impaired or
- Adversely affect the efficient accomplishment of the agency’s mission because another employee cannot be readily assigned to perform the work that the disqualified employee would not be able to perform.

5 CFR §2635.403(c) defines “financial interests” somewhat more broadly than financial interests that would be deemed disqualifying under 18 U.S.C. § 208(a) and 5 CFR § 2635.402 in that it gives agencies more discretion to ban certain discrete financial interests even when the interest would not cause a potential conflict of interest.²²⁰

Until 2021, including periods before and subsequent to the passage of section 988, the SASC’s policies on civilian and military nominees required the following:

- DOD Senate-confirmed, Presidentially appointed officials divest of holdings in any entity that held DOD contracts valued at \$25,000 or more in the preceding fiscal year—a cohort of more than 30,000-plus contractors that could change on an annual basis. Although EIFs and mutual funds were generally exempt from the divestiture requirement, stock holdings at or below the \$15,000 OGE de minimis threshold were *not* exempt.
- Military nominees for appointment to the grades of O-9 or O-10 in designated key acquisition positions divest of holdings in any entity that held DOD contracts valued at \$25,000 or more in the preceding fiscal year—a cohort of more than 30,000-plus contractors that could change on an annual basis. EIF and mutual funds were generally exempt from the divestiture requirement, as were stock holdings at or below the \$15,000 OGE de minimis threshold.
- Military nominees for appointment in the grades of O-9 or O-10 in positions *other than* key acquisition positions divest of holdings in companies appearing in the top 10 of the General Services Administration (GSA)-published “Top 100” contractors listing for DOD in the previous year. Although EIF and mutual funds were generally exempt from

²²⁰ Example 2 in 5 CFR § 2635.403(c)(1) best illustrates the broader nature of this definition (see Prohibited Financial Interests, 5 CFR § 2635.403, <https://www.law.cornell.edu/cfr/text/5/2635.403>):

An agency that insures bank deposits may, by supplemental agency regulation, prohibit its employees who are bank examiners from obtaining loans from banks they examine. Examination of a member bank could have no effect on an employee’s fixed obligation to repay a loan from that bank and, thus, would not affect an employee’s financial interests so as to require disqualification under [5 CFR] § 2635.402. Nevertheless, a loan from a member bank is a discrete financial interest within the meaning of [5 CFR] § 2635.403(c) that may, when appropriate, be prohibited by supplemental agency regulation.

the divestiture requirement, stock holdings at or below the \$15,000 OGE de minimis threshold were *not* exempt.²²¹

In 2021, the SASC confirmation policy was revised to align its coverage with the new law.²²²

2. Evaluation of Major Changes to Existing Coverage

Section 988 and the SASC policy for nominees apply only to DOD officials, not to their peers in other federal agencies. The argument in favor of a restriction limited to DOD officials is that the Department is a unique federal agency that acquires roughly \$400 billion in products and services from contractors every year—roughly as much as all other federal agencies combined. The contrary argument is that officials in other federal agencies are called upon to make decisions with a financial impact on NFEs at least as great as those made by DOD officials. To the extent that the restrictions in section 988 provide unique protections against the improper influence in government decision-making processes, it may be better to apply these provisions to some agencies and some officials than to none at all. To the extent that the restrictions are duplicative, the added confusion created by overlapping provisions with inconsistent language would appear to be counterproductive.

Two other differences between section 988 and other policies regarding divestiture of financial holdings by DOD personnel are as follows: (1) section 988 covers categories of officials not addressed by the SASC nomination policies and (2) section 988 uses terms and conditions that differ from those used in executive-branch-wide regulations.

a. Coverage of additional categories of DOD officials

As enacted, section 988 did not impose any new requirements on senior civilian political nominees for DOD positions, who were already required by SASC policy then in effect to divest interests in almost all defense contractors. It also imposed no new requirements on 3- and 4-Star military officers nominated to key acquisition positions, who were already required by SASC policy then in effect to divest interests in the top 10 defense contractors. However, section 988

²²¹ An early Senate version of section 988 would have extended the divestiture requirement to a larger cohort of DOD officials involved in acquisitions and applied the requirement that DOD officials and employees divest stock holdings in DOD contractor or subcontractor organizations subject to a determination that the value of the stock could be influenced by the individual's official acts (see National Defense Authorization Act for Fiscal Year 2020, S. 1790, 116th Cong. (2019), https://www.intelligence.senate.gov/sites/default/files/legislation/BILLS-116s1790es_0.pdf). Although the House amendment did not contain a similar provision, the House receded with an amendment that eventually became section 921 of the law (see National Defense Authorization Act for Fiscal Year 2020, P.L. 116-92) and was codified at 10 U.S. Code § 988 (see Prohibition on Ownership or Trading of Stocks in Certain Companies by Certain Officials of the Department of Defense, 10 U.S. Code § 988). The final provision is narrower in scope with respect to the officials to whom it applies and the value of DOD contracts held by the company at issue and does not require a determination regarding a DOD official's potential to influence the value of their stock holdings.

²²² Office of General Counsel (OGC)/Standards of Conduct Office (SOCO), "Overview of Stock Divestiture Requirements Under 10 U.S.C. § 988," SOCO Advisory Number 23-05 (Washington, DC: Department of Defense, November 2, 2023), SOCO ADVISORY (osd.mil).

extended the restriction on ownership interests in the top 10 defense contractors to two new categories of senior officials:

- Military officers in the grades of 1- and 2-Star serving in key acquisition positions and
- The most senior career civilians (SES, SL, and ST) serving in key acquisition positions.²²³

The rationale for a policy requiring divestiture rather than recusal is that the group of the most senior DOD officials is relatively small and that they can be expected to regularly meet and talk to each other about major issues affecting the Department, even when no specific decision is pending. These officials should be free to participate in discussions regarding major requirements, funding, and acquisition decisions without having to check their portfolios for potential conflicts of interest and potentially recuse themselves. In addition, because the largest DOD contractors play a significant role in supporting the Department, a senior official who holds a financial interest in such a contractor could risk the appearance of impropriety even without directly participating in a specific decision affecting the financial interests of the contractor.

The rationale for extending such divestiture requirements to new categories of slightly less senior officials serving in acquisition positions is that this group officials is also relatively small and that they can also be expected to meet and talk to each other about the full range of acquisition issues on a regular basis, even when no specific decision is pending. Even in the absence of a specific decision affecting the financial interests of a contractor, the participation in such discussions by a senior acquisition official who holds a financial interest in the contractor could create the appearance of impropriety. Senior acquisition officials should be available to participate in discussions with their peers of the full range of acquisition issues without consulting their financial portfolios or risking the appearance of an impropriety.

Potential concerns with applying divestiture requirements to these new categories of officials center around the financial impact and feasibility of divesting significant assets, some of which may be entwined in trusts or estate planning vehicles, and the burdens of compliance that require officials to continually monitor stock holdings and, when necessary, request Certificates of Divestiture. Officials who are required to divest stock holdings could suffer adverse personal tax consequences, although some of these consequences can be mitigated by a Certificate of

²²³ In February 2021, shortly after the 117th Congress convened and slightly more than a year after the enactment of 10 U.S.C. § 988, the SASC revised its nominee divestiture requirements to parallel those of section 988 of the National Defense Authorization Act for Fiscal Year 2022. This action had the effect of reducing the SASC's divestiture requirements for civilian nominees and for 3- and 4-Star military officers nominated for key acquisition positions and of eliminating the divestiture requirement for 3- and 4-Star officers serving in other than acquisition positions. Unlike section 988, however, SASC requirements apply only to civilian officials and certain senior military officers subject to confirmation by the Senate.

Divestiture.²²⁴ There is at least a theoretical risk that some highly skilled hires or appointees could be dissuaded from accepting DOD positions (or promotions) by a divestiture requirement. However, this risk has been substantially limited by Congress' decision to limit the divestiture requirement to financial interests in the top 10 defense contractors.

b. Differences of terminology with 18 U.S.C. § 208 and other applicable provisions of law and regulation

Unlike the generally applicable conflict of interest standards in 18 U.S.C. § 208 and related regulations, which together apply to all executive branch employees, regardless of status, rank, or position, section 988:

- Requires divestiture, rather than permitting recusal, as the tool for addressing potential financial conflicts of interest;
- Requires divestiture of stock in the “top 10” DOD contractors without regard to whether the divesting official is required by his or her DOD position to participate in official action with respect to such contractors; and
- Does not provide for a waiver.

Similar to 18 U.S.C. § 208, 5 CFR § 2635.402(a), and 5 CFR§ 2635.403(a), section 988 imputes to affected DOD officials the stock holdings of their spouse and minor children. Section 988 prohibits only the holding or purchase of stock, whereas the types of financial interests considered under 18 U.S.C. § 208, 5 CFR § 2635.402(a), and 5 CFR § 2635.403(a) are broader in scope. Section 988 exempts de minimis stock holdings of \$15,000 or less and widely held investment and mutual funds, akin to exemptions authorized by 18 U.S.C. § 208(b)(2) and implemented in 5 CFR § 2640.202(a)(2) for matters involving parties. However, section 988 does not include the Native American or Alaskan Native birthright exemption set forth in 18 U.S.C. § 208(b)(4).

E. Section 847

Section 847 of the NDAA for FY 2008 established the following:

- A requirement for certain “covered DOD officials” to request a written ethics opinion on PGE restrictions before accepting compensation from any defense contractor for a period of two years after leaving the Department;
- A prohibition on contractors providing compensation to “covered DOD officials” who have not requested and received the required written opinion; and

²²⁴ 5 C.F.R. 2634, Subpart J. Officials who are subject to divestiture requirements may also suffer adverse financial consequences if they are required to divest at a time when the market value of their financial interests is at a temporary low point.

- A requirement for DOD to maintain all such written opinions in a central database.

The balance of this section describes how the requirements of section 847 work in practice and assesses four issues that arise in its operation: (1) the limitation of the provision to “covered DOD officials, (2) its application to any of 30,000 entities that contract with the Department, (3) its application to officials who have already left the Department, and (4) its elimination of discretion as to whether a written opinion is needed.

1. The Operation of Section 847

The intent of section 847 would appear to be to ensure that the “covered DOD official” and the potential contractor employer are fully informed of PGE restrictions applicable to the DOD official before formalizing an employee-employer relationship or other relationship of which remuneration is a part. In addition, section 847 ensures a written record of the advice provided to the official and the contractor, making it difficult for either to claim ignorance of the law and rules. By putting the potential employer and the potential employee in a strong position to take steps in advance to avoid violations of the ethics laws, this provision likely has a positive effect on detection, deterrence, and prevention of such violations.

The Conference Report accompanying the NDAA for FY 2008 does not provide a detailed insight as to the nature of Congressional concerns underpinning the enactment of section 847, except to encourage “covered DOD officials to request the required written opinion from an ethics counselor regarding post-employment restrictions that may apply to the official prior to leaving the Department whenever possible.”²²⁵

Section 847 requires that “covered DOD officials” request written PGE advice before accepting compensation from a DOD contractor and, in turn, that the DOD contractor validate that

²²⁵ National Defense Authorization Act for Fiscal Year 2008, Conference Report To Accompany H.R. 1585, H.R. Report 110-477, 110th Cong. (2007), 957. <https://www.congress.gov/110/crpt/hrpt477/CRPT-110hrpt477.pdf>.

S. 1547, the SASC-reported version of the NDAA for FY 2008, contained a series of provisions targeted at defense contractors. Section 862 of S. 1547 required each DOD contract for goods and services in excess of \$10 million to include a provision under which the contractor was required to submit to the Secretary of Defense annually a written report of the names and employment information of former DOD officials: PAS, SES, military GOFOs, and DOD acquisition officials to whom the contractor had provided compensation in the past year. See National Defense Authorization Act for Fiscal Year 2008, S. Report 1547, 110th Cong. (2007), 227, <https://www.congress.gov/110/bills/s1547/BILLS-110s1547rs.pdf>.

As envisioned by section 862, contractor reporting would be limited to those former DOD officials to whom the contractor first provided compensation within two years after the official left DOD. The provision allowed that a former DOD official need be identified in a contractor’s annual report only once; the contractor need not identify the same DOD official in subsequent annual reports (even if the official continued to receive compensation from the contractor in ensuing years).

The House-enacted bill contained no similar provision. Section 847 as enacted in the NDAA for FY 2008, reflects the conferenced compromise.

the DOD official has requested and received written post-government employment advice before paying such compensation.

Section 847 and implementing DOD policies define a “covered DOD official” as follows:

- A current or former DOD official²²⁶ who, within the two-year period before departure from DOD²²⁷, participated²²⁸ personally²²⁹ and substantially²³⁰ in an acquisition as defined in 41 U.S.C. § 131²³¹ with a value in excess of \$10 million;
- A current or former DOD official serving in a PAS, SES, or military GOFO position²³² *or* as a program manager, deputy program manager, procuring contracting officer,

²²⁶ National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181, 122 Stat. 3, 110th Cong. (2008), Stat. 243–244 (sections 847(a)(1) and (c)), <https://www.congress.gov/110/plaws/publ181/PLAW-110publ181.pdf>.

²²⁷ Office of General Counsel (OGC)/Standards of Conduct Office (SOCO), “Interpretation of ‘Covered Department of Defense Officials’ Under Section 847.” DOD SOCO issued this memorandum to all DOD Designated Agency Ethics Officials to promote uniform application of Section 847 throughout the Department. This guidance clarified that “a covered DoD official” must have participated in the kinds of matters that trigger application of Section 847 “within two years prior to his or her departure from DOD.”

²²⁸ “Participation means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or purposeful inaction in order to affect the outcome of a matter.” See Office of General Counsel (OGC)/Standards of Conduct Office (SOCO), “Seeking Employment Restrictions,” 2.

²²⁹ 5 CFR § 2635.402(b)(4); 5 CFR § 2640.103(a)(2). Defined as direct participation, or direct and active supervision of a subordinate’s participation in a matter. See Disqualifying Financial Interests. 5 CFR § 2635.402 and Prohibition, 5 CFR § 2640.103, <https://www.law.cornell.edu/cfr/text/5/2640.103>.

²³⁰ 5 CFR § 2635.402(b)(4); 5 CFR § 2640.103(a)(2). Defined as an employee’s involvement that is significant to the matter. See Disqualifying Financial Interests. 5 CFR § 2635.402 and Prohibition, 5 CFR § 2640.103, <https://www.law.cornell.edu/cfr/text/5/2640.103>.

Office of General Counsel (OGC)/Standards of Conduct Office (SOCO), “Seeking Employment Restrictions,” 2 (paragraph C. Definitions). Participation may be substantial even though it is not determinative of the outcome of the particular matter. A single act of approving or coordinating on a critical step may be substantial. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement of an administrative or peripheral nature.

https://dodsoco.ogc.osd.mil/Portals/102/Documents/PGE%20and%20PI/Toolbox%20-%20PGE-PI/2024%20Seeking%20Employment%20Handout.pdf?ver=oK8CFQgOhzX1ZmOSANU_6w%3d%3d

²³¹ 41 U.S.C. section 131. Defines “acquisition” as the process of “acquiring, with appropriated amounts, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency.” See Acquisition, 41 U.S. Code § 131, (1), <https://www.law.cornell.edu/uscode/text/41/131>.

In the DOD SOCO memorandum of April 16, 2014, “acquisition” does not include grants or cooperative agreements. See Office of General Counsel (OGC)/Standards of Conduct Office (SOCO), “Interpretation of ‘Covered Department of Defense Officials’ Under Section 847,” footnote 2. DOD SOCO has opined that because “other transactions” authorized by 10 U.S. Code §§ 4022 and 4023 are not included in the definition set forth in 41 U.S. Code § 131, they do not fall within the ambit of section 847. Of note, however, “other transaction agreements” and other non-traditional acquisition vehicles do qualify as a party matter such that the representational bans established by 18 U.S.C. § 207(a) would apply.

²³² In the DOD SOCO memorandum of April 16, 2014, the “while serving” caveat at the end of the first page is established by DOD SOCO policy. See Office of General Counsel (OGC)/Standards of Conduct Office

administrative contracting officer, source-selection authority, member of the source-selection evaluation board, or chief of a financial or technical evaluation team for such a contract²³³; and

- A current or former DOD official who has an actual offer of employment or compensation²³⁴ from a defense contractor²³⁵ to perform specific duties for that contractor within the two-year period after leaving DOD service.²³⁶

Per implementing DOD policy, a “covered DOD official” must submit a section 847 request for PGE advice electronically through the After Government Employment Advice Repository (AGEAR)²³⁷, using DD Form 2945.²³⁸ The request must be submitted to an ethics official with responsibility for the DOD organization in which the “covered DOD official” works or last served.²³⁹ The request for a legal opinion must be complete, including information relating to government positions held and major duties in those positions and to actions taken concerning

(SOCO), “Interpretation of ‘Covered Department of Defense Officials’ Under Section 847.” Section 847 of the FY 2008 NDAA does not include this caveat.

²³³ National Defense Authorization Act for Fiscal Year 2008. P.L. 110-181, Stat. 244 (section 847(c)).

²³⁴ One can receive compensation from a defense contractor outside of an employer-employee relationship (e.g., subcontractor).

²³⁵ Any entity that has a contract with DOD (e.g., traditional contractors, academic institutions, FFRDCs).

²³⁶ Department of the Army Office of the General Counsel, “Updated Business Rules for Using the AGEAR System,” Memorandum (Washington, DC: Department of Defense, June 10, 2021), 2 (paragraph 3.c). https://www.fdm.army.mil/documents/AGEAR/AGEAR_Business_Rules.pdf.

The Secretary of the Army is the DOD Executive Agent for AGEAR. See Deputy Secretary of Defense, “Mandatory DoD-Wide Use of After Government Employment Advice Repository (AGEAR) and Designation of Secretary of the Army as DoD Executive Agent for Operation of AGEAR,” Memorandum (Washington, DC: Department of Defense, September 19, 2011). For a copy of this memorandum, see Inspector General, *Section 847 Ethics Requirements for Senior Defense Officials Seeking Employment with Defense Contractors*, Report No. DODIG-2014-050 (Washington, DC: Department of Defense, March 31, 2014), 25 (Appendix C), <https://media.defense.gov/2014/Mar/31/2001713351/-1/-1/1/DODIG-2014-050.pdf>.

²³⁷ “Although retaining requests and opinions in AGEAR has been mandatory since September 2011, use of the system to document initial submission of requests has varied among DoD Components. Effective immediately, all covered officials required to receive opinion letters under Section 847 must submit requests for this advice with the necessary information through the AGEAR system in order to ensure universal compliance with the retention requirement. Ethics officials will decline requests submitted outside the system and direct covered officials to the AGEAR system to properly initiate their requests.” See Deputy Secretary of Defense, “Mandatory Department of Defense-Wide Use of the After Government Employment Advice Repository (AGEAR) System-Submitting Requests for Opinion Letters,” Memorandum (Washington, DC: Department of Defense, November 2, 2016), https://www.fdm.army.mil/documents/AGEAR/DSD_Memo_2_Nov_16_Mandatory.pdf. A Common Access Card (CAC) is not required to submit a request to AGEAR or complete DD Form 2945, which meets the needs of former DOD officials who are required by section 847 to seek an opinion but no longer possess a CAC.

²³⁸ “Post-Government Employment Advice Opinion Request,” DD Form 2945, May 2022, <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2945.pdf>.

²³⁹ There are 17 DAEs and approximately 3,000 ethics counselors across DOD (see United States Government Accountability Office, *Post-Government Employment Restrictions*, 10).

future employment, positions sought, and future job descriptions.²⁴⁰ In practice, developing a “complete” request can involve significant back and forth between the requestor and the responsible ethics official. The responsible ethics official must issue a responsive section 847 ethics opinion within thirty days of receiving a “complete” request.²⁴¹ The responsive opinion must be reduced to writing²⁴² and describe the applicability of PGE restrictions to activities that the requester may undertake on behalf of the potential future employer. Specifically, the written opinion must include advice as to applicability of the following:²⁴³

- Chapter 21 of title 41, U.S.C. (new “procurement integrity” provisions);
- 18 U.S.C. § 207 (Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches)²⁴⁴; and
- Any other statute or regulation restricting the employment or activities of individuals who leave government service in DOD (e.g., section 1045, Ethics Pledge, 18 U.S.C. § 203, Emoluments, Restrictions during Transition and Annual Leave, Additional

²⁴⁰ “Section 847 explains that the legal opinion from the appropriate ethics counselor should address *the applicability of post-employment restrictions to the activities that the former official may undertake on behalf of the contractor*, i.e., an opinion specifically tailored to the official or former official’s new position and duties. In our experience, on occasion, a DOD official or former officials will seek a written opinion from an ethics counselor before he or she has specific information regarding his or her future employer, position, and duties to be performed. Although it may be possible to provide that individual with a general opinion summarizing the post-government employment restrictions, it is not possible to provide that official with the type of tailored written opinion required by Section 847. Accordingly, such a request should not be considered valid for a Section 847 opinion, and, therefore, would not trigger the requirement in Section 847 to provide a written opinion within 30 days of the request or the requirement to upload the request and opinion into the AGEAR database. In such a circumstance where the requirements of 847 are not triggered, you should, of course, continue to provide post-Government employment advice to the departing official as you would in your normal course of practice.” See Office of General Counsel (OGC)/Standards of Conduct Office (SOCO). “Interpretation of ‘Covered Department of Defense Officials’ Under Section 847,” 2.

The AGEAR system allows an ethics official to request more information from the requestor. When such a request is made, the system creates an audit trail documenting that the ethics official has not yet receive a complete request with sufficient information to permit issuance of the section 847 opinion to the requestor, thereby demonstrating to any reviewing authority that the ethics official is not responsible for any delay. Department of the Army Office of the General Counsel. “Updated Business Rules,” 4 (paragraph 4.d.3)).

²⁴¹ Office of General Counsel (OGC)/Standards of Conduct Office (SOCO). “Interpretation of ‘Covered Department of Defense Officials’ Under Section 847,” 2. Per “FAQs for DoD Ethics Counselors,” the 30-day clock does not start until complete information is received (see Department of the Army, “FAQs for DoD Ethics Counselors” (Washington, DC: Department of Defense, Updated June 2021), 2 (question 4). https://www.fdm.army.mil/PM_Reference_Docs/Ethics_Official_Help.pdf.

²⁴² National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181, Stat. 243 (section 847(a)(3)).

²⁴³ Ibid., Stat. 244 (section 847(d)).

²⁴⁴ 5 CFR § 2641.105(a) encourages current or former employees or others who have questions about 18 U.S.C. section 207 to seek advice from a DAEO or another agency ethics official. The agency in which an individual formerly served has the primary responsibility to provide oral or written advice concerning a former employee’s post-employment activities. See Advice, 5 CFR § 2641.105, <https://www.law.cornell.edu/cfr/text/5/2641.105>.

Restrictions for Licensed Attorneys, Requirement for Termination Public Financial Disclosure Report (OGE 278) Filers).²⁴⁵

An ethics official's section 847 opinion is specific to a particular defense contractor. A former official's acceptance of compensation from another defense contractor within a two-year period after leaving DOD requires a new section 847 request and opinion.

A DOD contractor may not knowingly provide compensation to a former defense official covered by section 847 within two years after that official leaves DOD without determining that the official has requested and received (or has not received within 30 days) the ethics opinion requested.²⁴⁶

²⁴⁵ DOD SOCO publishes comprehensive template post-government employment advice letters. For ethics counselors charged to provide post-government employment advice, these templates help to ensure that all issues applicable to a departing or former DOD employee are addressed.

²⁴⁶ National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181, Stat. 243 (section 847(a)(4)). DFARS clause 203.171 (see Policy, DFARS 201.171-3, DFARS Change 02/15/2024, 203.171-3 Policy. | Acquisition.GOV) implements section 847. DFARS 203.171-3 provides that.

“(a) A DoD official covered by the requirements of section 847 of Pub. L. 110-181 (a “covered DoD official”) who, within 2 years after leaving DoD service, expects to receive compensation from a DoD contractor, shall, prior to accepting such compensation, request a written opinion from the appropriate DoD ethics counselor regarding the applicability of post-employment restrictions to activities that the official may undertake on behalf of a contractor.

“(b) A DoD contractor may not knowingly provide compensation to a covered DoD official within 2 years after the official leaves DoD service unless the contractor first determines that the official has received, or has requested at least 30 days prior to receiving compensation from the contractor, the post-employment ethics opinion described in paragraph (a) of this section.

“(c) If a DoD contractor knowingly fails to comply with the requirements of the clause at 252.203-7000, administrative and contractual actions may be taken, including cancellation of a procurement, rescission of a contract, or initiation of suspension or debarment proceedings.”

“Covered DOD official” as used in DFARS 203.191 is defined in the DFARS clause at 252.203-7000 See Requirements Relating to Compensation of Former DoD Officials, DFARS 252.203-7000 DFARS Change 02/15/2024, 252.203-7000 Requirements Relating to Compensation of Former DoD Officials. | Acquisition.GOV.

Per DFARS 203.171-4, DFARS clause 252.203-7000, “Requirements Relating to Compensation of Former DoD Officials,” is used in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services and solicitations for task orders and delivery orders. DFARS Clause 252.203-7005 effectively requires the Offeror contractor to certify that, to the best of its knowledge and belief, all covered DOD officials employed by or otherwise receiving compensation from the Offeror, and who are expected to undertake activities on behalf of the Offeror for any resulting contract, are presently in compliance with all applicable post-employment restrictions, including those contained in 18 U.S.C. § 207, 41 U.S.C. 2101-2107, 5 CFR part 2641, section 1045 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), and FAR 3.104-2.

Each section 847 request and ethics opinion that is issued must be filed in a centralized database maintained by the Department²⁴⁷ and designated as AGEAR. The request and opinion are retained in AGEAR for not less than five years beginning on date the ethics official's written opinion is issued.²⁴⁸ Although the PGE opinions required by section 847 and other PGE opinions not required by section 847 are often similar in content, the AGEAR database does not include routine, non-section 847 post-government employment requests and opinions, including letters addressing the inapplicability of section 847 to a particular DOD requestor.²⁴⁹

Administrative and contractual penalties may apply to DOD officials and to DOD contractors²⁵⁰ who knowingly fail to comply with section 847. A "knowing violation" of section 847 is defined differently for DOD officials and DOD contractors, although these differences align with the different roles played by each in the section 847 process:

- DOD officials who accept compensation from a DOD contractor before requesting a section 847 opinion are in violation.
- DOD contractors who pay compensation to a former DOD official before ascertaining that the official has requested and received a section 847 opinion are in violation.

In the event of a section 847 violation, the Secretary of Defense may take action affecting a DOD contractor or former DOD official, including the following:²⁵¹

- Canceling the procurement (if a contract has not yet been awarded);
- Rescinding a contract, in certain circumstances;²⁵²

²⁴⁷ National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181, Stat. 243–244 (section 847(b)).

²⁴⁸ "Given the Privacy Act and records management objective to retain materials retrievable by an individual's name or other personal identifier for no longer than the minimum period required, the AGEAR Program Management Office (Army [Office of General Counsel] OGC) will regularly purge AGEAR records more than five years old. ... Each legal office using AGEAR *must notify* Army OGC if it wants any of its AGEAR records retained for more than five years. This would include records subject to ongoing investigation, personnel action, prosecution, civil litigation or similar matters that would warrant a record's retention. See Department of the Army Office of the General Counsel, "Updated Business Rules," 5 (paragraph 4.g. 1) and 2)).

²⁴⁹ *Ibid.*, 5 (paragraph 4.d.2)).

²⁵⁰ Policy. DFARS 201.171-3 (203.171-3(c)).

²⁵¹ National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181, Stat. 243 (section 847(a)(5)). In addition, the DFARS 203.171-3(c) provides, "If a DOD contractor knowingly fails to comply with the requirements of the clause at 252.203-7000 [implementing Section 847], administrative and contractual actions may be taken, including cancellation of a procurement, rescission of a contract, or initiation of suspension or debarment proceedings." See Policy, DFARS 201.171-3.

²⁵² The Secretary of Defense would not be able to rescind a contract based solely on a violation of section 847 but likely could take this action if a determination of section 847 non-compliance was coupled with a conviction for a violation of 41 U.S. Code § 2102 (Prohibitions on Disclosing and Obtaining Procurement Information); 41 U.S.C. section 2103 (Actions Required of Procurement Officers When Contacted Regarding Non-Federal Employment); or 41 U.S. Code § 2104 (Prohibition on Former Official's Acceptance of Compensation from Contractor).

- Initiating suspension or debarment proceedings in accordance with Federal Acquisition Regulations (FARs); or
- In limited circumstances, initiating adverse personnel action.²⁵³

As originally enacted, section 847 required the DOD Inspector General (DOD IG) to conduct periodic reviews to ensure that written ethics opinions were being provided and retained.²⁵⁴ After conducting four such periodic reviews, the DOD IG submitted and Congress enacted a legislative proposal removing the IG review requirement from section 847 in the NDAA for FY 2023.²⁵⁵

Although there are no federal or executive-branch-wide statutory or regulatory requirements comparable to section 847, longstanding executive-branch rules encourage current and former executive branch employees to seek advice on post-government employment and other ethics issues from agency ethics officials at any time and charge agency ethics officials to provide such advice.

Each agency head²⁵⁶, the Secretary of Defense included, must appoint a DAEO who exercises primary responsibility for directing the daily activities of the agency's ethics program and coordinating with OGE. The responsibilities of the DAEO (acting directly or through subordinate ethics officials), include the following:²⁵⁷

- Maintaining records of agency ethics program activities,

²⁵³ The Secretary of Defense may take these actions only against certain DOD “employees”—not retirees or unaffiliated persons or entities.

²⁵⁴ National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181, Stat. 243–244 (section 847(b)(2)).

²⁵⁵ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023. P.L. 117-263, Stat. 2709 (section 821).

Pursuant to this requirement, the DOD IG reviewed the Department's compliance with section 847 four times in the decade between 2010 and 2019. The DOD IG, in its 2019 report, found the Department's processes, timeliness, and substance of opinions fully compliant with section 847 and made no recommendations for additional action (see Inspector General, *Evaluation of DoD Processes and Procedures for Issuing Post Government Employment Opinions in Compliance with Section 847 Requirements*, Report No. DODIG-2020-044 (Washington, DC: Department of Defense, December 20, 2019), <https://media.defense.gov/2019/Dec/26/2002229032/-1/-1/1/DODIG-2020-044.PDF>).

Notwithstanding the DOD IG's determination that section 847 does not benefit from repeated audits, proposals have been made to reinstate mandatory DOD IG reviews. In this context, it is important to note that the DOD IG, even lacking a statutory mandate to do so, has the authority to institute an investigation or audit of the section 847 process at any time if it should deem that the facts and circumstances warrant such a review.

²⁵⁶ 18 U.S.C. § 207(h) authorizes the Director of the Office of Government Ethics to designate a component of a department as a separate agency for the purposes of the statute. The Department of Defense and the Military Departments are considered separate “agencies,” and the Secretary of Defense and the Secretaries of the Military Departments are separate “agency heads.”

²⁵⁷ Government Ethics Responsibilities of Agency Ethics Officials, 5 CFR § 2638.104 (2638.104(c)). <https://www.law.cornell.edu/cfr/text/5/2638.104>.

- Carrying out an effective government ethics education program,²⁵⁸ and
- Providing current and former agency employees with advice and counseling regarding applicable post-employment restrictions.²⁵⁹

All departing DOD personnel have the opportunity to “out-process” through their servicing ethics office.²⁶⁰ In practice, when personnel leave DOD, they are provided access to written materials and the opportunity to receive a tailored exit briefing and written advice. The nature of the specific ethics advice provided will depend on the departing official’s plans after leaving DOD. In addition, former personnel may continue to reach back to the Office of the Secretary of Defense (OSD) and Military Department ethics officials for advice and assistance in applying PGE rules for many years after their departure from DOD.²⁶¹

Evidence backs assertions that DOD’s program and approach are effective. A recently issued GAO report on DOD employee compliance with PGE restrictions cited only a handful of reported PGE violations by former DOD personnel over the last decade, usually resulting from individual “bad actors” who intentionally disregarded the law.²⁶²

2. Evaluation of Major Changes to Existing Coverage

Section 847 differs in scope and coverage from executive-branch-wide regulations governing ethics advice for outgoing employees in four significant ways. In particular, the provision

- Applies only to specified DOD officials,”
- Addresses compensation from *any* DOD contractor,
- Covers former DOD officials for two years after they leave government service, and

²⁵⁸ Department of Defense, “Joint Ethics Regulation (JER),” DoD 5500.7-R (Washington, DC: Secretary of Defense, August 1993, Incorporating Change 7, November 17, 2011, 91 (paragraph 11-301), 78 (paragraph 8-400), <https://dodsoco.ogc.osd.mil/Portals/102/550007r.pdf>.

Paragraph 11-301 requires that PGE and disqualification issues be included in annual ethics training. In addition, paragraph 8-400 requires that all public financial disclosure filers certify annually that they are aware of the post-government service restrictions and Procurement Integrity Act post-government service restrictions.

²⁵⁹ OPM requires executive branch departments and agencies to notify all public financial disclosure filers subject to 18 U.S.C. § 207(c) what the restrictions are; that employees covered by 18 U.S.C. 207(c) are subject also to 18 U.S.C. § 207(f), which imposes additional post-employment restrictions on representing, aiding, or advising certain foreign entities; and the penalties for violating 18 U.S.C. § 207.

Notification of Post-Employment Restrictions, 5 CFR Part 730, <https://www.law.cornell.edu/cfr/text/5/part-730>. This part implements 5 U.S.C. § 7302, which requires agencies to provide written notice to senior executives and other individuals covered by 18 U.S.C. § 207(c)(2)(A)(ii) that they are subject to certain post-employment conflict of interest restrictions in 18 U.S.C. § 207(c).

²⁶⁰ The JER requires that ethics officials provide PGE guidance during DOD employee out-processing (see Department of Defense, “Joint Ethics Regulation (JER),” 81 (paragraph 9-402).

²⁶¹ Advice, 5 CFR § 2641.105 (2641.105(a)).

²⁶² United States Government Accountability Office, *Post-Government Employment Restrictions*, 11.

- Eliminates discretion as to whether to seek ethics advice and establishes specific procedural requirements for the writing and retention of ethics opinions.

a. Applies only to “covered DOD officials”

Provisions of 5 CFR that encourage executive branch employees to seek advice from ethics officials and assign responsibility to ethics officials for providing such advice apply to employees and former employees of all executive branch departments and agencies. Further, provisions of 5 CFR encourage federal employees to seek ethics advice on any PGE matter, not only those related to employment with agency contractors.

By contrast, section 847 imposes procedural requirements on DOD personnel and DOD contractors only. A DOD contractor must decline to provide compensation to a former DOD official until the contractor ascertains that the former official has sought and received a written ethics opinion setting forth the applicability of PGE to the former official’s potential duties for that contractor.²⁶³ IDA is not aware of any other law or regulation that attaches purely procedural prerequisites to the ability of non-DOD government contractors to former executive branch officials.²⁶⁴

Only a limited subset of all current and former senior DOD officials and others who during their service with DOD participated in significant acquisition actions are designated as “covered DOD officials” and required to request and receive an opinion under section 847. Other laws and regulations establish PGE requirements applicable to a far greater number and breadth of former executive branch and DOD officials, all of whom are encouraged by 5 CFR to seek ethics advice on any PGE matter. However, former senior DOD officials interviewed by the IDA team indicate that many defense contractors will not hire any former DOD official who applies for employment—even one not considered to be a “covered DOD official”—until that applicant has obtained a formal written PGE opinion from a DOD ethics counselor.

The senior DOD officials covered by the provision are often called upon to make decisions that can have a significant financial impact on defense contractors. As described previously, officials of non-defense agencies are rarely called upon to make acquisition decisions of this magnitude, but often make regulatory decisions with an equal or greater financial impact on private sector entities. While there does not appear to be a strong policy reason for singling out DOD officials for coverage, policymakers could reasonably conclude that it would be preferable to

²⁶³ From the start, section 842—finalized as section 847—was likely limited to former DOD officials for jurisdictional reasons associated with its enactment as a part of the FY 2008 NDAA.

²⁶⁴ Substantive PGE restrictions are imposed on former acquisition officials across the federal government by 41 U.S.C. § 2104, known as the “Procurement Integrity Act.” This provision affirmatively prohibits federal officials who performed key contracting functions for a government contract in excess of \$10 million from accepting compensation from the contractor awardee for a period of one year. Penalties can also be imposed on a contractor for providing compensation to a former official if the contractor knows that the former official is accepting the compensation in violation of this prohibition.

provide the ethics safeguards established in this provision to some senior government employees than to none at all.

b. Addresses compensation from any DOD contractor (i.e., 30,000 contractors)

Section 847 mandates that “covered DOD officials” request and receive a written legal opinion on PGE before working for any entity that contracts with DOD. The requirement to seek and receive a written legal opinion on PGE is not limited to only those contractors whose business focus or DOD contracts have some connection to the “covered DOD official’s” DOD position or duties. In addition, neither the value of DOD contracts held by the contractor nor the level of compensation the former DOD official will receive from the contractor is a factor in determining whether a section 847 legal opinion is required.

DOD contracts with more than 30,000 entities spanning all market, geographic, and socioeconomic sectors, including academic institutions. Any all-inclusive “list” of DOD contractors is susceptible to frequent change, particularly given the Department’s current push to address national security challenges by increasing the flow of innovation into the Department through new contracts with small and non-traditional businesses.

There does not appear to be a strong policy rationale for requiring senior DOD officials to obtain ethics opinions before accepting compensation from contractors (including entities that barely do business with the Department at all) with which they had no connection while in office. However, a requirement for a connection between the departing official and the contractor could require judgement calls that would make the provision more difficult to administer and the record less conclusive than a blanket requirement. However, before leaving DOD, such former employees already receive a PGE brief from an ethics official that addresses specific restrictions based on the former employee’s duties. Policymakers could reasonably conclude that the clarity provided by a bright-line test outweighs any benefits to be gained through greater precision in the requirement.

c. Covers post-employment application

Section 847 mandates that certain former DOD employees who will be receiving compensation from a defense contractor at any time within two years of leaving DOD request and receive a written legal opinion on applicable PGE. A “covered DOD official” must seek and receive a written PGE opinion when he or she begins employment with and expects to receive compensation from any DOD contractor during this two-year period, without regard to whether the “covered official” already has received a section 847 written opinion in conjunction with employment and receipt of compensation from another DOD contractor.

While it is unusual to establish a requirement for government ethics officials to provide written opinions to personnel who have already left the government, such written advice would appear to serve an important public purpose in helping former senior officials understand a complex set of statutory and regulatory requirements and avoid inadvertent violations.

Interviewees indicated that, in practice, former DOD officials frequently seek informal (i.e., oral) ethics advice from agency ethics officials to ensure that they understand and comply with the law—even in cases where the requirement to obtain a formal written opinion do not apply.

d. Eliminates discretion and establishes specific procedural requirements

Section 847 *requires* that certain current and former DOD employees request and that appropriate agency ethics officials provide a written legal opinion on applicable PGE. By contrast, the provisions of 5 CFR encourage but do not mandate that an employee or former employee seek such legal advice. As discussed previously, DOD ethics regulations do mandate that DOD personnel receive PGE training,²⁶⁵ and Office of Personnel Management (OPM)²⁶⁶ and DOD rules²⁶⁷ require DOD components to provide guidance on relevant PGE restrictions to DOD employees who are separating or retiring from the Department, as part of out-processing procedures.

Moreover, the requests for opinions and the opinions issued pursuant to section 847 must be in writing and maintained in a DOD database for five years. By contrast, 5 CFR contemplates that, in most cases, the requests for PGE advice and the advice itself may take any suitable form acceptable to the requesting officer or employee and the rendering ethics official.²⁶⁸ In practice, however, non-section-847 written PGE opinions use the same template as section 847 PGE opinions. Given that section 847 applies to only a subset of DOD employees/former employees, requests for non-section-847 PGE opinions are more numerous. However, with a view to ensuring that the ethics counselor rendering the legal opinion is fully informed of all relevant facts, even DOD employees who request non-section-847 ethics advice must make that request using the DD Form 2945—the same form by which information is collected to inform the issuance of section 847 PGE opinions.

As explained previously, the senior DOD officials covered by the provision are often called upon to make decisions that can have a significant financial impact on defense contractors. Actual or perceived misconduct by former officials could raise questions about the validity of those decisions, potentially undermining public confidence in the defense acquisition process. Under

²⁶⁵ Paragraph 11-301 of the JER requires that PGE and disqualification issues be included in annual ethics training. In addition, JER, paragraph 8-400 requires that all public financial disclosure filers certify annually that they are aware of PGE and Procurement Integrity Act post-government service restrictions. See Department of Defense, “Joint Ethics Regulation (JER),” 91 (paragraph 11-301), 78 (paragraph 8-400).

²⁶⁶ Notification of Post-Employment Restrictions, 5 CFR Part 730. This part implements 5 U.S.C. § 7302, which requires agencies to provide written notice to senior executives and other individuals covered by 18 U.S.C. § 207(c)(2)(A)(ii) that they are subject to certain post-employment conflict of interest restrictions in 18 U.S.C. § 207(c).

²⁶⁷ The JER requires that ethics officials provide PGE guidance during DOD employee out-processing (see Department of Defense, “Joint Ethics Regulation (JER),” 81 (paragraph 9-402)).

²⁶⁸ DOD ethics records are kept for six years under existing records management rules but are not held in a consolidated database like AGEAR.

these circumstances, policymakers could reasonably conclude that a mandatory requirement to obtain written ethics opinions and maintain them as part of the public record are justified.

4. Impact on Recruitment and Retention

Section 1073 requires an assessment of how the covered ethics requirements have affected, or are likely to affect, the recruitment and retention of personnel, particularly those with specialized experience or training, by the Department. This section provides the required analysis, finding a possible negative impact of PGE requirements on recruiting and hiring for political positions and other temporary appointments but no clear evidence of an impact on the retention of military or civilian officials.

Individual decisions to accept or to depart from senior positions in the Department appear to be driven primarily by factors such as the desire to serve and family considerations rather than by PGE rules. Available quantitative data on military personnel does not show a link between PGE legislation and military officer retention, and qualitative data provides only weak anecdotal evidence of such a link. IDA was unable to identify any source of quantitative data that could link ethics requirements to military or civilian recruiting or hiring. However, interview data provides significant anecdotal evidence that PGE legislation has been an impediment to the Department's effort to recruit and hire candidates for political and other temporary positions, including positions requiring specialized training and expertise.

A. Recruiting

PGE and other ethics restrictions could adversely impact DOD hiring if they discourage qualified candidates from seeking or accepting employment with the Department. Indeed, as early as 1962, when the executive-branch-wide PGE statutes were first codified in their current form, Congress asserted two purposes for the change: to “simplify and strengthen the conflict of interest laws then in effect, and facilitate the government’s recruitment of part-time employees with specialized knowledge and skills without weakening the government’s protection against unethical conduct.”²⁶⁹

Members of the military are potentially subject to more restrictive PGE restrictions only after rising to the senior ranks near the end of a career of twenty-five years or more. It seems unlikely that a seventeen-year old considering whether to enroll in the Reserve Officers’ Training Corps (ROTC) or a military academy would even be aware of ethics restrictions that might take effect several decades later, let alone give them serious weight. Similarly, the vast majority of DOD

²⁶⁹ Katherine Stone, “The Twilight Zone: Post-Government Employment Restrictions Affecting Retired/Former Department of Defense Personnel,” Thesis (The Judge Advocate General’s School, United States Army, April 1993), 14, quoted in S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), <https://apps.dtic.mil/sti/pdfs/ADA456703.pdf>.

career civil servants serve in the Department over the course of a career. Even employees who are recruited directly into the SES ranks appear more likely to anticipate a substantial period of service than to focus on their post-employment prospects at the time of their hiring.

There are at least two categories of potential DOD hires who are likely to give weight to PGE restrictions before joining the Department: political appointees and other temporary hires.

- Political appointees are term-limited by definition. They serve at the pleasure of the President and have no expectation of remaining in office past the end of a presidential term. It is not unreasonable to expect that this short tenure would lead some political appointees to give serious consideration to their post-government careers at the time that they are hired.
- HQEs²⁷⁰ and other term employees²⁷¹ also serve the Department for a limited period of time. For this reason, they may also be expected to give consideration to post-government employment at the time that they are hired.

Candidates for career positions requiring specialized expertise that is highly marketable in the private sector may also give weight to these restrictions.

IDA was unable to identify any source of quantitative data that could link ethics requirements to military or civilian recruiting or hiring. However, interview data provides significant anecdotal evidence that PGE legislation has been an impediment to the Department's effort to recruit and hire candidates for political and other temporary positions, including positions requiring specialized training and expertise.

Current and past senior DOD civilian officials who have participated in the Department's recruiting efforts pointed to problems with presidential appointees, schedule C appointees, and even interns. They pointed to difficulties in accessing individuals with industry backgrounds and acquisition expertise but also difficulties in recruiting scientists, software specialists, engineers, and experts in fields such as energy and the environment. For example,

- A former senior official with responsibility for research and development (R&D) stated that she had seen individuals at all levels decline invitations to work in the government. She pointed out that DOD salaries are already extremely low compared to what these individuals can make outside government, and, when ethics restrictions are piled on top, it is not clear that they will be able to recover their earning power even after leaving the Department.²⁷²
- A former senior official with responsibility for acquisition and sustainment stated that he had difficulty recruiting individuals with expertise in supply chain issues, individuals

²⁷⁰ See Attracting Highly Qualified Experts, 5 U.S. Code § 9903.

²⁷¹ See Temporary and Term Employment, 5 CFR Part 316.

²⁷² Interview, December 7, 2023.

with experience managing major projects, and individuals with technical expertise. It got to be “in the ‘too hard’ category,” he stated, when these individuals learned that they would be limited in what they could do for two years after leaving government.²⁷³

- Another senior official with responsibility for acquisition and sustainment stated that “there is a huge fear about restrictions on the way out of the Department.” For technology experts, for schedule C appointments, and even for internships, “if you have somebody in their thirties or forties, they have so many years to work, have families and mortgages,” she said, “the straight answers scare them.”²⁷⁴
- A senior official with responsibility for intelligence and cyber issues stated that the Department would like to recruit more talent out of industry, especially in highly specialized areas. However, recruitment has been difficult because they do not want to “go through the process, including ethics restrictions. It’s not the only factor, but it is a factor.”²⁷⁵

No interviewees who participated in the process of recruiting political appointees, scientific and technical talent, or other temporary personnel expressed a contrary view.

Notwithstanding these views, IDA, for two reasons, is not in a position to quantify the impact of PGE restrictions on the Department’s recruiting efforts or even to state conclusively that any particular individual has declined to accept employment with the Department due to these restrictions:

- All the IDA interview evidence on this point is second-hand evidence. None of IDA’s interviewees had personally declined employment in the Department on the basis of PGE requirements. Those who spoke about the issue were not discussing their own motivations but were speculating on the motivations of others.
- Second, all interviewees cited several factors (including government pay rates) that deter recruits from accepting employment with the Department. While all see PGE restrictions as a factor in decisions that they had observed, none could say that these restrictions were the decisive factor.

On the basis of this evidence, IDA concludes that PGE provisions likely serve as an impediment to the Department’s efforts to recruit and hire candidates for political and other temporary positions and positions that require specialized training and expertise that is highly marketable in the private sector. Amendments that make these restrictions more complex and/or more restrictive are likely to increase this adverse effect. However, IDA cannot quantify the

²⁷³ Interview, December 4, 2023.

²⁷⁴ Interview, November 21, 2023.

²⁷⁵ Interview, November 12, 2023.

adverse effect of such restrictions on recruiting or reach a conclusion as to whether the impact is justified by any benefits that the restrictions may have to offer.

B. Retention

PGE and other ethics restrictions could adversely impact DOD retention if they encourage military or civilian officials to leave the Department earlier than these officials would in the absence of such restrictions. Two possible scenarios can be envisioned for such an impact:

- 2-Star GOFOs (who are subject to a one-year PGE restriction) could retire at that level rather than seeking advancement to 3- and 4-Star positions (which are subject to a two-year PGE restriction) or
- Career civilian SES officials (who are generally subject to a two-year PGE restriction), could seek SES positions at other federal agencies (where they would be subject to only a one-year PGE restriction) or in the private sector.

In the alternative, some officials could choose to stay in the Department longer than they otherwise would rather than facing restrictions that limit their available employment options after their departure.

Ideally, retention changes due to PGE restrictions could be detected in two ways. First, retention changes should be directly observable. We can estimate annual loss rates for senior military personnel and might find that tightening PGE restrictions permanently increase turnover at key points in the career. However, in practice, retention impacts may be obfuscated. For GOFOs in particular, advancement opportunities and retention opportunities are linked. At some point, to be able to be retained, GOFOs must be promoted. If one O-8 who otherwise would have been promoted decides instead to leave to avoid additional PGE restrictions, it is possible that an O-8 who otherwise would have been required to leave will instead stay and receive the promotion. This situation is less of a concern for senior civilian personnel, most of whom do not face the same “up or out” demands. One SES leaving does not correspond with another SES who otherwise would have had to leave being able to stay.

This difference in who is promoted (particularly on the uniformed side) points to the second way in which retention changes could be detected: by decreased quality (as perceived by the services) among the GOFOs who are promoted. This scenario would be the result if highly qualified officers choose to retire early, leaving senior positions to be filled by other, less qualified officers. Unfortunately, unlike retention, the data available to IDA does not provide any clear indication of GOFO quality. No direct quality metrics exist on the personnel file and the services (1) are unlikely to have data on which GOFOs they would have liked to have promoted but could not due to attrition and (2) would be unlikely to share that information even if they did have it. Direct promotions of multiple ranks (e.g., from O-7 to O-9) are another way to measure quality, but these promotions are sufficiently rare that no statistical analysis can be performed on them in this context.

Given that quality cannot be directly observed or measured, IDA's retention estimates are based on the first measure: observed loss rates. However, this measure is only a partial reckoning. PGE restrictions could be causing changes in GOFO quality that are simply not possible to measure.

Appendix E contains the formal empirical methodology for estimating retention, and Appendix F shows the data used for the retention analyses.

1. Empirical Methodology

Having introduced the retention effect that will be measured, this section discusses *how* the measurement will occur: methodologically and within the limitations of the data which are available. Methodologically, the approach is relatively straightforward. The IDA team studies the effects of PGE restrictions by identifying a policy that introduces changes to PGE restrictions and then estimates whether retention trends of GOFOs and SESs changed as a result. The implementation of section 1045, which expanded PGE restrictions for the senior-most personnel from one year to two years, was chosen as the studied change for several reasons:

- It is fairly recent (enacted in December 2017), ensuring that resulting findings are applicable to today's senior personnel but also far enough back that we can observe post-change data.
- It has clearly defined groups who are impacted, notably 3- and 4-Star GOFOs (and their tier III SES civilian equivalents).
- For GOFOs, in particular, the group whose retention is most affected to not be the group who is impacted (3- and 4-Stars who are subject to the two-year limitation) but the group who can avoid being impacted by leaving (2-Star GOFOs who are not subject to the 2-year limitation, but will be, if promoted).
- Feedback from subject matter experts (SMEs) and responses from a previously administered DOD survey suggest that the implementation (which did not "grandfather" existing personnel) was relatively unexpected. As such, most retention effects, if any exist, would be expected to appear after the policy is implemented and not preemptively to avoid being subjected to the stricter constraints.

With section 1045 identified as the analytical focus, the analysis compares the retention of senior officials before and after the policy was implemented at the end of 2017. This comparison is not as simple as a before-and-after calculation of the retention of the potentially affected groups. Retention can be influenced by a variety of events across time that are unrelated to section 1045, with a couple of notable events occurring within a few years of December 2017: two political administration changes and the outbreak and response to the COVID-19 pandemic.

To isolate the impact of the change in PGE restrictions from these and other factors that occurred over the past decade, IDA also identifies baseline groups that would be affected by the

same non-section 1045 factors but that are unlikely to be directly affected by the change in PGE restrictions. For GOFOs, we focus on O-8s despite the fact that they are not directly impacted by the two-year PGE restriction imposed by section 1045. O-8 was the career point that was consistently identified as being the most likely to see attrition changes by the SMEs with whom the team spoke. Which makes sense intuitively. O-8s need to be promoted to be able to be retained long term, and these promotions would come with longer PGE restrictions that they may want to avoid. Given our choice of O-8 as our group of interest, the baseline group is straightforward. O-7s (1-Star generals/admirals) are used as the primary baseline since they are likely to be affected by many of the same miscellaneous factors that might influence O-8 retention but are unlikely to be directly affected by the two-year PGE restriction imposed by section 1045 (since promotion from O-7 to O-9 is quite rare).

In contrast to GOFOs, SESs do not face the same “promote or leave” career path. A tier 2 SES can remain in tier 2 SES positions. Since it is presumably easier for SESs to avoid promotions without leaving, the focus is instead on the SES tier that is directly impacted by the policy: SES tier 3, with tier 1 and 2 SESs serving as a baseline. In situations where all SESs may be affected, GS-15s are used as a baseline.

2. Empirical Results

The IDA team applied this methodology to the data resident in IDA: Defense Manpower Data Center (DMDC) data that tracks individuals across time and records changes in their relevant demographics/career characteristics (e.g., rank) and their loss date if applicable. Appendix G describes the data in detail. The only practical barrier to implementing the methodology as outlined is the inability to see directly the tier of SESs resident in the IDA data. As discussed in Appendix G, this barrier led to two empirical strategies for measuring retention among senior civilians: one that compares SESs with GS-15s and one that relies on a subset of SESs whose tiers can be identified in the data.

There is no consistent evidence of different annual loss rates (relative to the proposed baselines) after the implementation of section 1045 for any of the groups expected to be most impacted by the policy.

This discussion begins by illustrating the annual loss rates of retired GOFOs in the sample. Recall from earlier discussions that O-8s are the group in which changes in retention are most expected. If O-8s get promoted, they will become subject to the longer PGE restrictions faced by O-9s, and their ability to stay in the military without getting promoted is extremely limited. O-7s are less likely to be affected since O-7 to O-9 promotions are rare, and so O-7s are used as a baseline for O-8 retention changes. O-9 retention is a wildcard. O-9 loss rates may be unaffected since the longer restrictions are unavoidable or they may be more likely to leave earlier than they otherwise would to regain some of the year of civilian earnings theoretically hampered by the PGE restrictions.

As Figure 1 shows, there is no obvious evidence of a sustained spike in loss rates for O-8s immediately following the introduction of section 1045. Loss rates rise in 2018 relative to 2015–2017, but including more historical data reveals that 2015–2017 does not represent the normal amount of annual turnover among O-8s. It is possible that, absent section 1045, O-8s would have otherwise seen a decline in loss rates for reasons that have not been accounted for. The O-7 loss rate baseline helps account for that possibility. No substantive changes in loss rates among the O-7 population are evident, suggesting that a large, sustained decline in O-8 loss rates absent section 1045 would have been unlikely.²⁷⁶ The changes in O-9 retention are qualitatively similar to the changes in O-8 retention.

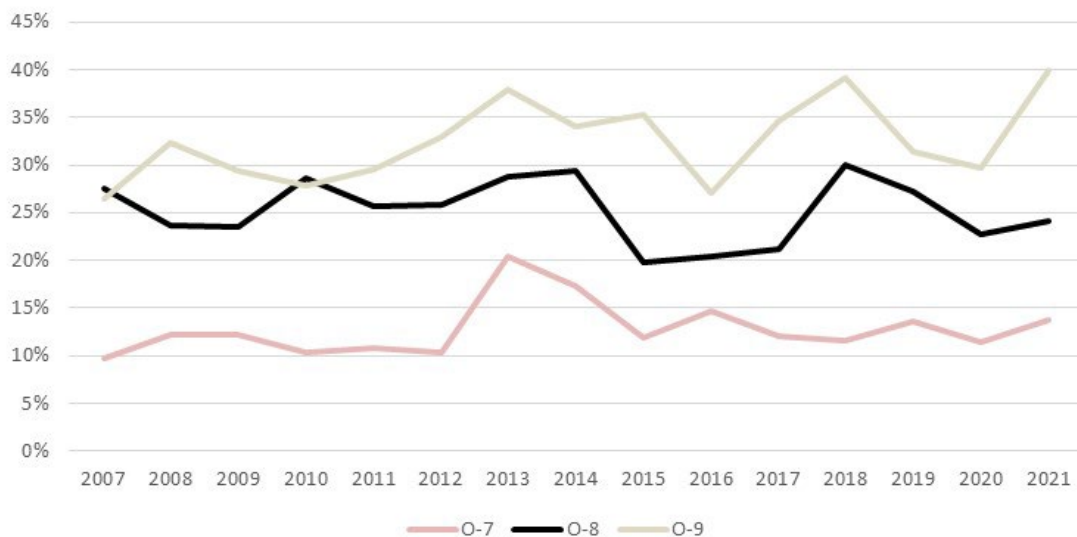


Figure 1. Annual Loss Rates of Senior Uniformed Personnel, Two+ Years in Grade

The results for GS-15 and SES personnel mimic those for uniformed personnel. Recall that the tier for the SESs in our sample cannot be conclusively identified. As such, the first contrast is the loss rates of SES and GS-15 personnel. Unlike the data for GOFOs, where additional historical data added additional context for “typical” loss rates, the focus here is on the time period immediately surrounding the implementation of section 1045 (2014–2021). The baseline group (GS-15s) displays an attrition spike in 2016, coincident with an election cycle, but GS-15 loss rates otherwise vary between (approximately) 10 and 15 percent per year. Likewise, aggregate SES loss rates vary between about 10 and 15 percent per year. There is a slight increase in loss rates in 2018 and 2019, but those loss rates have subsequently stabilized and started to fall. As with GOFOs, Figure 2 does not display the sustained change in attrition that would be expected if section 1045 had meaningfully impacted the retention of senior DOD civilians.

²⁷⁶ In addition to seeing no obvious permanent effect from the raw loss rates, our assertions are supported by regressions not presented here. After controlling for age and service, we see no substantive or statistically significant differences in attrition trends between O-7s and O-8s.

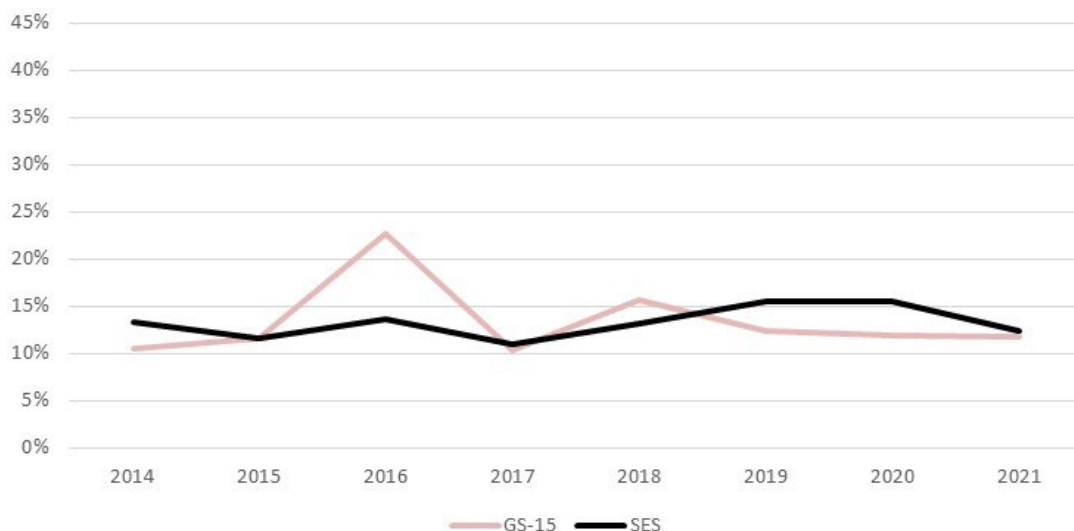


Figure 2. Annual loss rates of SES and GS-15 personnel

The results are similar when we focus on those SESs whose tier can be identified (see Figure 3). Recall that tier 3 SESs are the group expected to be most affected by section 1045. As in Figure 1 and Figure 2, no permanent spikes in loss rates starting in 2018 are evident for the group that we expect to be most affected. Indeed, 2018 loss rates for these SESs are quite similar to loss rates in 2017, with loss rates that increase and decrease between 2019 to 2021. As before, nothing in the baseline groups suggests that our groups of interest should have experienced a sustained fall in loss rates absent the implementation of section 1045. As with the other retention results, formal testing of the differences of these loss rates suggests that any differences in retention trends before and after section 1045 are small and statistically insignificant.

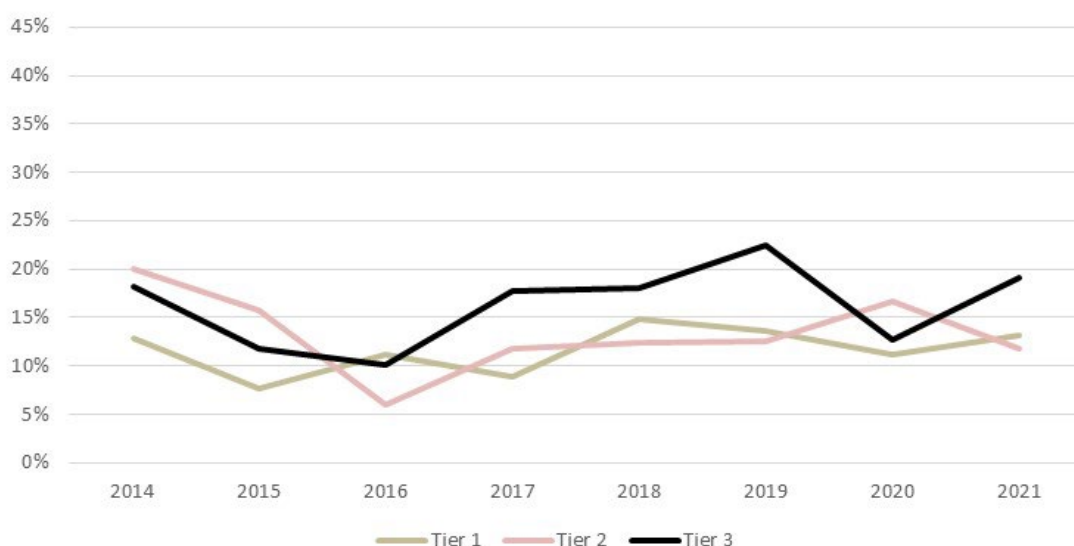


Figure 3. Annual Loss Rates of SES Personnel in Identifiable Tiers

One caveat here is worth noting: these results are based on modest changes in PGE restrictions (from one year to two years) for a relatively small group of individuals. The finding of “no discernable impact” would not necessarily be applicable if much larger changes in PGE restrictions were implemented (e.g., an increase from two to four years, or the application of a more comprehensive restriction on behind-the-scenes support).

3. Qualitative Data

While the available quantitative data does not show a link between PGE legislation and retention for either senior military officers or senior civilians, IDA interviews provide some anecdotal evidence of such a link in the case of 2-Star officers weighing retirement.

Several interviewees told IDA that the two-year cooling-off period applicable to 3-Star retirees is a major factor in the decision of some 2-Stars to retire early. For example, a former DOD official with a career in industry described “a handful of instances” of 2-Stars who decided to retire early rather than accepting promotion to 3-Star rank to avoid the added ethics restriction. The former official said that he was personally aware of the decisions of these individuals because they sought his advice about potential employment opportunities.²⁷⁷ A retired 2-Star explained that a 2-Star and a 3-Star are “both getting out with roughly the same retirement check. And yet [the 3-Star] is going to be unable to do quite a few of the things that [the 2-Star] could do.”²⁷⁸

An even stronger case was made by a retired 3-Star, who told IDA that when GOFOs have the opportunity for promotion to 3-Star rank, they are an age “that is prime territory if you are going to make the move to go work for Deloitte or Boeing or Lockheed Martin or whoever. If you want to be a college president, you’re probably going to move out sooner rather than later.” This individual explained:

You have to serve about 10 years in industry to make it worth their while and to make it worth your while.... They’re not interested in hiring people much older than their mid-fifties, so that has to play into your decision making as well.... It’s bigger than the ethics rules, but the ethics rules will certainly play into it They’re going to take account of those, and I know they do because you have to add [the two year restriction] to the timeline. So, I’ve got friends that decided to retire as 2-Stars. They were going to be nominated for their third star, [but] they turned down the nomination and said, “No, I need to get out now.”²⁷⁹

On the other hand, several other IDA interviewees expressed the belief that few 2-Stars are not likely to be impacted by these incentives. A DOD ethics official stated, “I’m not seeing any effect [of the two-year cooling-off period] because I don’t think people think about [ethics

²⁷⁷ Interview, November 29, 2023.

²⁷⁸ Interview, November 13, 2023.

²⁷⁹ Interview, November 21, 2023.

requirements] when they are moving on in their careers.”²⁸⁰ A retired 1-Star agreed, stating that for most GOFOs, the biggest factor is a desire to serve for as long as their Service has a place for them.²⁸¹ Similarly, a retired 4-Star told IDA that his colleagues were too focused on the job that they are doing to think about what they are going to do after leaving the military until a few months before they leave. “So I’ve never heard anybody talk about, ‘hey, I’m really thinking about retiring now because of the post-retirement restrictions.’”²⁸²

On the basis of this qualitative evidence, IDA concludes that the two-year cooling-off period applicable to 3- and 4-Star officers has led to some early retirements but that the overall impact likely remains limited. IDA cannot say that the decision to extend the PGE “cooling-off” period to two years for the most senior DOD officials was unreasonable. However, the possibility of an adverse effect on retention should be considered in any decision on whether to extend the limitation.

²⁸⁰ Interview, November 27, 2023.

²⁸¹ Interview, November 6, 2023.

²⁸² Interview, January 2, 2024. This individual indicated that while he had not seen a measurable impact on retention from the lengthened “cooling-off period,” the across-the-board hold recently placed on senior military nominations had a devastating impact in terms of loss of talent in the senior ranks.

5. Impact on Access to Expertise

This chapter examines the ways in which DOD may benefit from the knowledge and expertise of former senior officials and may be harmed by post-employment restrictions limiting access to such knowledge and expertise.²⁸³ The adverse effects of PGE restrictions do not necessarily mean that the restrictions are unnecessary or unwise. As described previously, PGE restrictions serve important public purposes by placing appropriate constraints on communications between former government employees and their former agencies to prevent former senior personnel from exerting improper influence on former subordinates and colleagues and limit the potential for the misuse of confidential government information to give an advantage to private employers. However, the benefits of post-employment restrictions come at a cost, and policymakers should consider the costs and the benefits in assessing proposals to adjust PGE requirements.

The quantitative analysis in this chapter addresses the following question: In what kind of work do senior DOD officials engage after they leave government? In other words, to what extent do the post-government employment roles of senior DOD officials lend themselves to potential improper influence and to what extent do these roles provide scope for more beneficial applications of the officials' background and experience? This question can be further broken down into two sub-questions: (1) For whom do former DOD officials work and (2) what types of work do they perform on behalf of these employers? Significant data is available on the organizations for which former DOD officials work. Less data is available on the types of work that they perform for these entities. For this reason, the second question is largely addressed through a qualitative assessment, based on the extensive interviews conducted by the IDA team.

Overall, IDA found that former DOD officials work for a wide variety of employers, with only a small minority working for the largest defense contractors. Former officials who work in the defense industry hold a wide variety of jobs, with less than one percent working as registered lobbyists for the largest defense contractors. IDA found that former DOD officials play a critical role in connecting the Department to the private sector by helping industry understand the Department's needs and by translating the technologies and capabilities that industry has to offer into terms that the Department can understand. Such assistance can be particularly critical to small businesses and non-traditional contractors that are new to the defense business. While the large contractors would continue to do business with the Department with or without the help of former DOD officials, IDA interviewees pointed out that many non-traditional contractors would likely

²⁸³ This chapter addresses the impact of PGE restrictions on the Department's access to the knowledge and expertise of former personnel. The recusal requirement in section 1117 has an impact on the Department's access to the knowledge and expertise of its current personnel. This issue is addressed in the discussion of section 1117 in Chapter 3, Section C of this report.

never be able to enter the defense market at all without such assistance. Former DOD officials also add value to advice provided to the Department by management consultants, FFRDCs, and others.

A. Assessment of Previous Studies

1. GAO Reviews

At the direction of Congress, GAO has performed two reviews of post-government employment of former DOD officials: the first in 2008 and the second in 2021. To conduct this work, GAO had access to personnel data on individuals compensated by major defense contractors during a calendar year and personnel data for military and civilian employees who separated or retired from the Department during the prior five years. GAO also had access to taxpayer data from the Internal Revenue Service, which enabled it to match the DOD and contractor data.

As a result, the GAO data reviews were based on the most comprehensive data available and are definitive regarding the issues that they address. The two studies provide a clear picture of the number of former DOD military and civilian personnel who worked for major defense contractors and that companies for which they worked in the two years covered. Unfortunately, the reports do not provide any information on what types of work former DOD personnel performed for these companies. In short, the reports show that the engagement between the Department and the defense industry is significant, but do not help describe the nature of that engagement.

a. The 2008 GAO review

The 2008 GAO review identified fifty-two defense contractors that received at least \$500 million in DOD contracts in 2005.²⁸⁴ GAO determined that in 2006, these fifty-two largest defense contractors collectively employed the following:

- 86,181 of the 1,857,004 former military and civilian personnel who left DOD service between 2001 and 2006.
- 2,435 of the 35,192 military and civilian senior or acquisition officials²⁸⁵ who left DOD service in the same period. This number included 2,021 former acquisition officials

²⁸⁴ United States Government Accountability Office, *Defense Contracting: Post-Government Employment of Former DOD Officials Needs Greater Transparency*, GAO-08-485 (Washington, DC: U.S. GAO, May 2008), 27 (Appendix I), <https://www.gao.gov/assets/gao-08-485.pdf>.

²⁸⁵ Ibid., 1 (footnote 1). In GAO-08-485, GAO defined senior and acquisition officials as follows: “For purposes of this report, former DOD officials include senior military officials such as generals, admirals (ranked O-7 and above) and senior civilians in the Senior Executive Service (SES) or executive-level appointees. Former DOD officials also refers to military (grades O-3 to O-6: captain, major, lieutenant colonel and colonel –Army, Air Force, and Marine Corps– lieutenant, lieutenant commander, commander, and captain–Navy) and civilian (from grades GS-12 through GS-15) acquisition officials who performed such jobs designated as part of DOD’s acquisition workforce, including program managers, deputy program managers, and contracting officers.”

(1,167 military and 854 civilians) and 414 former senior officials (177 GOFOs and 237 civilians).²⁸⁶

In short, just under 5 percent of all former military and civilian personnel and just under 7 percent of senior or acquisition officials who left DOD this period went to work for major defense contractors. Seven contractors—SAIC, Northrop Grumman, Lockheed Martin, Booz Allen, L3 Communications, General Dynamics, and Raytheon—accounted for about 65 percent of the former senior and acquisition officials hired by the major defense contractors.²⁸⁷

Unfortunately, the GAO review does not provide any information on the nature of the work that former military and civilian personnel performed for these defense contractors. However, the data provided in the 2008 report provides some basis for assessing the types of contractors that subsequently employed these former military and civilian personnel. In particular, the twelve contractors identified by GAO as employing the most former DOD officials included the following:

- Six major hardware contractors that provide the Department with weapon systems and associated products and services. Collectively, these six companies—Northrop Grumman, L-3 Communications, Lockheed Martin, General Dynamics, Raytheon, and BAE Systems—received just over \$80 billion in DOD contract awards in FY 2005 and employed 1,285 former DOD senior and acquisition officials.
- Six major service contractors, none of which ranked in the top 10 DOD contractors in terms of contract awards. Collectively, these six companies—SAIC, Booz Allen, CACI, CSC, URS, and MITRE—received just over \$10 billion in DOD contract awards in FY 2005 and employed 864 former DOD senior and acquisition officials.²⁸⁸

This data indicates that, in the period examined, service contractors hired a much higher share of former DOD senior and acquisition officials relative to contract dollars received from DOD, than did the major hardware contractors. Notably, the top hiring service contractors in the 2008 review provide knowledge-based services to the Department. Potential differences in the types of work performed by knowledge-based service contractors and by major hardware contractors are discussed based on IDA's qualitative analysis in Section 5.B.2.

b. The 2021 GAO review

The 2021 GAO report identified thirty-four DOD contractors that received at least \$500 million in DOD contract awards in 2019. However, GAO, to streamline its review, chose to examine only the largest fourteen of these contractors on the grounds that they accounted for over

²⁸⁶ Ibid., 10, 12.

²⁸⁷ Ibid., 10–11.

²⁸⁸ Ibid., 38.

80 percent of DOD obligations to major contractors.²⁸⁹ GAO determined that in 2019, the fourteen largest defense contractors collectively employed the following:

- 37,032 of the 1,497,882 military and civilian employees who left DOD service from 2014 through 2019.²⁹⁰
- 1,718 of the 100,660 military and civilian senior or acquisition officials who left DOD service in the same period. This number included 1,616 former acquisition officials (646 military and 970 civilian) and 414 former senior officials (75 GOFOs and 27 civilians).²⁹¹

In short, just under 2.5 percent of all military and civilian employees and just under 2 percent of the senior or acquisition officials leaving the Department during this period went to work for the fourteen largest contractors. While the 2021 numbers are not directly comparable to the 2008 numbers because of the difference in the number of contractors included in the sample, it is notable that the share of DOD senior or acquisition officials going to work for major contractors appears to have declined dramatically, to the point where it is now lower, rather than higher, than the overall percentage of departing military and civilian employees going to work for these companies.

GAO found that the weapons contractors in its sample hired significantly more former senior and acquisition officials than the non-weapons contractors. For example, GAO reported that in 2019, Raytheon alone employed 315 former senior and acquisition officials, while the 5 non-weapons contractors in the sample collectively employed only 88 such officials. However, this result may have been skewed by GAO's small sample size.²⁹² The non-weapons contractors in the GAO sample included a construction company, two health care companies, and two logistics companies but none of the knowledge-based service contractors that were shown to have hired a heavy share of senior and acquisition in GAO's 2008 report. The largest of these knowledge-based contractors would have made the \$500 million cutoff used in the 2008 report but were outside the top 14 sample used in the 2021 report. Consequently, it is not possible to determine whether these contractors continue to hire a disproportionate share of former DOD senior and acquisition officials.

Finally, GAO's focus on the largest defense contractors necessarily excludes data on smaller DOD contractors, including start-ups, technology innovators, and other non-traditional defense contractors that now play a significant role in supporting the Department's transformational efforts. The interviews conducted by the IDA team, discussed in Section 5.B, frequently highlighted the importance of the role played by former DOD officials in enabling such companies to do business with the Department.

²⁸⁹ United States Government Accountability Office. *Post-Government Employment Restrictions*, 3.

²⁹⁰ Ibid., Highlights page.

²⁹¹ Ibid., 14.

²⁹² Ibid., 14–15.

2. Other Reviews

Two reviews conducted by public interest groups have also sought to shed light on the work performed by senior DOD officials after they leave the Department:

- A 2018 report issued by POGO, which sought to identify former senior officials who went to work for major defense contractors as senior executives, board members, or registered lobbyists; and
- A 2023 report by the Quincy Institute for Responsible Statecraft (Quincy), which sought to characterize the post-government employment of retired 4-Star officers.

Like the GAO reports, these two reviews document the significant role played by former DOD officials in the defense industry.

Each of the reports describes and questions the conduct of a handful of former DOD officials who went to work for defense contractors after leaving the Department. Each seeks to link these episodes to the post-employment activities of a broader range of former DOD officials. While the reports contain useful information regarding former senior officials now employed in the defense industry, incomplete analysis and flawed methodology undermine their conclusions. For example, both reports lean heavily on the misleading statement that “[o]ver 90 percent of senior government officials who go into the arms industry serve as lobbyists.” In fact, the vast majority of the lobbyists in this sample are former congressional staffers, not former DOD officials. Based on the evidence provided in the reports, the percentage of former DOD officials who become registered lobbyists appears to be almost vanishingly small.²⁹³

a. March of the Four-Stars

In October 2023, Quincy issued a report that assesses the post-government employment of thirty-two 4-Star officers who retired between 2018 and 2023 and concludes that almost all of them went to work for “the arms industry” in some capacity after leaving government.²⁹⁴ According to the report,

- Twenty-six of thirty-two 4-Star officers who retired after June 2018—over 80 percent—went to work for the arms industry as board members, advisors, executives, consultants, lobbyists, or members of financial institutions that invest in the defense sector.

²⁹³ This conclusion is consistent with the results of IDA’s own quantitative and qualitative analyses, presented later in this chapter, which shows that fewer than 0.3 percent of senior DOD military and civilian officials leaving the Department in the last ten years became lobbyists for the top 100 defense contractors after leaving office.

²⁹⁴ William D. Hartung and Dillon Fisher, “March of the Four-Stars: The Role of Retired Generals and Admirals in the Arms Industry,” Quincy Brief No. 47 (Washington, DC: Quincy Institute for Responsible Statecraft, October 2023), <https://quincyinst.org/wp-content/uploads/2023/10/QUINCY-BRIEF-NO.-47-OCTOBER-2023-HARTUNG.pdf>.

- The biggest category of post-retirement employment for 4-Stars, by far, was as board members or advisors for small- and medium-sized arms contractors, with fifteen choosing that option. This number compares to five who became board members, advisors or executives for one of the top 10 arms contractors.
- Five retired 4-Stars became arms industry consultants, five became lobbyists²⁹⁵ for weapons companies, and four joined financial firms that make significant investments in the defense sector.²⁹⁶

The report states that the employment of retired General Officers in the defense industry is a problem “because it creates the appearance – and in some cases the reality – of conflicts of interest in the making of defense policy and in the shaping of the size and composition of the Pentagon budget.”²⁹⁷ These issues of appearance are a major reason why the existing provisions governing post-government employment are in place. However, the report contains almost no information about the nature of the work that the retired 4-Star officers have performed on behalf of these employers, so it provides little basis for assessing the extent to which they may have engaged in inappropriate activities or provided knowledge and expertise that was beneficial not only to their employers but also to the Department.²⁹⁸

b. Brass Parachutes

In 2018, POGO released a report that, unlike the Quincy report, endeavored to assess the nature of the work performed by former DOD officials by comparing the number who went to work as lobbyists against the number who went to work as board members or executives.²⁹⁹ Unfortunately, the POGO methodology is flawed, and the conclusions of the report are misleading.

First, the report attempts to reach conclusions about the career choices of senior DOD officials based on a small and unbalanced sample of such officials. POGO states that its database

²⁹⁵ This assertion appears to be inaccurate. The employment information provided in the report for these officials indicates only that they joined firms that engaged in lobbying and/or government relations activities among other activities, not that they “became lobbyists.” Of the five retired officers identified as “lobbyists,” only one (Holmes) appears to be registered as a lobbyist. The report does not identify any activities engaged in by these individuals that would have violated any post-employment lobbying prohibitions or required them to register as lobbyists. (See Hartung and Fisher, “March of the Four-Stars, 15–16 (General Robert Brooks Brown), 18–19 (General Edward Daley), 23 (General James M. Holmes), 32–33 (Admiral Michael Rogers), and 35 (General Tod D. Wolters)).

²⁹⁶ Ibid., 2.

²⁹⁷ Ibid., 4.

²⁹⁸ The Quincy Brief No. 47 dismisses the possibility that the expertise provided by former senior officials could be beneficial to the Department with the conclusory statement that “[t]heir job is to promote projects and practices that boost the bottom lines of their new employers, not to weigh in on how the firms carry out their government-funded projects, for good or ill (Ibid., 7). The only evidence provided for this conclusion is previous reporting that “over 90 percent of senior government officials who go into the arms industry serve as lobbyists (Ibid., 7). As discussed later on, the previous reporting on this point is inaccurate and misleading.

²⁹⁹ Project on Government Oversight (POGO). *Brass Parachutes*.

includes all senior military and civilian officials who left DOD from 2008 to the time of the report, but it only examined the careers of those who either registered as lobbyists or became board members or Chief Executive Officers (CEOs) of major defense contractors.³⁰⁰ As IDA’s analysis shows, these officials constitute a small minority of former DOD officials and even a small minority of those who work for major defense contractors.

Second, the report contains misleading language as to timing of the employment of senior officials covered by the study. The report states that “[t]here were 645 instances of the top 20 defense contractors ... hiring former senior government officials, military officers, Members of Congress, and senior legislative staff as lobbyists, board members, or senior executives in 2018”³⁰¹ Most people reading this sentence would conclude that these former government officials had been *hired* by the contractors in 2018. In fact, the POGO sample covers former government officials who were *employed* by the contractors in 2018, without regard to when they left government service or were hired by contractors. More than two-thirds of the DOD employees in the sample left government service before 2010 and only eleven left government service after 2014—meaning that their Pentagon connections had become stale and their post-employment lobbying restrictions had long since expired.³⁰²

Finally, the report lumps former senior DOD officials together with former congressional staffers, two populations with different employment profiles. In particular, the report concludes that “nearly 90 percent [of these 645 instances³⁰³] became registered lobbyists, where the operational skill is influence-peddling.”³⁰⁴ Because the report is subtitled *Defense Contractors’ Capture of Pentagon Officials Through the Revolving Door*, readers may be led to believe that this conclusion means that 90 percent of senior officials leaving the Pentagon become registered lobbyists.³⁰⁵ On the contrary, the POGO sample includes contractor employees who previously worked at DOD, in other federal agencies, or on Capitol Hill. In fact, the sample is heavily weighted toward Capitol Hill: 410 of the individuals in the POGO sample had Capitol Hill experience, while only 98 had DOD experience.³⁰⁶ Moreover, thirty-three of the ninety-eight DOD

³⁰⁰ Ibid., 7–8.

³⁰¹ Ibid., 9.

³⁰² Ibid., 88–200. Analysis based on information in Appendix B, which provided information on the 645 instances in the POGO sample.

³⁰³ Ibid., 9. The report refers to “instances” of hiring rather than to the number of individuals, explaining that “[s]ince some lobbyists work for multiple defense contractors, there are more instances than officials.” This approach would appear to overcount lobbyists and board members, who may have multiple employers, in comparison to senior executives, who are likely to have a single employer.

³⁰⁴ Ibid., 9.

³⁰⁵ See, for example, Warren, “Chairing Subcommittee on Personnel, Senator Warren Highlights Need.” Even a POGO official interviewed by the IDA team initially expressed this view.

³⁰⁶ Project on Government Oversight (POGO). *Brass Parachutes*, 88–200 (Appendix B). Analysis based on Appendix B, which provided information on the 645 instances in the POGO sample. This discrepancy highlights another flaw in the POGO methodology: lobbyists are included in the sample without regard to their

employees in the sample had experience in the Pentagon and on Capitol Hill.³⁰⁷ Figure 4 shows the prior government experience of the defense contractor employees included in the POGO sample.

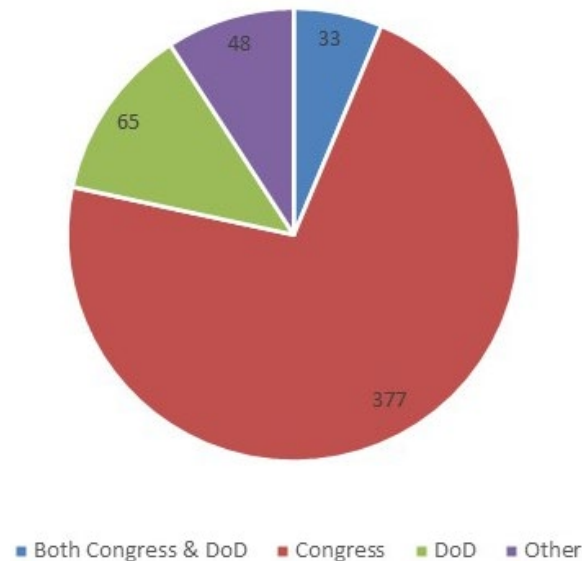


Figure 4. 2018 POGO Report: Defense Contractor Employees' Past Government Experience

Of the sixty-five DOD employees included in the POGO sample who worked only for DOD and not on Capitol Hill, nineteen were employed as lobbyists and forty-six were employed as senior executives or board members—a ratio of just under 30 percent (not 90 percent).³⁰⁸ Furthermore, this ratio does not include the hundreds of former DOD employees identified in the GAO report who go to work for contractors but do not serve as either lobbyists or senior executives. The 19 former DOD officials employed as lobbyists by top defense contractors would be less than 5 percent of the 414 former senior officials identified by GAO as working for top defense contractors in the same period and less than one tenth of one percent of the total number of DOD employees working for such contractors.³⁰⁹ In short, the logical conclusion from the POGO report appears to be that congressional staff members who go to work for defense

rank, while only the most senior executives are included. While the senior executives are drawn almost exclusively from a small class of GOFOs and their civilian equivalents, lobbyists are drawn from a much larger group that includes junior officers and their civilian equivalents. This methodology explains why the POGO sample includes only 98 former DOD employees working for the top 20 defense contractors, when the GAO review revealed that 1,718 former acquisition and senior officials were employed by the top 14 defense contractors in a similar period.

³⁰⁷ Ibid., 88–200. Analysis based on information in Appendix B, which provided information on the 645 instances in the POGO sample.

³⁰⁸ Ibid.

³⁰⁹ This rough estimate is consistent with data from IDA's own review, which concludes that fewer than 0.4 percent of senior DOD military and civilian officials become registered lobbyists for the top 100 defense contractors after leaving office.

contractors are extremely likely to be employed as lobbyists, while the number of senior DOD officials who go to work as registered lobbyists for defense contractors appears to be almost vanishingly small (a conclusion that is reinforced by IDA’s own review (see Section 5.B)).

The POGO report, despite the weaknesses in its methodology and conclusions, is accurate when it points out that the definition of lobbyist does not capture all methods by which defense contractors seek to influence the Department. As the POGO report states, many former DOD officials work as “policy advisors, strategic consultants, trade association chiefs, corporate government relations executives, [and] affiliates of agenda-driven research institutes” among other positions. IDA’s quantitative and qualitative assessments seek to shed light on these other, more significant roles played by former DOD officials.

B. Potential Abuses and Countervailing Values

The reports published by POGO and the Quincy Institute cite a handful of proven or alleged abuses by former DOD officials. The POGO report references the case of Darleen Druyun, a former Principal Deputy Assistant Secretary of the Air Force, who was convicted and sent to prison after she illegally negotiated for employment with Boeing while, at the same time, ensuring that the company received favorable terms on major Air Force contracts.³¹⁰ The Quincy report cites cases in which a retired Vice Chairman of the Joint Chiefs of Staff and a retired Commander of U.S. Central Command joined the boards of directors of companies whose products they had allegedly favored while in office.³¹¹ Both reports imply that these examples of apparent abuses are just the tip of the iceberg.³¹²

Several IDA interviewees referenced the Druyun case. Others mentioned specific incidents of conduct which, although not illegal, made them uncomfortable. For example,

- A career civilian serving in a senior position stated that he had seen former officials “throw their weight around” and use their credentials to push favored programs.³¹³
- Two former political appointees who went to work in the defense industry stated that they had seen inappropriate behavior on both sides of the table.³¹⁴

³¹⁰ Project on Government Oversight (POGO). *Brass Parachutes*,4.

³¹¹ Hartung and Fisher, “March of the Four-Stars,” 5–6.

³¹² “More consistent and detailed reporting on post-government activities of military officers who go to work in the arms industry would likely uncover many other incidents similar to the ones described above” (see Hartung and Fisher, “March of the Four-Stars,” 7).

The Druyun case “was an unusual case” in that “the system ultimately worked” and the behavior was punished (see Project on Government Oversight (POGO). *Brass Parachutes*,4).

³¹³ Interview, November 6, 2023.

³¹⁴ Interviews, November 29 and November 30, 2023.

- A retired General Officer stated that he had seen former DOD officials serving on the advisory boards of companies that they had helped while they were still serving.³¹⁵
- A second retired General Officer stated that a former colleague “pushed the boundaries relentlessly” and that he wasn’t surprised when this individual “got busted.”³¹⁶

However, current and former DOD officials interviewed by the IDA team insisted that instances of perceived “influence peddling,” far from being the norm, were rare exceptions to the widely accepted rule.³¹⁷ Moreover, these rare instances of abuse drew strong negative reactions from officials that they were intended to influence. One retired General Officer told the IDA team that he had “a very visceral reaction” to a colleague who pushed him in an inappropriate way. It “bothered him deeply that that person assumed that their relationship was more important” than his fidelity to the Department and to ethical behavior, and he was confident that “overwhelmingly everyone else [in uniform] would react in the same way as I did.”³¹⁸

Others expressed similar views. For example,

- A former political appointee stated, “I would tell them that this was inappropriate. I’ve never been shy.”³¹⁹
- A retired O-6 stated that “on the government side, they are pretty dismissive when people try to use their previous positions to get something,”³²⁰
- A career civilian stated that there is heavy pressure not to abuse relationships because retirees do not want to “betray the family” and “be disinvited to the game.”³²¹

Underlying these negative reactions was a continued strong commitment of former DOD officials to the values and interests that they served while in office. For example, one retired General Officer stated, “My first loyalty is to the United States of America. And I want to make sure that we are spending every dollar the right way. My focus is for the U.S. Army, the U.S. Air Force, and the [rest of the Department of Defense].”³²² Other retired GOFOs expressed the same view, telling the IDA team that “You never take the uniform off”³²³ and asking, “Why would someone think that the second you leave the military, your values go away?”³²⁴ Similarly, senior

³¹⁵ Interview, December 5, 2023,

³¹⁶ Interview, November 24, 2023.

³¹⁷ For example, Interviews, November 17, November, and December 6, 2023.

³¹⁸ Interview, November 17, 2023.

³¹⁹ Interview, November 30, 2023.

³²⁰ Interview, November 8, 2023.

³²¹ Interview, November 6, 2023.

³²² Interview, December 5, 2023.

³²³ Interviews, December 4 and December 6, 2023.

³²⁴ Interviews, November 20 and November 28, 2023.

civilian interviewees stated that they maintained their loyalty to the Department and its interests after leaving office. “I took an 80 percent pay cut and walked away from stock options and other benefits to serve the mission and make a difference,” one explained. “Why would I do that if I’m not committed?”³²⁵

Former senior officials interviewed by the IDA team indicated that these values cause them not only to avoid illegal activity, but also to avoid “gray areas” that may be seen as close to the line of impropriety. One former General Officer stated that he was “scared to death” of a possible violation and “made sure to stay away from” anything that could trigger the ethics rules.³²⁶ A second stated that “the rules are confusing enough that I would prefer not stepping even close to the line.”³²⁷ More than one retired GOFO decided not to work at all during the applicable one- or two-year cooling-off period to avoid any possible perception of impropriety.³²⁸ “People will just throw up their hands and say I won’t do anything for two years,” a DOD ethics official told the IDA team.³²⁹

A large number of interviewees stated that one of their goals in retirement was to “give back” through continued service. Some IDA interviewees serve on a voluntary basis for public institutions like the Defense Science Board, the Army Science Board, the Air Force Studies Board, Defense Acquisition University, or the National Academies of Science.³³⁰ Others work without compensation for veterans’ organizations and other non-profits and foundations³³¹ or for industry and professional associations such as the Air & Space Forces Association, the Space Force Association, and the National Contract Management Association.³³²

Importantly, many interviewees expressed the view that paid work can also be a part of the spectrum of “giving back.” This paid work can include work for FFRDCs and management consulting firms that advise the Department on how to improve its programs and operations.³³³ It can also include work for defense contractors. Several DOD officials told the IDA team that they believed that they were able to provide a valuable service to the Department by reviewing products and services available from the private sector and helping identify those products and services that could serve important military needs.³³⁴ One retired career civilian stated, “I’m not here to close deals. I’m here to open up opportunities on both sides, and that’s an important differentiation that

³²⁵ Interviews, December 7, December 4, and November 30, 2023.

³²⁶ Interview, November 7, 2023.

³²⁷ Interview, November 24, 2023.

³²⁸ Interviews, November 15 and November 24, 2023.

³²⁹ Interview, December 1, 2023.

³³⁰ Interviews, November 28, November 30, 2023, and December 6, 2023.

³³¹ Interviews, November 13, December 5, and December 6, 2023.

³³² Interviews, November 28 and December 5, 2023.

³³³ Interviews, November 15, November 23, and December 1, 2023.

³³⁴ Interviews, November 13 and December 7, 2023.

government folks can do.”³³⁵ Similarly, a retired political appointee stated, “If I use my credibility or knowledge to validate a company by agreeing to work with [the Department], they’re using my judgement to make a better decision.”³³⁶

The balance of this chapter will examine the types of services that former DOD officials provide when they work for defense contractors and other non-federal entities and the extent to which those services also provide value to the Department.

C. Where do Former DOD Senior Officials Work?

Consistent with previous reports, the IDA review found that a significant percentage of former senior DOD officials take positions associated with the defense industry. GOFOs covered by PGE requirements have built expertise in defense matters over a career of twenty-five years or more, so it is natural for them to seek avenues of employment that take advantage of that expertise. The same is generally true of most senior career civilians who are covered by PGE requirements. Political appointees have a more diverse background, but many of them have also built expertise in defense matters over the course of many years.

One retired 3-Star who worked for a non-defense company for two years before joining a defense-related business told the IDA team that when he moved to the defense-related business “It was like coming home.” The non-defense company benefited from his basic management skills and crisis management experience, but “I couldn’t contribute as much, because I didn’t know that much” about the company’s products and markets. When he moved to the defense-related business, by contrast, he found that he could “really add value because I know the military and [his former Service] so well.”³³⁷ Similarly, a retired 4-Star stated that he “started out not wanting to do anything associated directly with defense,” but “now, as I look back, everything in my portfolio has some tie to national security” because that is what he knows best.³³⁸

Although most former senior DOD officials work in defense-related matters, IDA found that they work for a wide array of different types of organizations, including different categories of defense contractors.

1. Quantitative Results

As has been noted, previous reports have examined the post-military occupations of retired personnel, but these reports have been limited by their use of small and selective data sets. This section contributes to the discussion by offering a broader perspective: a look at the self-reported

³³⁵ Interview, December 4, 2023.

³³⁶ Interview, December 1, 2023.

³³⁷ Interview, December 4, 2023.

³³⁸ Interview, January 2, 2024.

employment of all GOFOs³³⁹ who have retired since 2014 and who maintained a public LinkedIn page as of October 2023.

a. Data

This subsection begins by discussing which data we use and how we obtained that data and by describing the general contents of our data sets. Analyzing where GOFOs found employment via their LinkedIn profiles requires obtaining three pieces of information:

- A list of retired GOFOs,
- LinkedIn profile identifiers for these GOFOs, and
- The information contained in these LinkedIn accounts.

The first, the list of retired GOFOs, had to be collected externally. Data sharing agreements prevented the IDA team from using the DMDC data used in the retention analysis to identify retiring GOFOs by name. IDA instead requested lists of retired GOFOs (starting in 2014) from each of the services. All the services provided the requested lists.

The officials in these lists then needed to be matched to their LinkedIn profiles (if they had LinkedIn profiles). Unfortunately, IDA could not directly scrape this data from LinkedIn. This analysis did not fall under the use cases permitted by LinkedIn's Application Programming Interface (API). IDA instead contracted the data scraping through a third party: Lix.³⁴⁰ For a fee, Lix allows users to leverage their platform to search for LinkedIn profiles matching desired criteria and then to scrape the data from each profile once the correct one is identified.

To identify the profiles, the IDA team combined automated searching and Google searches. For the automated search, Lix was used to identify the top 3 profiles matching "First Name + Last Name + Service + Admiral/General". The top-3-suggested matches were then reviewed; fortunately, it was typically obvious when one of the matches was, in fact, a retired GOFO since this fact tended to be prominently featured on the LinkedIn profile. When automated search failed to find a match, Google searches were used to identify profiles for some of the remaining retired GOFOs using similar search terms but also including the word "LinkedIn." Former officials using nicknames or call signs as their LinkedIn profile name was a common cause of a failed automated match. Manual searches could not be used for all matches because manual searching was much more resource intensive than beginning with an automated search.³⁴¹

³³⁹ We restrict our LinkedIn discussion to GOFOs because our ability to find LinkedIn profiles for these officials was much higher than our ability to find LinkedIn profiles for former SES and PAS employees. Our ability to find LinkedIn pages for the latter was sufficiently low that we felt it necessary to exclude them from the analysis.

³⁴⁰  <https://lix-it.com/>.

³⁴¹ As a corollary to our previous footnote, we tried manual searching for a subset of SES profiles as well as the automated search and still had a relatively low success rate in finding corresponding LinkedIn profiles.

Once the matches were found, IDA saved the list of LinkedIn profile addresses and used Lix to scrape the data from each of those profiles. The data were then matched back to the information provided by the services (including paygrade and date of retirement) for analysis. The scraped LinkedIn data included all the information listed by the individuals, including beginning and end dates (if applicable) for each job, names and descriptions of employers, and description of jobs/roles.³⁴² There is no enforcement within LinkedIn that job titles or employers have to be listed in a standardized way. There was substantive standardization of employers and job titles as part of the analysis of this data.

IDA was provided with 1,311 Army, Navy, Marine Corps, and Air Force GOFOs who retired between 2014 and 2023. As noted previously, the LinkedIn profiles of these individuals were identified using their first and last names and the service in which they were employed. In certain cases—twelve U.S. Marine Corps generals, fifty-one U.S. Army generals, and twenty-two U.S. Navy flag officers—the employment histories were collected from non-LinkedIn sources. For simplicity, jobs found via manual search are included as part of the LinkedIn data. Unfortunately, a similar search for the ninety-seven retired U.S. Air Force generals who did not have a LinkedIn profile was infeasible due to resource constraints. Overall, 85 percent of the sample of retired GOFOs sample were matched with a valid set of jobs. Table 1 shows few descriptive statistics of the sample of retired and flag officers. As expected given the relative force sizes, the Air Force, Army, and Navy have substantively more retired GOFOs during this time period than did the Marine Corps. The representation of the pay grades aligns with the military grade structure, with a substantially smaller number of O-10s than other grades of GOFOs.

Table 1. Descriptive Statistics of GOFO Losses, 2014–2023

		Mean	N
	Has LinkedIn profile	0.854	1311
	Retired after 2018	0.604	1311
Service	Air Force		409
	Army		432
	Navy		366
	USMC		104
Pay Grade	O7		414
	O8		502
	O9		311
	O10		84

³⁴² As an example, “Booz Allen Hamilton” might varyingly be referenced as its full name, as “BAH”, as “Booz Allen”, or as “Booz”

Of the 1,120 individuals with LinkedIn data, the IDA team focused on the 1,057 individuals who had been retired for at least one year (i.e., before 2023), with the additional restriction of the subset of jobs that began during or after the year in which the individual retired. Not all 1,057 individuals report jobs after they retire from the military, and 258 only report military jobs or education and are excluded from the analysis. The final sample consists of 799 individuals across all four services, who collectively hold 2,526 jobs. Individuals can and do report holding multiple jobs in a time period, which is especially true in cases where the individual serves on a corporate board or undertakes consulting work in addition to salaried employment.

In tandem with the LinkedIn data, IDA analyzed requests for written post-government employment advice that former or departing DOD employees made to ethics counsel and retained in AGEAR.³⁴³ These requests offer a limited window into the kinds of places where senior officials considered working. AGEAR requests are initially assessed on whether they meet the following criteria: the individual had a role at the level of the Executive Service, SES, or was a GOFO in the two years before the request, who either participated substantially and materially in acquisitions valued at over \$10 million or who was a program manager or equivalent, was a contracting program officer, was a source-selection authority, or a member of an evaluation team for an acquisition worth over \$10 million. In addition, the individual must have a tentative job offer from a defense contractor that specifies the duties of the role.

IDA requested AGEAR data from DOD; the initial database we received consists of 3,491 unique requests filed by 2,299 individuals between May 2011 and May 2023. We excluded requests that were irrelevant to our direct analysis.³⁴⁴

Requests which are not *prima facie* rejected are assigned to an ethics official, who provides the individual with a written PGE opinion. The AGEAR database tracks the progression of each request through the system, creating a new observation for the request every time its status changes. The analysis includes one observation per request and aggregated to the individual level to ensure that individuals who have multiple requests in the data are not overweighted. The final sample consists of 325 individuals who made requests between 2011 and 2023, of whom 318 have been retired for at least one year.

³⁴³ AGEAR is the central repository used by DOD to store all written PGE requests required under Section 847 of the FY 2008 NDAA. See National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181, Stat. 244 (section 847(b)(1)).

³⁴⁴ Specifically, requests that do not meet the criteria detailed previously are not required to be retained in AGEAR; thus, ethics counsel will “reject” the request from AGEAR and provide the requestor with a written PGE opinion outside of AGEAR. These rejected requests were also excluded from our analysis. This exclusion reduces the sample to 3,162 unique requests filed by 2,100 individuals. Entries where individuals indicated that they did not hold a role in the Executive Service or SES and were not a GOFO are also excluded. This exclusion removes 2,038 requests and 1,564 individuals from the sample. Finally, 415 requests that were not rejected by AGEAR but which have no specific employer or position defined were thus removed. This exclusion removes an additional 235 individuals from our sample.

The AGEAR data is not a representative sample of the universe of senior officials who have left DOD. Individuals who meet the statutory criteria set forth in section 847 of the FY 2008 NDAA are required to submit a valid request to AGEAR if they expect to receive compensation from a DOD contractor within two years of leaving DOD. Individuals who do not seek compensation from a contractor or otherwise do not meet the statutory criteria do not appear in the data. For this reason, the potential jobs and employers for which individuals submit AGEAR opinion requests are unlikely to be reflective of the entire set of jobs that these individuals are pursuing.

For the LinkedIn and the AGEAR data sets, the focus is on the post-separation outcomes of individuals in our sample. These analyses complement each other. While the AGEAR database illustrates the set of positions and organizations that individuals consider, the LinkedIn data shows where they ultimately find employment.

The analysis focuses on the impact of the 2018 restrictions on post-government employment. In particular, the focus is on whether individuals who retired after 2018 were

- More or less likely to apply to and/or ultimately work for a top 10 defense contractor, top 100 contractor, FFRDC/academic institution, non-profit/think tank, or another private corporation.
 - Among the individuals who apply to/work for a defense contractor, whether they are more or less likely to work for a particular type of contractor: R&D/science and technology (S&T), consulting or knowledge-based services, health care, major weapons systems and subsystems, support services, engineering and construction, IT, and other.
- More or less likely to apply for roles and/or ultimately work as a consultant, board member, academic, CEO, other executive, or HQE/senior mentor.

Classifying different roles and organizations involves some subjectivity and discretion by the researcher. The IDA team divided the organizations where individuals are employed into five different categories: (1) top 10 contractors, (2) top 100 contractors, (3) FFRDCs and academia, (4) non-profits associations and think tanks, and (5) other corporations. Not all employment we see in the data fits into these categories. We do not specifically analyze outcomes for individuals who choose to serve in federal or local government, teach below the college level, who become students, and so forth.

A company is classified as a “top 10” defense contractor if it appeared in the top 10 spots of the list of DOD contractors published by the GSA in the five fiscal years between 2018 and 2022. Of the thirteen entities that are listed, individuals in the sample are employed only at eight. Similarly, “top 100” defense contractors are organizations that appear in the top 100 spots of list of DOD contractors published by GSA in FY 2022. The IDA team looked at the contractors

occupying the top 100 spots in contracting with several major DOD entities.³⁴⁵ These top contractors are then categorized into eight groups based on their main business activities: R&D/S&T, consulting or knowledge-based services, health care, major weapons systems and subsystems, support services, engineering and construction, IT, and other.

Another category represents institutions that conduct academic research: FFRDCs, colleges and universities, the National Academies, and similar organizations, which we identify by either the direct name of the institution (e.g., RAND, Massachusetts Institute of Technology (MIT)) or the presence of key words and phrases such as “university” and “institute.” These organizations are distinct from non-profits, think tanks, and other advocacy groups, which form the fourth grouping (and which are identified using keywords such as “foundation,” “association,” and “fund”). The final category consists of other private companies that do not fall into the prior four categories and that are not government entities.

b. Results

The discussion of results begins by examining the organizations to which individuals apply, and for which they ultimately work, after they conclude their government service. The first analysis is whether 2018 PGE restrictions were associated with any differences in either the type of organizations mentioned in the requests submitted AGEAR or the jobs listed on the LinkedIn profiles of former GOFOs. Since AGEAR represents a small sample of people, the LinkedIn data is treated as the primary results that may (or may not) be supported by AGEAR. The IDA team began by focusing on employment in the first two years after retirement, which is the period of time where section 1045 is likely to have had the largest effect.

As Figure 5 shows, there are three major takeaways:

- Employment with top 10 contractors in the first two years post-retirement is extremely uncommon both before and after section 1045.
- About a quarter of retired GOFOs end up working for top 100 contractors.
- There is very little difference before and after the implementation of section 1045.

³⁴⁵ For the broad “employer type” data, we take an expansive view of “top 100” and include organizations that are in the top 100 contractors for DOD or for any of the individual services. We are intentionally more precise about “top 100” being only the top 100 DOD contractors later when we identify registered lobbyists (for ease of replication).

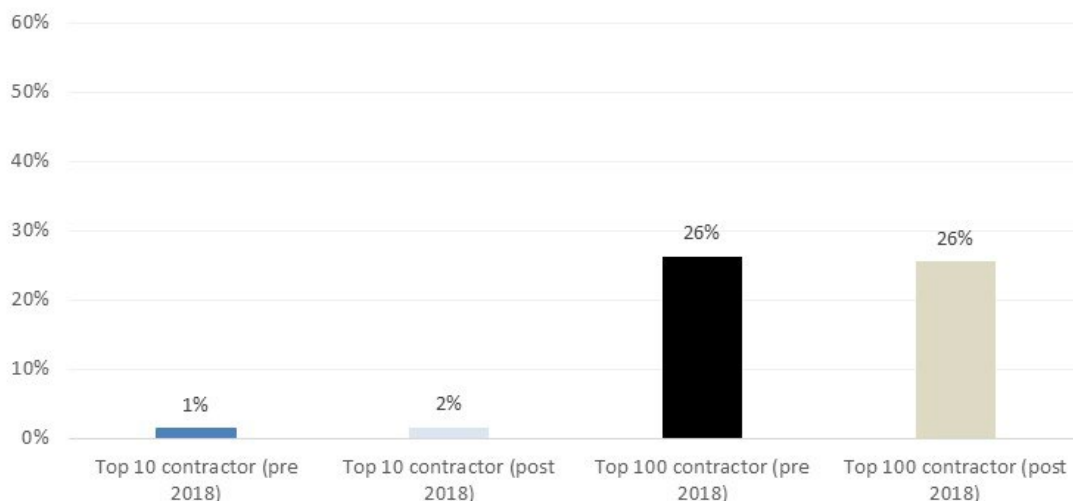


Figure 5. Post-Military Employment, GOFs, First Two Years After Retirement

The AGEAR database includes only individuals who are considering employment with defense contractors. Perhaps for this reason, Figure 6 shows that requests for legal opinions related to top 10 and top 100 employers are much more common in AGEAR than in the LinkedIn data. About a quarter of qualifying requests pertain to the top 10 contractors and about half pertain to the top 100. Section 847 requires that AGEAR requests are for prospective employment with DOD contractors; thus, due to the requirements applicable to AGEAR requests, 100 percent of the requests were for prospective employment with DOD contractors. However, as in the LinkedIn data, the share of requests for top 10 and top 100 DOD contractors is similar before and after the enactment of section 1045. That is, since the small sample size in AGEAR prevents us from drawing firm conclusions about modest changes, the decline in applications pertaining to top 10 contractors is not statistically significant.

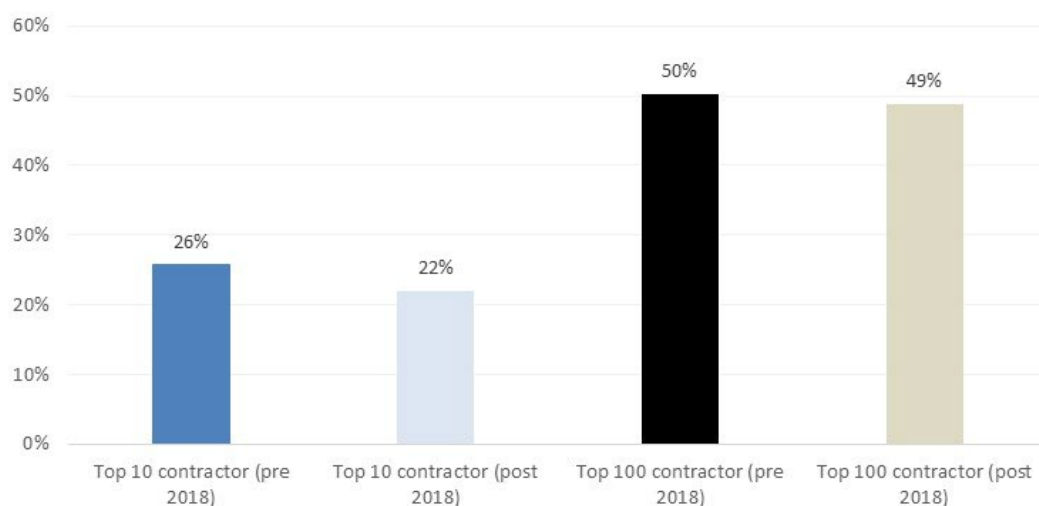


Figure 6. AGEAR Requests for Senior DOD Officials, First Two Years After Retirement

These results lead to a natural follow-on question: If retired GOFOs are not working at top DOD contractors, where are they working? To answer this, the broad employer groupings described earlier are used to check whether each individual in the LinkedIn data worked for at least one of those types of employers.³⁴⁶ Figure 7 illustrates the results graphically.



Figure 7. Where Do Retired Generals and Admirals Work in Their First Two Years After Retirement?

The values in Figure 7 range from 68 percent (LLC/Other) to 2 percent (top 10 contractors), and collectively sum to more than 100 percent since the GOFOs on LinkedIn often hold more than one position. The top category, LLC/Other, includes both GOFOs who start their own contracting firm upon exiting the military and those who work for employers who were not able to be neatly categorized into the other groups.³⁴⁷ Despite the lack of detail about what GOFOs in this group are doing, the fact that it is the dominant illustrates a notable point: retired GOFOs work for a variety of companies, much more so than they work for top 100 contractors. The results when employment timing is broadened to include any employment, not just employment in the first two years, are qualitatively similar (see Figure 8).



Figure 8. Where Do Retired Generals and Admirals Work?

³⁴⁶ This distinction is important for interpretation. In the referenced graph, a person who works for one top 100 and a person who works for two top 100 contractors will simply be a “yes” in the top 100 contractor count.

³⁴⁷ While a handful of GOFOs might work for the same company, we did not see evidence of large employer concentrations that are being disguised by inclusion in this category.

The similarity between Figure 7 and Figure 8 is important. It rules out the possibility that large numbers of retired GOFOs are finding temporary employment directly after retirement before congregating at common DOD contractors. Instead, employer types while under PGE restrictions look similar to employer types writ large.

While the variety of employers in the LLC/Other category preclude making definitive statements about what those employers do, the top 100 contractors are a small enough group that they can be subjectively categorized into broad groups: R&D/S&T, consulting or knowledge-based services, health care, major weapons systems and subsystems, support services, engineering and construction, IT, and other. The work that former DOD senior officials are likely to perform may vary, depending on the type of contractor. For example, former officials working for knowledge-based contractors such as management consulting firms and FFRDCs are less likely to work in government relations and more likely to help advise the Department on its programs and operations. As Figure 9 shows, these knowledge-based contractors are one of the two dominant types of top 100 contractors for which retired GOFOs in the sample work.

The quantitative analysis of employers has shown that section 1045 was coincident with little change in employment with top DOD contractors and that only about a quarter of our sample found employment with top contractors in the first two years after they left DOD. This finding is consistent with the quantitative retention findings as well: minimal impact on employer type is consistent with minimal impact on retention.

IDA's quantitative analysis also shows that former senior DOD officials work for a broad range of employer types. IDA's qualitative analysis, which follows, discusses the types of work that former officials perform for such contractors, and the value that this work may provide to the contractors and to the Department.

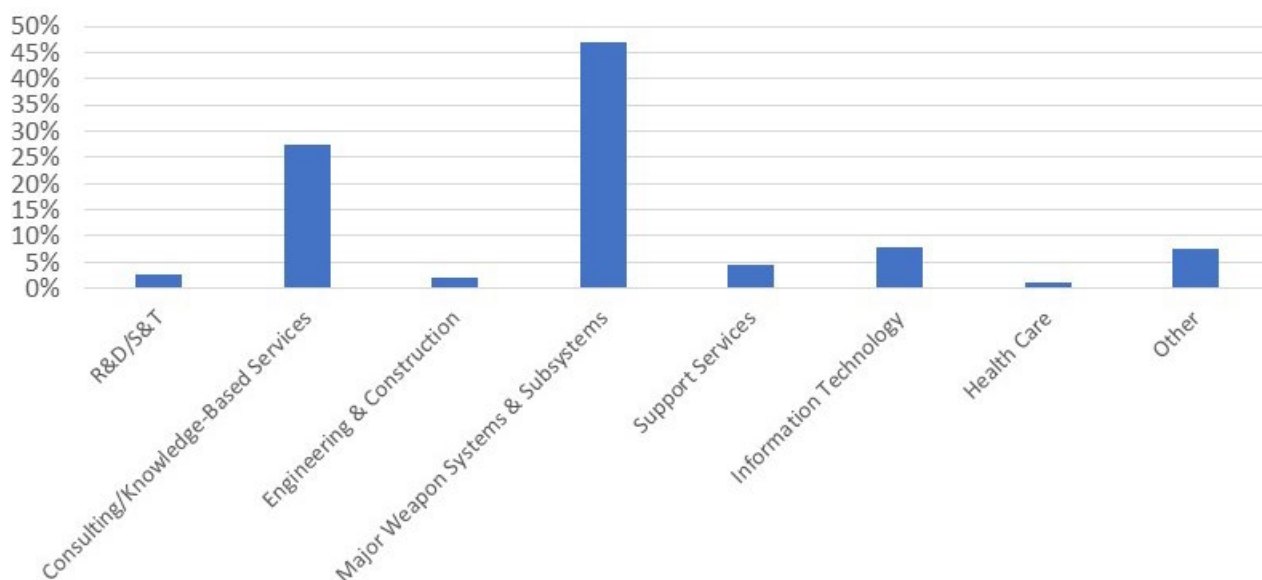


Figure 9. What Types of Top 100 contractors Do Retired Generals and Admirals Work For?

2. Qualitative Results

IDA interviewees acknowledged that former senior DOD officials working for defense contractors often play a government-relations role and that these roles sometimes require them to communicate with their former colleagues in the Department. Preventing the abuse of such contacts is a fundamental purpose of the PGE statutes and regulations and a reason why IDA interviewees expressed an understanding of the need for such limitations.

However, IDA interviewees also expressed the strong view that former senior DOD officials working for defense contractors or other defense-related organizations provide significant value not only to their employers, but also to the Department. The key to this view is that the Department depends heavily on its contractors and cannot succeed in any of its missions if the contractors fail to perform their work or fail to perform it well. As one retired 3-Star explained, “The companies are our partners, and we couldn’t succeed without them. And they certainly couldn’t succeed without us.”³⁴⁸

The value provided by former officials is likely to differ, depending on the type of organization for which they work. The value that former senior DOD officials are believed to provide to their employers and to the Department when they work for different categories of employers is highlighted in Subsections 5.C.2.a–5.C.2.c.³⁴⁹

a. Traditional defense contractors

Former officials working for traditional defense contractors provide a benefit to their employers and to the Department in two major ways: (1) they help facilitate open communication with the Department, and (2) they help companies understand DOD’s priorities and how best to meet the Department’s needs.

1) Open communication

Multiple interviewees told the IDA team that the contractor and the Department benefit from having a trusted avenue of communication that enables frank discussion of problems and issues that might otherwise not be apparent. The common backgrounds and experience shared by current and former DOD senior officials play a critical role in building trust.

- A retired 4-Star stated that the contractor and the Department are well-served by “frank communication with someone whom you share a background with.” Major contractors are likely to have access to the Department with or without former officials but, with the

³⁴⁸ Interview, December 4, 2023.

³⁴⁹ In cases where IDA interviewees described communications between current and former DOD officials, these communications appear to have taken place outside of applicable cooling-off periods and to have been otherwise in full compliance with applicable PGE statutes and regulations.

knowledge and expertise of former officials, are likely to bring to the table a level of trust and “a true, granular understanding of the programs at hand.”³⁵⁰

- A retired 3-Star explained that a person with an industry background generally sounds “like a salesperson,” while a person with a military background has a different perspective. “The first thing they mention is how the product is performing operationally and what they are bringing to the national defense.”³⁵¹
- A second retired 3-Star stated that former DOD officials play an important role by “helping build the bridge to bring people together so that they can understand each other.” He went on to explain that “we need to get together, get all this on the table.”³⁵²
- Another interviewee told IDA that contractor representatives never came into his office unless he asked them to. If they brought a former colleague with them, he would use the opportunity to have a private conversation with the retiree beforehand. This conversation provided an opportunity for frank and open communication that was his way of “getting ‘ground truth’ on a program.”³⁵³

According to these officials, open and honest communications between the Department and its contractors help the contractors understand DOD concerns and how to address them. Such communication helps the Department by making it more likely that its concerns will be addressed. Several interviewees pointed out that such communication is important not only to the contractors who build major weapons systems, but also to the Department’s major service contractors.³⁵⁴

A former PAS official explained, “Candidly, you can’t run a government without an understanding of what’s going on in industry, and you need somebody who shares your understanding of the government.” This individual stated that she regularly called contractors into her office to discuss progress on their programs. When the contractors brought former DOD officials who understood the military aspects of the programs, the discussions were almost always productive. When they failed to do so, she usually had to send them back with “homework assignments” to get needed information and answer her questions.³⁵⁵

This role requires former DOD officials to communicate with their former colleagues, and it cannot be performed during the statutory “cooling-off” period when such communications are prohibited.

³⁵⁰ Interview, December 6, 2023.

³⁵¹ Interview, November 21, 2023.

³⁵² Interview, December 4, 2023.

Similarly, a retired 2-Star stated that “there is a level of trust that overcomes the lack of communication between government and industry” (Interview, November 7, 2023).

³⁵³ Interview, January 3, 2024.

³⁵⁴ Interviews, December 4 and December 5, 2023.

³⁵⁵ Interview, November 30, 2023.

2) Understanding DOD priorities

Interviewees also emphasized that contractors benefit from an understanding of the Department's priorities, which helps them make better decisions on how to invest their money and design their products. The Department also benefits if the contractors provide improved solutions to military problems.

- A former PAS official stated that former DOD officials bring value to contractors by offering their knowledge and expertise to improve the relevancy of a contractor's products to the Department's needs. Improved relevancy can help companies cut costs and improve their products.³⁵⁶
- A retired 4-Star stated that he helps investment teams view the strategic landscape by giving companies advice on how to get their research dollars in the right places to add real value to their military customers.³⁵⁷
- A retired 3-Star stated that former DOD officials bring knowledge of what the product is going to bring to the warfighter from a strategic and operations standpoint. "No one else has that level of knowledge at the industry level," he stated.³⁵⁸
- A second retired 3-Star stated that although he was paid by a major defense contractor, his role was to reinforce the message of his former military service, telling the contractor what the Department expected it to do rather than the other way around. This message helped the company understand what the customer needed from them, but it also helped to ensure that the Department got the product it needed.³⁵⁹
- A retired 2-Star stated that an understanding of what the Department needs and why it is needed enables contractors to avoid sinking money into ideas that would not be sellable. As a result, he said that "the contractor is more productive and the Department gets more productive, better solutions and work from the contractor."³⁶⁰

This role does not necessarily require former DOD officials to communicate with their former colleagues, but some communication is probably needed for the former officials to remain current on DOD needs over time. A retired 3-Star explained that former DOD officials work to build relationships with major commands, to understand their technology needs so that they can help guide company R&D programs. "They've used the technology. They've needed it. And they can see how it applies," this individual stated. Commercial people, by contrast, "rarely have military

³⁵⁶ Interview, November 21, 2023.

³⁵⁷ Interview, January 2, 2024.

³⁵⁸ Interview, November 21, 2023.

³⁵⁹ Interview, January 3, 2024.

³⁶⁰ Interview, November 23, 2023.

experience” and “rarely do they understand what the work is all about.” As a result, “they depend on that type of insight from former military members.”³⁶¹

Current PGE limitations do not appear to unduly restrict the performance of this role, but a stronger limitation on behind-the-scenes activities might make it more difficult.

b. Non-traditional defense contractors

In December 2023, the *New York Times* reported that it had identified at least fifty former Pentagon and national security officials who are now working in defense-related venture capital or private equity firms that are backing defense-oriented start-up companies.³⁶² Former Secretary of Defense Mark Esper, who reportedly represents several small, high-tech firms, told the reporter, “I can really leverage my experience, my positions, and my voice to help accelerate innovation adoption.”³⁶³ Senator Elizabeth Warren, on the other hand, expressed concern about the trend, stating that the “growing role of venture capital and private equity firms ‘makes President Eisenhower’s warning about the military-industrial complex seem quaint.’”³⁶⁴

The 2022 National Defense Strategy emphasized the Department’s need to access the commercial “innovation ecosystem” to maintain its technological edge.³⁶⁵ To this end, the Department has established a seemingly endless array of new organizational structures, such as the Strategic Capabilities Office (SCO), the Defense Innovation Unit (DIU), the National Security Innovation Network (NSIN), the Joint Rapid Acquisition Cell (JRAC), the Joint Artificial Intelligence Center (JAIC), and similar entities in the military departments and select combatant commands.

Despite these efforts, the Department continues to struggle in its effort to adapt rapidly evolving commercial technologies for military use. As the Atlantic Council recently explained:

Many start-up, commercial, and international businesses are unable or unwilling to enter the DoD ecosystem....

The DoD struggles to effectively leverage critical emerging technologies (like biotechnology and quantum information technology) due to a lack of understanding of their state-of-the-art applications among those who generate requirements and

³⁶¹ Interview, November 28, 2023.

³⁶² Eric Lipton, “The Pentagon Road to Venture Capital,” *New York Times*, December 30, 2023, <https://www.nytimes.com/2023/12/30/us/politics/the-pentagon-road-to-venture-capital.html?smid=nytcore-ios-share&referringSource=articleShare>.

³⁶³ Eric Lipton, “New Spin on a Revolving Door: Pentagon Officials Turned Venture Capitalists,” *New York Times*, December 30, 2023, <https://www.nytimes.com/2023/12/30/us/politics/pentagon-venture-capitalists.html?smid=nytcore-ios-share&referringSource=articleShare>.

³⁶⁴ Ibid.

³⁶⁵ Department of Defense, 2022 National Defense Strategy of The United States of America (Washington, DC: Office of the Secretary of Defense, October 27, 2022), 19, <https://media.defense.gov/2022/Oct/27/2003103845/-1/-1/1/2022-NATIONAL-DEFENSE-STRATEGY-NPR-MDR.PDF>.

draft requests for proposals. As these technologies mature, the DoD is challenged to have meaningful conversations about how to adopt, leverage, and defend against these technologies.³⁶⁶

Multiple interviewees told the IDA team that former DOD officials working for small businesses and non-traditional contractors play a critical role in helping the Department identify and access innovative products and technologies from new sources. The military departments “get used to dealing with those same companies and they don’t go anywhere else (especially with weapons systems). They have no ideas about the market.”³⁶⁷ On the other hand, non-traditional contractors tend to view the Department as an impenetrable “black box.”³⁶⁸ While the large contractors would continue to do business with the Department with or without the help of former DOD officials, as IDA interviewees pointed out, many non-traditional contractors would likely never be able to enter the defense market at all without such assistance.

Former senior officials perform several key functions that help non-traditional contractors break down barriers and enter the defense market: (1) they help companies understand who in the Department they need to contact, (2) they help companies understand what the Department is telling them and vice versa, (3) they help companies navigate the maze of government-unique business requirements (and convince them that it is worth doing so), and (4) they advise companies on how to modify their products and technologies so that they will meet DOD needs.

1) Helping companies understand whom to contact

Multiple interviewees told the IDA team that small businesses and non-traditional contractors often have no idea how the Department works and need somebody who can “tell them where to go [in DOD] to get answers.”³⁶⁹ A retired 3-Star explained that former DOD officials “have more of an impact on start-ups because they are opening lines of communication with the government, whereas bigger companies are used to collaborating with the government.”³⁷⁰ Other interviewees provided specific examples from their own work:

- A former PAS official was brought on as a consultant to a small business that had wasted a year talking about its product to potential users who had no authority to make acquisition decisions. The former official recommended that the company speak to a

³⁶⁶ Eric Lofgren, Whitney M. McNamara, and Peter Modigliani, Lofgren, *Commission on Defense Innovation Adoption*. Interim Report (Washington, DC: Atlantic Council, April 2023), 3–4, <https://www.atlanticcouncil.org/wp-content/uploads/2023/05/Commission-on-Defense-Innovation-Adoption-Interim-Report.pdf>.

³⁶⁷ Interview, November 7, 2023.

³⁶⁸ Interview, December 4, 2023.

³⁶⁹ Interview, November 7, 2023.

³⁷⁰ Interview, November 28, 2023.

particular program manager and then send an e-mail introducing them. “Just opening the door and providing them some advice is useful,” the official stated.³⁷¹

- A second former PAS official was brought on as a consultant to a small microelectronics firm specifically to help the company access the Department. This official did not contact any DOD officials but now helps guide the company’s decisions to the government officials who should be contacted regarding important research findings and new technological developments.³⁷²
- A third former PAS official consults with numerous small businesses and non-traditional contractors. These companies “don’t know all the alternative ways to use contracting to do that or the organizations to go to.” The former official helps by pointing them to organizations such as JRAC, DIU, or key officials and by advising them on public forums that they should attend.³⁷³
- A retired 3-Star stated that his role is to point a company to the appropriate government officials and to advise on what kinds of issues should be addressed and what kinds of questions the government is likely to ask. By providing this assistance to a contractor, he stated that he helps provide the Department with a set of options that actually address its needs.³⁷⁴

This role does not always require former DOD officials to communicate with their former organizations, so it can be performed in a manner that is consistent with existing statutory PGE requirements. However, this activity is necessarily performed in support of communications by others, so it must be conducted in compliance with any applicable ban on behind-the-scenes activities.

2) Helping companies understand what the Department is telling them and vice versa

For small businesses and non-traditional contractors that are new to the Department, getting in the door may not be enough. They also have to understand what the Department wants from them and how to communicate what they have to offer. While a “translation” function is helpful to traditional contractors, multiple interviewees told the IDA team that it is absolutely critical to companies that have not previously worked with the Department. For example,

³⁷¹ Interview, December 7, 2023.

³⁷² Interview, November 30, 2023.

³⁷³ Interview, November 21, 2023. A currently serving General Officer provided a similar view in an interview on November 6, 2023.

³⁷⁴ Interview, January 3, 2024.

- A former PAS official stated that non-traditional suppliers “don’t understand the ecosystem.... They don’t understand the opportunities and the decision space that they actually have.” He concluded, “You’re basically a translator of value to both parties.”³⁷⁵
- A second PAS official explained, “There’s a huge translation factor that takes place, lots of acronyms and lingo. When people from DOD speak, non-DOD folks without experience have no idea what they are saying.” Former DOD officials can help these companies shape their communications, show them what an appropriate pitch deck looks like, and tell them what the Department expects.³⁷⁶
- A retired 4-Star told IDA that one of his clients has developed cutting edge AI technology but would not be able to work with DOD without somebody who has been on the inside and can provide insight into what the Department’s needs are so that the company can effectively respond.³⁷⁷
- A retired 2-Star stated, “You have to talk to DOD with DOD-speak.” A former DOD officials can serve as “an arbitrator in the middle,” finding the problems, explaining DOD language, and putting the value that the non-traditional contractor has to offer into language that the Department can understand.³⁷⁸

This role often requires former DOD officials to communicate with government officials. In the past, former DOD officials have been able to comply with PGE requirements and provide services of this kind by waiting out cooling-off periods and by working with organizational units from which they are not barred. Requirements that lengthen cooling-off periods or broaden the organizational prohibitions would make it more difficult for former DOD officials to assist non-traditional contractors in this way.

3) Helping companies navigate the maze of government-unique business requirements (and convincing them that it is worth doing so)

Former DOD officials also help small businesses and non-traditional contractors understand and comply with the complex set of regulatory procedures and requirements that govern the defense acquisition and contracting processes. While weapon systems manufacturers and other traditional contractors deal with the FAR, the DOD Supplement to the FAR, and other regulatory directives on a daily basis, these requirements appear “overwhelming”³⁷⁹ to new entrants, who “have no idea how to deal with the DOD.”³⁸⁰

³⁷⁵ Interview, December 4, 2023.

³⁷⁶ Interview, November 21, 2023.

³⁷⁷ Interview, January 2, 2024.

³⁷⁸ Interview, November 13, 2023.

³⁷⁹ Interview, former PAS official, November 30, 2023.

³⁸⁰ Interview, former PAS official, December 7, 2023.

Interviewees told the IDA team that non-traditional contractors need advice on how to respond to requests for proposals (RFPs), how to cost programs, and how to address contract disputes. One retired 3-Star who served in acquisition positions explained that this is the role most commonly played by retired procurement officials with deep experience in the contracting process. Such officials often set up consulting practices and advise contractors on issues such as how to ensure that the proposals are responsive and responsible, what the government is looking for in proposals, how the government evaluates proposals, how to cost a program, how to set up a business structure to ensure that the company lives up to the commitments in its proposals, and how to get relief when something goes wrong. The job of these former DOD officials is essentially to demystify the acquisition system, which looks like “a lot of smoke and mirrors” to outsiders who are new to the process.³⁸¹

This type of advice can be critical to small businesses and non-traditional contractors trying to do business with the government for the first time. One interviewee stated that many companies would “give up” without expert advice on how to break through the bureaucracy.³⁸² A second stated that without advice on how to navigate relationships with the government, small businesses and non-traditional contractors are likely to make mistakes that could have severe financial consequences. This official stated that they go under if they get things wrong.³⁸³

This role does not generally require former DOD officials to communicate with their former colleagues. However, assistance provided in the preparation of a contractor proposal, a cost estimate, a request for equitable adjustment, or similar documents could be viewed as supporting such communications. Consequently, restrictions on behind-the-scenes activities could limit the ability of former DOD officials to provide these services.

4) Advising companies on how to modify their products and technologies so that they will meet DOD needs

Finally, former DOD officials can assist small businesses and non-traditional contractors by helping them make their products and services relevant to the Department’s needs. The Department has a great interest in taking advantage of technologies (e.g., AI, software, communications, sensors, and satellites) that are evolving quickly in the commercial sector. However, it is often a challenge to ensure that these technologies are developed in a way that meets military requirements.

Several interviewees stated that former DOD officials, who bring a deep understanding of military operations and environments, can often provide essential advice on how to match commercial capabilities to military needs. For example,

³⁸¹ Interview, November 28, 2023.

³⁸² Interview, former PAS official, December 4, 2023.

³⁸³ Interview, former PAS official, November 30, 2023.

- A retired PAS official stated that he advises robotics companies on how to make their technologies valuable to the Department (or to contractors who build weapon systems for the Department).³⁸⁴
- A retired 2-Star reported that some of her peers advise AI companies how to make their technologies fit in a military environment.³⁸⁵
- A retired 3-Star indicated that he could have played a role in bringing problem sets to AI companies, translating warfighter domains so that the companies could respond to them, and identifying the value of company products to the Department. However, he chose not to do so, at least in part, because of PGE restrictions.³⁸⁶

This role does not require former DOD officials to communicate with their former organizations. It is not clear whether the type of assistance provided would count as behind-the-scenes support to such communications; however, the lack of clarity on this issue appears to have dissuaded at least some former officials from providing such assistance.

c. Other Defense-Adjacent Employers

In addition to working for defense contractors, former senior DOD officials provide value to the Department through a number of other employers. Because the PGE statutes and regulations generally apply to all NFEs and not just to defense contractors, former officials are likely to be limited in the services that they can perform on behalf of these employers. What follows is a brief description of other types of employers that frequently employ DOD officials. Additional information on the roles that former officials play on behalf of such employers is provided in following subsections, addressing the types of positions that former officials fill.

1) Management consultants

Numerous interviewees reported that they currently work as consultants of one kind or another. Some of these individuals work as consultants to either traditional or non-traditional defense contractors and provide services similar to those provided by employees of such contractors, as described previously. Others work for management consulting firms that provide advice directly to the Department. These individuals frequently work as a part of teams of management experts, including recent business school graduates. Former DOD officials report that they provide value to these teams (and, through them, to the Department), because “if they haven’t lived in that labyrinth, they don’t get it and [don’t know] how hard it is.”³⁸⁷ This role does not

³⁸⁴ Interview, December 4, 2023.

³⁸⁵ Interview, November 13, 2023.

³⁸⁶ Interview, November 24, 2023.

³⁸⁷ Interview, retired career civilian, December 1, 2023.

necessarily require communication with the individual's former organization but could run afoul of prohibitions on behind-the-scenes activities.

2) FFRDCs

Several interviewees reported that they work on a full- or part-time basis for FFRDCs performing R&D and providing trusted advice on behalf of the Department. These individuals are likely to work alongside scientists, engineers, economists, statisticians, and other highly credentialed experts. Former DOD officials report that they add value to the advice provided by FFRDCs by providing their "honest feedback and opinion" based on years of experience.³⁸⁸ "Former military officers have incredibly valuable experience, which can turn into valuable insights and recommendations," a retired 3-Star reported.³⁸⁹ Similar to management consulting positions, this role does not necessarily require communication with the individual's former organization but could run afoul of prohibitions on behind-the-scenes activities.

3) Training program administrators

Several interviewees indicated that they have chosen to "give back" to the Department by helping to train their successors. Retired GOFOs have long participated in established DOD officer training programs such as the CAPSTONE, KEYSTONE, and PINNACLE programs and the more narrowly tailored programs developed for specific commands or occupational communities. For ease of administration, the Department has chosen to use contractors to run many of these programs. The contractors do not generally provide substantive input or content for the training programs but help perform pay, scheduling, and other administrative functions. All these programs entail direct communication between former DOD officials and their former colleagues.

Unlike senior mentors who are appointed as "highly qualified experts" and are considered to be government employees to participate in wargames and operational planning and decision-making exercises, contracted trainers typically teach in executive leadership courses designed to prepare future senior leaders. IDA understands that communications made during such training programs do not trigger the restrictions of sections 207(c) and 1045 as long as they follow an approved curriculum, because such communications are not considered to be made "on behalf of" the contractor administering the program with an intent to influence DOD and are called for by the terms of the contract. However, any discussion with DOD officials about problems and issues that may arise regarding contract performance could trigger the restrictions. Unfortunately, the line between permitted and prohibited communications appears to be neither clear nor well-understood in the affected community. As a result, interviewees report that questions have been raised about

³⁸⁸ Interview, retired 4-Star, December 5, 2023.

³⁸⁹ Interview, December 4, 2023.

whether these communications could be considered to be made “on behalf of” contractors and that these questions have led recent retirees to back out of participation.³⁹⁰

4) Non-profits and associations

Numerous former senior DOD officials work on a full- or part-time basis for non-profit organizations such as the Fisher House Foundation, the National Military Family Association, and the Green Beret Foundation and for professional associations such as the National Contract Management Association and the American Society of Military Comptrollers. Interviewees reported that while the officers and employees of these organizations are paid, board members and trustees often serve as unpaid volunteers.³⁹¹ The Department has taken the position that section 1045 does not prohibit uncompensated activities, because the LDA definition of “lobbying contact” refers to a communication “on behalf of a client,” and a “client” is defined as a person or entity that “employs or retains another person for financial or other compensation.” Nonetheless, some former DOD officials have expressed concern that unpaid activities for these organizations may be subject to the same restrictions as paid employees of defense contractors, leaving some to refrain from such activities during their cooling-off periods.

D. What Types of Positions do Former DOD Senior Officials Fill?

Consistent with previous reports, the IDA review found that a significant number of former senior DOD officials who work for defense contractors perform government relations functions on behalf of their employers. However, the IDA review found that former officials also perform a wide array of more diverse functions. Almost none of the former DOD senior officials leaving the Department in the last decade have become registered lobbyists.

1. Quantitative Results

The IDA team analyzed the work that former senior DOD officials perform in two ways. First, IDA identified whether these officials become registered lobbyists for top defense contractors by comparing the lists of former GOFOs and SESs provided by DOD and the services with the names of all people who have been registered as a lobbyist for a top 100 defense contractor. Second, IDA assessed the job titles of former GOFOs and SESs based on LinkedIn data and AGEAR data. The IDA analysis shows that fewer than one percent of former DOD senior officials become registered lobbyists for major defense contractors. A far larger number of former senior officials take jobs as consultants, executives, board members, and other positions.

³⁹⁰ Interview, retired 4-Star, December 6, 2023; Interview, retired career civilian November 20, 2023.

³⁹¹ Interview, November 28, 2023.

a. How many former officials become registered lobbyists for top 100 defense contractors?

One of the ways in which post-government employment is measured is by identifying whether former DOD officials become registered lobbyists after they leave DOD. Two sources of data are used:

- Names of all former GOFOs, SESs, and PASs who left DOD since 2014 and
- A list of all registered lobbyists for the top 100 defense contractors since 2014.

Privacy and data-use agreements prevent use of the DMDC administrative personnel data used in the retention analyses to identify former DOD officials by name. Instead, the IDA team was provided the list of names by each service (for GOFOs) and by DOD (for SES/PAS). The list of registered lobbyists was obtained from the Office of the Clerk Lobbying Disclosure database.

The matching procedure is straightforward. Since last names are unlikely to vary across the samples, IDA created a variable that identified whether the last name of a former DOD official matched the last name of any of the DOD registered lobbyists. For first-name matches, however, an automated precise match is infeasible. It is possible that one list might contain the person's legal first name while the other list contains a common nickname (or their first initial plus a middle name). To avoid falsely excluding matches on the basis of common nicknames, the IDA team manually checked each former DOD official with a last name match to all the matches in the registered lobbyist list, with uncertain cases assumed to be matches.³⁹²

Far less than one percent of former DOD officials became registered lobbyists for top 100 defense contractors in this time period. Table 2 shows the counts by service.

³⁹² To use a hypothetical example, suppose that the sample included a retired GEN Edward Timothy Williams, III. This name would have been marked as a match to any of the following (footnote 394 continued at bottom of next page):

- Edward Williams
- Ed Williams
- E. Timothy Williams
- E. T. Williams.

In practice, matching was typically straightforward, and there are minimal concerns about having any significant number of false negatives for two reasons: First, last names typically did not match. Last names like "Williams" with multiple entries in both lists were the exception, not the norm. Second, for last names that did match, there was not a multitude of obvious nicknames. In cases like the hypothetical one at the beginning of this footnote, "Edward" was far more likely fail to match to names like "Margaret," "Reginald," and "Trent" than to fail to match to something that would have required a judgement call (such as "Tim" or "Tripp").

Table 2. Who Is A Registered Lobbyist for Top 100 Contractors?

	Number retired, 2014+	Number Registered As Lobbyists with Top 100 Defense Contractors, 2014+
Army GOs	432	0
USAF GOs	409	1
Navy FOs	366	1
USMC GOs	314	0
SES/PAS	1624	9

The small share of registered lobbyists becomes even more stark when illustrated graphically (see Figure 10).

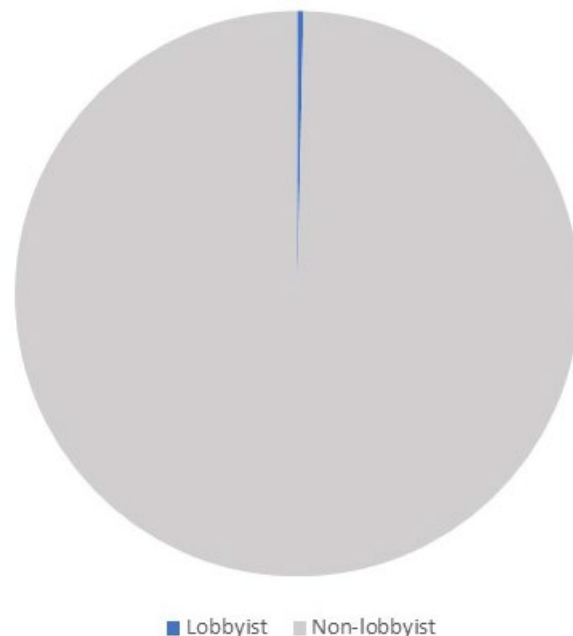


Figure 10. What Share of Former Senior DOD Officials Are Registered Lobbyists for a Top 100 Defense Contractor?

These data raise the question: If not formal lobbying, what do retired senior officials do for the organizations that employ them? To answer that question, the analysis turns back to the LinkedIn data detailing the self-reported employment of retired GOFOs.

b. What roles do former senior DOD officials fill?

The LinkedIn data and the steps taken to collect and clean that data were described in a previous section. Here, instead of analyzing where retired senior officials work, the analysis focuses on what kinds of roles they have for those employers. To do so, listed job titles (e.g., “VP of Research and Strategy”) and job descriptions are used. Job descriptions can vary substantially

in length, from no description to a several sentences. These fields are searched for key terms to separate positions into six categories: consultants,³⁹³ academics,³⁹⁴ board memberships,³⁹⁵ CEOs, other executives,³⁹⁶ and HQE/Senior Mentors.³⁹⁷

As with the employer data, the IDA team calculated whether each retired GOFO in our sample has held at least one of each type of position. Because retired GOFOs can and frequently do have more than one job after retiring, the probabilities sum to more than 100 percent. Figure 11 shows the frequencies of these jobs (held at any point since retirement), with executive (68 percent), board member (42 percent), and consultant (41 percent) being the prominent roles held by these officials.



Figure 11. How Many GOFOs Hold at Least One of These Types of Jobs on LinkedIn?

The jobs titles of retired GOFOs look similar when sample is limited to jobs held within the first two years of retirement. As with employer types, we do not see evidence of substantive differences in immediate job titles and job titles overall.

Job titles show a similar pattern in AGEAR (see Figure 12). Recall that top DOD contractors were much more common in AGEAR requests than in actual employment.³⁹⁸ Despite this difference, a similar concentration of executives and consultants are seen in AGEAR as in the LinkedIn data. Academic and researcher positions, already uncommon in LinkedIn, are even less

³⁹³ Positions where the title or description include the words “consultant” or “advisor” and include Limited Liability Corporations (LLCs) that individuals incorporate themselves.

³⁹⁴ Positions with the words “adjunct”, “professor”, “instructor”, “faculty”, “fellow”, or “lecturer” in the title or description.

³⁹⁵ Identified using the terms “chairman/woman/person”, “director”, or “board member”.

³⁹⁶ Positions containing the words “president”, “chief”, “VP/vice president”, “principal”, “partner”, “associate”, or “executive” and where the position has not already been categorized as another type of role.

³⁹⁷ Positions that contain the term “senior mentor” or “HQE/highly qualified”.

³⁹⁸ This pattern could be a consequence of the highly selected sample in AGEAR and the fact that, by definition, all AGEAR requests are for prospective employment with DOD contractors.

common in AGEAR (probably because these positions are less likely to trigger the AGEAR requirement for a formal legal opinion).



Figure 12. What Were the Job Titles Involved in Senior Officials' AGEAR Requests?

This section's results are internally consistent with the rest of the quantitative findings. Increased PGE restrictions introduced in section 1045 did not coincide with a measurable sustained change in GOFO or SES retention. The rest of the results add context about why this might be the case: retired GOFOs typically do not work for top DOD contractors immediately upon leaving service, and, when they do work for top contractors, they are almost never registered lobbyists. Instead, there is concentration among executives, consultants, and board members. While performance of these jobs may be limited in some dimension by existing PGE restrictions, the fact that they are commonly held even while retired GOFOs are subject to PGE restrictions suggest that minimal retention impact might be expected.

It is still possible, however, that PGE restrictions are affecting employment in ways that we cannot measure here. Perhaps retired DOD officials are becoming executives, consultants, and board members, but PGE restrictions are limiting what duties they can perform in those roles and making them less effective than they otherwise would be. The data from LinkedIn and AGEAR cannot really capture this dynamic. Instead, this report once again turns to the qualitative analysis to provide additional information on the types of work performed by former senior DOD officials employed by defense contractors and the value that this work provides to the contractors and to the Department.

2. Qualitative Results

As IDA's quantitative analysis demonstrates, very few former DOD senior officials who work for defense contractors are employed as registered lobbyists. IDA's interviews confirm that former senior officials are most likely to be employed as board members, executives, or consultants.

Many of these officials have at least some government relations responsibilities. Several interviewees indicated that they have provided introductions to former senior officials, while a

smaller number stated that they had contacted the Department on behalf of an employer. Likewise, interviewees indicated that while they were in their government roles, they occasionally met with former senior officials. Preventing the abuse of such contacts is a fundamental purpose of the PGE statutes and regulations.

IDA interviewees indicated that they also have significant responsibilities that do not require regular interaction with DOD officials. While a “rolodex” of contacts in the Department may be important for some employers, interviewees indicated that former DOD senior officials also brought years of accumulated knowledge and experience to their new employers. This knowledge and experience can provide continuing benefits not only to their employers, but also to the Department.

The value that former senior DOD officials are believed to provide to their employers and to the Department when they work for defense contractors in different roles is described in the Subsections 5.D.2a–5.D.2.c.

a. Board members

Former senior DOD officials serve on two different types of contractor boards: boards of directors and boards of advisors.

A board of directors is a formal body, generally elected by the shareholders of a corporation. It has fiduciary duties to the corporation under State law. Boards of directors may have responsibility for overseeing budgets, establishing dividends, approving major investments, determining executive compensation, and hiring or firing senior executives.³⁹⁹

Most former senior DOD officials who serve as board members serve as “outside directors”—directors who are not employees or major shareholders of the company. As a general rule, outside directors are selected for their independence and objectivity, their industry knowledge and leadership expertise, their reputations, and the credibility that they can bring to the company. Smaller companies may also seek to leverage the networks of their directors to help build business.⁴⁰⁰

³⁹⁹ James Chen, “Board of Directors: What It Is, What Its Role Is,” *Investopedia*, August 18, 2023, <https://www.investopedia.com/terms/b/boardofdirectors.asp>.

⁴⁰⁰ Maria Castañón Moats et al., “Ramping Up Board Effectiveness: Why Private Company Boards Need Outside Directors,” PwC, May 2022. <https://www.pwc.com/us/en/services/governance-insights-center/pwc-why-private-company-boards-need-outside-directors.pdf>; Patrick Henry, “6 Things to Look for When Picking Your Company’s Board of Directors,” *Inc.*, August 10, 2017, <https://www.inc.com/patrick-henry/6-things-to-look-for-when-selecting-your-companys-.html>; David Larcker and Brian Tayan, “The First Outside Director,” Harvard Law School Forum on Corporate Governance, May 18, 2020, <https://corpgov.law.harvard.edu/2020/05/18/the-first-outside-director/>; Maria Moats, Shawn Panson, and Carin Robinson, “Why Private Company Boards Need Outside Directors,” Harvard Law School Forum on Corporate Governance, May 23, 2022, <https://corpgov.law.harvard.edu/2022/05/23/private-company-boards-need-outside-directors/>; Belle Wong, “Ins and Outs: The Basics of Having an Outside Director,”

A board of advisors is an informal body that does not have any formal decision-making authority or fiduciary responsibility and is constituted to provide advice to a company's executive leadership. While advisory boards are tailored to meet the needs of a specific company, they frequently provide advice on issues such as strategic direction, networking and partnerships, new markets, and crisis management. Members of advisory boards may be selected to bring new perspectives, bring credibility, and provide frank opinions or to bring specific expertise needed by the company.⁴⁰¹

IDA interviewees who serve on boards of directors noted their primary role as fiduciaries and representatives of company shareholders, providing oversight to the company's activities. Several described serving on committees addressing issues such as audits, nominations, and governance. All interviewees emphasized the strategic advice that they provide to companies based on their knowledge of how their primary customer works and what that customer is likely to need.⁴⁰² For example, a retired 4-Star officer stated that a lifetime in the military provides important experience in how to build a strategy and how to respond to a crisis.⁴⁰³

IDA interviewees who serve on boards of advisors described their primary role as one of providing strategic advice to the company. For example, one former PAS official stated that his role is "to help coach the management team."⁴⁰⁴ Similarly, a retired general officer stated that the role is "providing advice based on the experience that you have in the market that the company operates in."⁴⁰⁵ This officer also noted that the reputational impact of hiring a senior DOD leader is important to some companies: "Small companies think that there's a lot of power and having a 2- or 3-Star on their board. Just having the name on the board gives them prestige."⁴⁰⁶

Board members interviewed by IDA stated that their role is almost entirely internal and that they rarely, if ever, interface with DOD officials on behalf of their companies. "The companies that I am with are very shy about using advisors to 'open the door' on their behalf," one former PAS official stated.⁴⁰⁷ A second PAS official stated that she will occasionally suggest to company executives that they speak to a specific individual in the Department but never undertakes those

LegalZoom, November 1, 2023, <https://www.legalzoom.com/articles/ins-and-outs-the-basics-of-having-an-outside-director>.

⁴⁰¹ Talal Rafi, "Why Advisory Boards Are Important For Business Corporations," *Forbes*, October 20, 2020, <https://www.forbes.com/sites/forbesbusinesscouncil/2020/10/20/why-advisory-boards-are-important-for-business-corporations/?sh=69e8d7a83f72>; Martin Rowinski, "How to Build a Board of Advisors for Company Success," *Forbes*, May 26, 2022, <https://www.forbes.com/sites/forbesbusinesscouncil/2022/05/26/how-to-build-a-board-of-advisors-for-company-success/?sh=2e63479769c2>.

⁴⁰² Interviews, November 21, November 28, and November 30, 2023.

⁴⁰³ Interview, November 20, 2023.

⁴⁰⁴ Interview, December 4, 2023.

⁴⁰⁵ Interview, November 28, 2023.

⁴⁰⁶ Interview, November 28, 2023.

⁴⁰⁷ Interview, November 30, 2023.

conversations herself.⁴⁰⁸ Similarly, a retired general officer indicated that some smaller companies expect their directors to make introductions on their behalf but that she prefers to avoid such work.⁴⁰⁹

The board members indicated that they are more likely to provide advice to their companies on how to work with the Department. However, they generally see this advice as benefiting the company and the government. As one former PAS official explained, she helps companies understand how the Department functions, why it functions that way, and how its authorities and responsibilities are aligned. She then explained the value that this advice provides to the company and the government:

I have seen companies start to go down directions that are simply not aligned to how the government can perform its business. And these companies can go under. That's why I work with several small companies as well as large companies. And the challenge is that they don't understand ... the operational needs of the services.... [That's] my role. Personally, I feel that helps national security ... to be able to help industry focus its energy in directions that are aligned with current government intentions.⁴¹⁰

b. Executives and managers

The Quincy report dismisses the possibility that former senior officials could be hired because of their management expertise with the conclusory statement that “[t]heir job is to promote projects and practices that boost the bottom lines of their new employers, not to weigh in on how the firms carry out their government-funded projects, for good or ill.”⁴¹¹ As shown previously, however, IDA’s analysis shows that a substantial percentage of former DOD senior officials working for major defense contractors are hired into executive and/or management positions. One interviewee stated that he had seen senior government officials hired as executives, as managers of business units, as program managers, and even in functional positions (e.g., as lawyers).⁴¹² A second industry executive noted that former DOD officials serve in various positions on his company’s project teams, based on their previous experience in areas such as logistics, maintenance, or operations. Similarly, a current government official noted that some chief technology officers of defense contractors are former government officials.⁴¹³

These executives appear to be hired because of their management ability and because they understand how the customer works and what the customer needs. For example,

⁴⁰⁸ Interview, November 21, 2023.

⁴⁰⁹ Interview, November 28, 2023.

⁴¹⁰ Interview, November 30, 2023.

⁴¹¹ Hartung and Fisher. “March of the Four-Stars, 7.

⁴¹² Interview, November 29, 2023.

⁴¹³ Interview, December 7, 2023.

- A retired 4-Star stated that senior military officials learn to manage change, build strategic paths to goals, absorb information quickly, and respond to crises. These skills become useful in the private sector for mapping strategy, managing talent, providing direction, and navigating change.⁴¹⁴
- A former PAS official stated that “when contractors hire a former government official to be a program manager, it is because they believe not only that the government builds good program management skills, but also because they believe that the former official will understand what the government is looking for and be able to help tailor a program in the right direction.”⁴¹⁵
- A former DOD official who built a career in industry after leaving the Department stated that “most of my energy in senior positions was expended internally” to the company rather than working directly with the government. His role, he explained, was directed toward “shaping behaviors, activities, and understandings within the company,” helping it become a better supplier to the government.⁴¹⁶

In short, the value provided by former DOD officials in executive and management positions appears to be similar to the value provided by board members. While these positions do not necessarily require the executives and managers to contact their former colleagues in the Department, restrictions on behind-the-scenes support to such communications could reduce the value that they provide to industry and to the government.

c. Consultants and advisors

Finally, many former DOD senior officials interviewed by IDA currently work as consultants or advisors for defense contractors. Some of these individuals have formed their own consulting firms, and others have joined partnerships or larger consulting groups. In general, however, these consultants and advisors can be divided into two groups: (1) those who work exclusively or almost exclusively behind the scenes and (2) those who contact government officials on behalf of their new employers.

Behind-the-scenes consultants and advisors told IDA that they help their clients understand the DOD organization and who they need to contact, decode DOD priorities and understand what the Department is trying to tell them, navigate unfamiliar government-unique business requirements, and modify their products and technologies to better need military needs. For example,

⁴¹⁴ Interview, November 20, 2023.

⁴¹⁵ Interview, October 31, 2023.

⁴¹⁶ Interview, November 29, 2023.

- One consultant described helping a client understand the common interface needed to enable a small unmanned aerial vehicle to provide military utility.⁴¹⁷
- A second consultant described helping environmentally friendly companies adjust their technology offerings to meet defense needs.⁴¹⁸
- A third consultant said that she helped clients understand how to cost programs and with whom to speak to when they needed to get a better understanding of a DOD requirement.⁴¹⁹
- A fourth consultant said that his role was to help companies better understand how the Department’s resourcing process—the so-called Planning, Programming, Budgeting and Execution (PPBE) system—works in practice.⁴²⁰

Activities of these types appear to provide value to industry and to the government and to pose little risk of improper influence. In most circumstances, these activities are not prohibited by current law and regulation, but they could be precluded by a more expansive prohibition on behind-the-scenes advice. In the view of IDA interviewees, the result would be “absolutely detrimental” to government and industry alike,⁴²¹ “insane,”⁴²² and a “massive brain drain”⁴²³ that “[deprives] the federal government of the experience that they built and grew.”⁴²⁴

Company officials and consultants interviewed by the IDA team stated that former senior DOD officials working as government-facing consultants and advisors are more likely to work as a channel of communication between government and industry than as “salesmen.” For example,

- One interviewee explained the role of former senior officials as “intelligence gatherers” who “feed back into the corporate structure what the customer wants” to help guide not only current sales activities, but also investment in future research and product development.⁴²⁵
- A second interviewee stated that former senior officials are often asked to meet with the Department because they bring “the value of a common language,” positioning them to better understand what the government needs.⁴²⁶

⁴¹⁷ Interview, December 7, 2023.

⁴¹⁸ Interview, December 1, 2023.

⁴¹⁹ Interview, November 30, 2023.

⁴²⁰ Interview, November 20, 2023.

⁴²¹ Interview, December 7, 2023.

⁴²² Interview, November 30, 2023.

⁴²³ Interview, November 17, 2023.

⁴²⁴ Interview, December 1, 2023.

⁴²⁵ Interview, November 29, 2023.

⁴²⁶ Interview, October 31, 2023.

- A third interviewee stated that this work is performed most often by former officials with operational expertise rather than by former acquisition officials. He suggested that leaders with operational experience are the ones who have the contacts with combatant commands and other user organizations and best understand the military needs that must be matched with technical capabilities.⁴²⁷

Multiple interviewees confirmed that they saw the “translator” role played by former DOD senior officials from the government side of the table. One interviewee told IDA that “it absolutely helps” when a former government official accompanies the contractor to a meeting because this official understands the language and the government processes. “I can create initiatives to help solve problems as a result of this interaction,” she stated.⁴²⁸ A second interviewee said that he would frequently tell former government officials working with contractors, “You know what we do. Bring us something that makes us better. Don’t sell something that I don’t need. That’s not going to be effective.”⁴²⁹ A third interviewee stated that when she called contractor representatives into her office to discuss a problem, she “would pray” that they would bring former government officials with them. When they did,

It was quick. They knew exactly what to tell me. Industry doesn’t know how to explain themselves. They’re going to try to continue to sell when they’re in the room. [If] their business or their marketing people come, it is very hard to get honest ground level information.... The [former] government person has the ability to tell you that you don’t have clothes on when you need to hear it, when everybody else is afraid to hurt your feelings or somehow that there would be retribution.”⁴³⁰

Representational activities by former senior DOD officials are appropriately prohibited during cooling-off periods mandated by statute and EO. Policymakers considering whether to extend or expand existing cooling-off requirements should weigh the value of such an extension in reducing the opportunity for the improper influence against the value that former officials can play as effective channels of communication between government and industry.

⁴²⁷ Interview, November 28, 2023.

⁴²⁸ Interview, December 7, 2023.

⁴²⁹ Interview, November 6, 2023.

⁴³⁰ Interview, November 30, 2023.

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6. Potential Modifications to Requirements

This chapter examines potential modifications to the covered ethics requirements. This report does not recommend specific changes; rather, it considers a range of alternatives and assesses the pros and cons of each. Pros and cons are assessed in light of a wide range of factors, including (1) the impact of potential changes on DOD's ability to detect, deter, and redress violations of ethical standards; (2) the impact of the potential changes on the Department's ability to hire and retain personnel and to access needed knowledge and expertise; and (3) the importance of clear and well-understood standards of conduct.

A. Potential Modifications to Section 1045

Policymakers considering section 1045 could select either of two bookend options:

- At one extreme, policymakers could choose to retain the provision without change. This approach would preserve the perceived deterrence and prevention value of the expanded two-year ban, the limitations on lobbying of non-defense agencies with regard to DOD matters, the limitation on lobbying of all DOD components, and other changes made by the provision. However, it would also maintain the confusing LDA terminology infused into the PGE laws by this section as well as the problematic restrictions on behind-the-scenes activities that bear little connection to the core purpose of preventing improper influence.
- At the other extreme, policymakers could choose to repeal the provision outright. This approach would restore a single, executive-branch-wide standard for PGE restrictions, eliminating the confusing LDA terminology and the problematic behind-the-scenes restrictions in section 1045. It would minimize negative impacts on government access to the knowledge and expertise of former senior officials while still continuing to preclude the most obvious opportunities for abuse. However, this approach would be seen by some as providing reduced protection against opportunities for improper influence by prohibiting a narrower range of post-employment activities by former DOD senior officials for a shorter period of time.

The review team considered a wide range of potential modifications to section 1045 that would preserve most of the perceived benefits of the provision regarding deterrence and prevention while reducing the costs of confusion and uncertainty imposed by the current language. Three categories of options were considered:

- Options that would establish a single conflict of interest standard applicable across the Executive Branch of government,
- Options that would modify section 1045 to provide greater consistency with the well-defined terminology of longstanding executive-branch-wide standards, and
- Options that would modify section 1045 to clear up areas of obvious uncertainty and confusion.

Within each category, two or three specific options of varying stringency were considered. Table 3 lists the major approaches and options considered by the IDA team.

Table 3. Legislative Options Considered by the IDA Team

	Description
Single Executive Branch-Wide Standard	
Option 1	Repeal section 1045 and amend section 207(c) to incorporate the substantive aspects of section 1045's expanded coverage—the two-year restriction on the most senior former government personnel, the broader category of current officials with whom contact by former government personnel is limited, and the restriction on behind-the-scenes work—on a government-wide basis
Option 2	Repeal section 1045 and amend section 207(c) to incorporate the substantive aspects of section 1045's expanded coverage, except for the problematic restriction on behind-the-scenes work
Use of Well-Defined Terminology⁴³¹	
Option 3	Amend section 1045 to conform the terminology to section 207 but leave the policies of section 1045 substantively unchanged
Option 4	Amend section 1045 to conform the terminology to section 207 and leave the policies of section 1045 unchanged, except for the problematic restriction on behind-the-scenes work
Option 5	Amend section 1045 to conform the terminology and the coverage of the provision to section 207, eliminating DOD-unique standards
Minor Modifications to Section 1045⁴³²	
Option 6	Amend section 1045 to prohibit only “lobbying contacts” and eliminate the problematic restriction on behind-the-scenes activities, while leaving the provision otherwise unchanged
Option 7	Amend section 1045 to limit the restriction on behind-the-scenes activities to those that provide “material assistance” to lobbying contacts, as provided in EO 13989

⁴³¹ These options would amend section 1045 to eliminate the references to the LDA and substitute language based on the well-defined terms of section 207.

⁴³² These options would retain the references to the LDA in section 1045 while addressing the issues caused by the provision's coverage of behind-the-scenes activities.

The IDA team considered the potential costs and benefits of each of these options. The approach of establishing a single executive-branch-wide standard was set aside on the grounds that it would be the most difficult to implement because it would require modifications to laws and regulations that extend far beyond DOD and raise significant jurisdictional issues in the Congress. Of the remaining options, IDA assessed that Option 3 and Option 4 provided the most promising approaches, with the potential to preserve most of the benefits of section 1045, while eliminating the most problematic aspects of the provision. The IDA team does not make a specific legislative recommendation but outlines the pros and cons of these two options for the consideration of policymakers in the Department and in Congress.

- **Option 3. Amend section 1045 to conform the terminology to section 207 but leave the policies of section 1045 substantively unchanged.** This approach would significantly reduce the confusion and uncertainty caused by section 1045 without undermining its substantive protections by adopting the longstanding and well-understood terminology used in 18 U.S.C. § 207 in lieu of the terms imported from the LDA.
 - Pros
 - Would reduce the confusion and uncertainty caused by the introduction of terminology from the LDA into post-employment laws, making it easier for senior DOD officials to understand and comply with the restrictions.
 - Would maintain strong protection against opportunities for improper influence by leaving protections against post-employment activities by former DOD officials substantively unchanged.
 - Cons
 - Would continue to apply a unique standard to former DOD officials that would not apply to former officials from other executive branch agencies.
 - Would continue to cause confusion by using inconsistent standards and language, such as the problematic behind-the-scenes and prohibition representations based on an individual's appointment status.
 - Would continue to limit the Department's access to the knowledge and expertise of former DOD senior officials.
- **Option 4. Amend section 1045 to conform the terminology to section 207 and leave the policies of section 1045 unchanged, except for the problematic restriction on behind-the-scenes work.** This approach would modify section 1045 to reduce confusion and uncertainty by mirroring the terminology used in 18 U.S.C § 207 *and* eliminate the potentially counterproductive restriction on behind-the-scenes activities.
 - Pros

- Would reduce the confusion and uncertainty caused by the introduction of terminology from the LDA into post-employment laws, making it easier for senior DOD officials to understand and comply with the restrictions.
- Would eliminate the aspect of the section 1045 restrictions with the weakest connection to improper influence and other potentially detrimental activities.
- Would maintain strong protection against opportunities for improper influence by prohibiting a wide range of post-employment activities by former DOD officials for an extended period of time.
- Would provide the Department with improved access to the knowledge and expertise of former DOD officials.
- Cons
 - Would continue to apply a unique standard to former DOD officials that would not apply to former officials from other executive branch agencies.
 - Could be perceived by some as weakening PGE restrictions.

A further modification to Option 4 could harmonize the range of current government officials with whom contact is prescribed by eliminating restrictions on contacts with officials of non-defense agencies and/or officials in DOD components other than the component in which the former official worked. If all these changes were made, section 1045 would differ from section 207 only in the two-year restriction imposed on officers serving in positions at a grade at or above O-9 and their civilian equivalents.

Appendix G contains the Draft Legislation for Options 3 and 4.

B. Potential Modifications to Other Covered Provisions

1. Section 1117

Policymakers considering section 1117 could choose to retain the provision in its entirety, preserving its benefits and its costs. In the alternative, they could choose to repeal the provision, which could expose the Department to the perception of improper conduct based on ties and affinities that last for more than one year but would also enhance the Department's access to expertise by enabling new DOD officials to participate in a broader range of decisions.

The review team considered a range of potential modifications that could eliminate confusion and uncertainty caused by the language of section 1117 without reducing the Department's ability to detect, deter, and redress violations of ethical standards. Each of these options is designed to harmonize the language of section 1117 with the language of related provisions. These changes would streamline recusal requirements and make them easier to understand but increase recusal requirements for some executive branch personnel.

- **Option 8. Harmonize the recusal periods based on past employment and associations with non-federal entities by modifying the executive-branch-wide regulations in section 2635.502 to provide a two-year recusal period.**
 - Pros
 - Would reduce confusion and uncertainty by conforming regulatory language to the statutory standard.
 - Since all DOD officers and employees are covered by section 1117, a change to the regulatory language would not adversely impact the Department.
 - Cons
 - Would subject employees of other federal agencies to the heightened recusal standard applicable to DOD officers and employees.
 - Would require government-wide action beyond the control of the Department.
- **Option 9. Harmonize the types of previous associations for which recusal is required by modifying the list of types of associations covered in section 1117 to be identical to the list in the executive-branch-wide regulation (5 CFR § 2635.502).**
 - Pros
 - Would reduce confusion and uncertainty by conforming the language of overlapping provisions that impose similar requirements.
 - Cons
 - Would increase the length of the recusal period for DOD officials who formerly held a position as an agent, attorney, consultant, or contractor for an additional year. Would provide further barriers to the Department's ability to access the knowledge and expertise of currently serving officials.
- **Option 10. Harmonize types of matters for which recusal is required based on potential employment by modifying the section 1117 language regarding future employment to cover all particular matters, including particular matters of general applicability.**
 - Pros
 - Would reduce confusion and uncertainty by conforming the language of overlapping provisions that impose nearly identical requirements.
 - Would not impose any new requirements on DOD officers or employees, or the employees of any other federal agency.

- Cons
 - Would require a significant effort for a change with no impact on substantive requirements.

2. Section 988

The differences in coverage and terminology between section 988 and the executive-branch-wide ethics statutes and regulations add some minor complexity to divestiture requirements. IDA's interviews of DOD ethics officials did not indicate that this issue has been particularly problematic for the Department. Accordingly, IDA did not assess any options for legislative changes to this provision.

3. Section 847

The review team considered a range of options to address the most problematic aspect of section 847: the requirement to obtain a written ethics opinion before accepting compensation with any of 30,000 contractors, including contractors with minimal ties to the Department and with whom a former DOD official never engaged while in office. In designing these options, the team sought to preserve the core requirement for senior officials and acquisition officials to obtain written ethics opinions in cases where significant issues need to be addressed while reducing overall paperwork requirements. However, none of the options identified by the team fully met these objectives.

- **Option 11. Limit the requirement to obtain written ethics opinions to covered officials seeking employment with major defense contractors (i.e., companies that are one of the 100 entities awarded the greatest amount of contract dollars by DOD in a fiscal year during the five preceding fiscal years).**

- Pros
 - Would streamline paperwork requirements by reducing the number of companies with regard to which ethics opinions would be required from 30,000 to 100.
 - Would retain requirement for ethics opinions with regard to the contractors most closely connected with the Department while eliminating those contractors that have done a minimal amount of defense contracting and are unlikely to have a connection to an official's prior work.
- Cons
 - Would create a potential blind spot concerning the risk of PGE violations with regard to companies outside the top 100 contractors.
 - Would not address the issue that many of the top 100 defense contractors may have no connection to the former employee's duties.

- Would be perceived by some as weakening an ethics enforcement mechanism.
- **Option 12. Limit requirement to obtain written ethics opinions to (a) prime contractors on contracts in which the former covered official participated personally and substantially while in office or (b) prime contractors on the acquisition that triggered the section 847 requirement.**
 - Pros
 - Would match the requirement to the problem, requiring a written ethics opinion only in cases where there is significant potential for a conflict based on the senior official's previous work.
 - Would streamline paperwork requirements by eliminating companies that have no connection to the official duties of the former DOD official from the requirement to obtain written ethics opinions.
 - Cons
 - Would potentially miss some contractors with whom there is a connection with the senior official's previous work.
 - Would eliminate bright-line test for contractors, who would not necessarily know which former government officials require ethics opinions.
 - Would be perceived by some as weakening an ethics enforcement mechanism.

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7. Conclusion

The central purpose of federal ethics laws and regulations is to ensure that executive branch employees conduct themselves in a manner that places the public interest above any private interest. Debate about the appropriate ethics standards for executive branch employees has been particularly pointed with regard to former DOD personnel who go to work for defense contractors. Some public-interest advocates argue that the current restrictions are insufficient and that a “revolving door” between DOD and its contractors creates the appearance those who remain in government are being improperly influenced by their former colleagues. Others express the view that these restrictions “have grown out of proportion to public need and to common sense” and undermine the Department’s ability to attract and retain the talent that it needs.

To some extent, these competing views arise out of opposing assessments of the defense industry. For those who view the defense industry as “the arsenal of democracy,” providing essential capabilities that underwrite national security, former defense officials who work for contractors are perceived as continuing to serve the national security in a new role. Those who see instead a “military industrial complex” that “often confuses what is in the best financial interests of defense contractors—excessively large Pentagon budgets, endless wars, and overpriced weapon systems—with what is in the best interest of military effectiveness and protecting citizens” find it more difficult to see value to the government in the work that former defense officials perform for contractors.

In accordance with the requirements of section 1073, IDA addressed seven major issues with regard to ethics legislation applicable only to DOD personnel:

1. How the covered provisions are inconsistent or incongruent with statutes and regulations that apply to all executive branch employees;
2. The extent of any confusion or uncertainty in the interpretation of the covered provisions;
3. The extent to which these provisions may affect the ability of the Department to detect, deter, prevent, and redress violations of applicable ethics standards;
4. Whether the removal or alteration of the provisions may adversely affect the ability of the Department to negotiate and effectuate arms-length transactions;

5. How the covered provisions have affected, or are likely to affect, the recruitment and retention of personnel, particularly those with specialized experience or training, by DOD;
6. How these provisions may affect the ability of the Department to obtain expertise from industry and other groups in support of technology development, supply chain security, and other national security matters; and
7. Whether the application of these requirements exclusively to DOD personnel is justified.

With regard to these issues, IDA found the following:

1. **Inconsistency and overlap.** The ethics provisions under review substantially overlap with executive-branch-wide ethics provisions that address the same issues but differ in several significant ways. The differences are particularly acute with regard to section 1045. When compared to laws, rules, and EOs that apply across that executive branch, section 1045 restricts former DOD officials' communications with current government officials outside the former officials' DOD components; establishes a two-year restriction for the most senior former DOD personnel; prohibits not only communications with current government officials, but also, in some cases, behind-the-scenes activities in support of such contacts; and uses completely different and inconsistent terminology.
2. **Risk of confusion.** The proliferation of ethics provisions that address the same or similar issues, impose somewhat different restrictions, and use slightly different language creates a patchwork of requirements and risks confusion that could undermine compliance and enforcement. This risk is particularly acute regarding section 1045, which introduces terms from the LDA such as "lobbying contacts," "lobbying activities," "covered officials," and "covered matters," which have no direct counterpart in executive-branch-wide ethics laws. Former DOD individuals interviewed by IDA reported that they had difficulty understanding the PGE rules (especially section 1045) and felt it necessary to seek ethics advice from the Department on numerous occasions after leaving office. DOD ethics officials reported that the section 1045 prohibitions are difficult to explain and do not align well with what most people think of as "lobbying." The confusion and uncertainty arising from these provisions is likely to produce uneven advice and inequitable results and deter some former DOD officials from engaging in legal and beneficial activities while putting others at risk of inadvertently violating requirements that they do not fully understand.
3. **Impact on detection, deterrence, and redress.** Logically, more stringent PGE constraints, such as an extended cooling-off period, are likely to reduce opportunities for improper influence. Confusing and poorly understood PGE restrictions appear to

drive former officials not only from engaging in potentially improper communications, but also from engaging in beneficial forms of conduct.

Policymakers must assess whether the added measure of prevention outweighs the cost of limiting employment opportunities for former DOD personnel, restricting the Department's access to the knowledge and expertise of its former personnel and resulting in an adverse effect on DOD recruitment and retention. However, behind-the-scenes restrictions have minimal detection, deterrence, prevention, and redress benefits because they bear little connection to the core purpose of preventing former officials from exerting improper influence and are an overbroad and ineffective tool for addressing the improper use of non-public information.

4. **Impact on arms-length transactions.** Existing ethics and acquisition requirements provide important safeguards against improper influence in the acquisition system, helping to ensure that the Department's contracts can be negotiated and executed on an arms-length basis. The ethics provisions under review substantially overlap with longstanding executive-branch-wide ethics provisions that address the same issues and provide similar protections. The defense acquisition system includes other effective safeguards to ensure arms-length transactions, including requirements for higher level reviews for certain procurements and competition-in-contracting requirements, which are effectively enforced through the bid protest process. In light of these other protections, the removal or alteration of the provisions under review is unlikely to have a perceptible impact on the ability of the Department to negotiate and execute contracts on an arms-length basis.
5. **Impact on recruitment and retention.** Individual decisions to accept or to depart from senior positions in the Department appear to be driven primarily by factors such as the desire to serve and family considerations rather than by PGE rules. Available quantitative data does not show a link between PGE legislation and retention for either senior military officers or senior civilians. However, retention data for military officers likely reflects the officer grade structure and cannot show whether more highly qualified officers decide to retire early, leaving positions to be filled by less-qualified officers. Qualitative data provides relatively weak anecdotal evidence of a link between PGE restrictions and senior military officer retention. On the other hand, qualitative evidence provides relatively strong anecdotal evidence that PGE legislation has been an impediment to the Department's effort to recruit and hire candidates for political and other temporary positions and for positions requiring specialized training and expertise. Even in cases where the Department is able to hire candidates with needed expertise, recusal requirements relative to former employers may limit their usefulness on key issues for a period of time.
6. **Impact on access to expertise.** Former DOD officials play a critical role in connecting the Department to the private sector by helping industry understand the

Department's needs and by translating the technologies and capabilities that industry has to offer into terms that the Department can understand. Such assistance can be particularly critical to small businesses and non-traditional contractors who are new to the defense business. While the large contractors would continue to do business with the Department with or without the help of former DOD officials, IDA interviewees stated that many non-traditional contractors would likely never be able to enter the defense market without such assistance. Former DOD officials also add value to advice provided to the Department by management consultants, FFRDCs, and others. IDA's review indicates that the limitation on behind-the-scenes activities is particularly problematic. This restriction appears to have only an attenuated relationship to potentially unethical contact while posing a significant risk of reducing government access to the knowledge and expertise of former DOD officials and more generally to private-sector expertise in support of technology development, supply chain security, and other national security matters.⁴³³

7. **Application to DOD officials only.** Relatively few government officials in non-defense agencies are called upon to make *acquisition* decisions of a magnitude comparable to those made by senior DOD acquisition personnel, but officials in other agencies often make *regulatory* decisions with a comparable financial impact on private sector entities. These officials, despite the magnitude of their decisions, are not subject to the same PGE restrictions as DOD officials. There does not appear to be a strong reason to treat current and former DOD officials more stringently than officials in other federal agencies who make decisions that have a comparable financial impact. However, policymakers who believe that some or all these restrictions provide a helpful barrier against ethical abuses may reasonably conclude that it is better to apply them to some agencies and some officials than to none at all.

IDA considered a wide range of potential modifications to the provisions under review to address inconsistencies and lack of clarity. Because the development of legislative proposals requires that policymakers weigh competing objectives, this report does not make specific legislative recommendations, but instead discusses the pros and cons of each potential modification. However, the IDA team did conclude that the uncertainty and confusion caused by section 1045's use of terms such as "lobbying contacts," "lobbying activities," "covered officials," and "covered matters," which have no direct counterpart in executive-branch-wide ethics laws, is particularly problematic.

This report considers a range of alternatives to address problems caused by section 1045 and the other provisions under review. With regard to section 1045, policymakers could take either of two book-end approaches: (1) they could retain the section without change or (2) repeal it outright,

⁴³³ As described in Chapter 3.C., the two-year recusal requirement in section 1117 also limits the Department's access to the knowledge and expertise of currently serving officials for an extended period.

accepting or rejecting its collective costs and benefits. The IDA team also identified two potential modifications to the provision that would preserve most of its benefits, while eliminating most of its costs:

- An amendment that would modify the language of the provision without substantive change to provide greater consistency with the well-defined terminology of longstanding executive-branch-wide standards, and
- An amendment that would modify the language of the provision to provide greater consistency with the well-defined terminology of longstanding executive-branch-wide standards *and* remove the behind-the-scenes restrictions from the provision.

A more far-reaching alternative would harmonize the range of current government officials with whom contact is prescribed by eliminating restrictions on contacts with officials of non-defense agencies and/or officials in DOD components other than the component in which the former official worked. If all these changes were made, section 1045 would differ from section 207 only in the two-year restriction imposed on officers serving in positions at a grade at or above O-9 and their civilian equivalents.

This report does not make any specific legislative recommendations but assesses the pros and cons of the options considered.

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Appendix A. Statutory Provisions

Section 1073 of the FY 2023 NDAA

1073. REPORT ON EFFECTS OF CERTAIN ETHICS REQUIREMENTS ON DEPARTMENT OF DEFENSE HIRING, RETENTION, AND OPERATIONS.

(a) STUDY.—

(1) **IN GENERAL.**—The Secretary of Defense shall seek to enter into an agreement with a federally funded research and development center under which the center shall conduct a study to assess whether the covered ethics requirements have had an effect on—

(A) the hiring or retention of personnel at the Department of Defense, particularly those persons with specialized experience or training; and

(B) the ability of the Department of Defense to detect, deter, prevent, and redress violations of the Standards of Ethical Conduct for Employees of the Executive Branch and applicable statutory and regulatory ethics requirements, including conflicts of interest, by Department of Defense personnel.

(2) **ELEMENTS.**—A study conducted pursuant to paragraph (1) shall include the following elements:

(A) An examination of how the covered ethics requirements are inconsistent or incongruent with ethics statutes, and any implementing regulations, that apply to all executive branch employees.

(B) An examination of the relative degrees of risk associated with the potential for violations of ethical standards at the Department of Defense and those associated with the potential for such violations at other Federal agencies, and an analysis of whether ethical standards that are applied exclusively to Department of Defense personnel are justified.

(C) An examination of how covered ethics requirements have affected, or are likely to affect, the hiring and retention of personnel, particularly those persons with specialized experience or training, at the Department of Defense in comparison to other Federal agencies that are not subject to such requirements. The examination shall account for any relevant differences between the Department of Defense and other Federal departments and agencies within the executive branch and shall use analytical methods to control for any variables that may affect the comparative results.

(D) An examination of how any confusion in the interpretation of the requirement referred to in paragraph (3)(B) may have affected, or is likely to affect—

(i) the hiring or retention of personnel, particularly those persons with specialized experience or training, at the Department of Defense; and

(ii) the ability of the Department of Defense to detect, deter, prevent, and redress violations of ethical standards, including conflicts of interest, by Department of Defense personnel.

(E) An examination of how the ethics requirements referred to in subparagraphs (B) and (C) of paragraph (3) may affect the ability of the Department of Defense to obtain expertise from industry and other groups in support of technology development, supply chain security, and other national security matters.

(F) An examination of whether the removal or alteration of any covered ethics requirement may adversely affect the ability of the Department of Defense to detect, deter, prevent, and redress violations of ethical standards, including conflicts of interest, by Department of Defense personnel.

(G) An examination of whether the removal or alteration of any covered ethics requirement may adversely affect the ability of the Department of Defense to negotiate and effectuate arms-length transactions.

(H) Any suggested changes to any covered ethics requirement to further the establishment and maintenance of ethical standards, while also supporting the ability of the Department of Defense to hire and retain personnel and obtain expertise from academia, think tanks, industry, and other groups to support national security.

(3) COVERED ETHICS REQUIREMENTS.—In this section, the term “covered ethics requirement” means each of the requirements under the following provisions of law: Definitions.

(A) Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 10 U.S.C. 1701 note).

(B) Section 1045 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115–91; 10 U.S.C. 971 note prec.).

(C) Section 1117 of the National Defense Authorization Act for Fiscal Year 2022 (10 U.S.C. 971 note prec.).

(D) Section 988 of title 10, United States Code.

(b) REPORT.—

(1) IN GENERAL.—An agreement entered into under subsection (a) shall provide that the federally funded research and development center shall submit to the Secretary a report containing the results of the study conducted under the agreement by not later than one year after the date of the enactment of this Act.

(2) TRANSMITTAL TO CONGRESS.—Not later than 30 days after the Secretary receives the report under paragraph (1), the Secretary shall transmit a copy of the report to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives. Records.

(3) [SECRETARY OF DEFENSE EVALUATION.—The Secretary shall submit with the report transmitted pursuant to paragraph (2) an evaluation of each change suggested pursuant to subsection (a)(2)(H). The evaluation shall include—

(A) a determination of whether the Secretary concurs with each suggested change;

(B) an assessment of the potential effects of each suggested change on the ability of the Department of Defense to hire or retain personnel at the Department of Defense, particularly those persons with specialized experience or training;

(C) an assessment of the potential effects of each suggested change on the ability of the Department of Defense to detect, deter, prevent, or redress violations of ethical standards, including conflicts of interest; and

(D) any other information that the Secretary determines to be appropriate.

Section 1045 of the FY 2018 NDAA

SEC. 1045. PROHIBITION ON LOBBYING ACTIVITIES WITH RESPECT TO THE DEPARTMENT OF DEFENSE BY CERTAIN OFFICERS OF THE ARMED FORCES AND CIVILIAN EMPLOYEES OF THE DEPARTMENT FOLLOWING SEPARATION FROM MILITARY SERVICE OR EMPLOYMENT WITH THE DEPARTMENT.

(a) TWO-YEAR PROHIBITION.—

(1) *PROHIBITION.*—An individual described in paragraph (2) may not engage in lobbying activities with respect to the Department of Defense during the two-year period beginning on the date of retirement or separation from service in the Armed Forces or the date of retirement or separation from service with the Department, as applicable.

(2) *COVERED INDIVIDUALS.*—An individual described in this paragraph is the following:

(A) An officer of the Armed Forces in grade O-9 or higher at the time of retirement or separation from the Armed Forces.

(B) A civilian employee of the Department of Defense who had a civilian grade equivalent to a military grade specified in subparagraph (A) at the time of the employee's retirement or separation from service with the Department.

(b) ONE-YEAR PROHIBITION.—

(1) *PROHIBITION.*—An individual described in paragraph (2) may not engage in lobbying activities with respect to the Department of Defense during the one-year period beginning on the date of retirement or separation from service in the Armed Forces or the date of retirement or separation from service with the Department, as applicable.

(2) *COVERED INDIVIDUALS.*—An individual described in this paragraph is the following:

(A) An officer of the Armed Forces in grade O-7 or O-8 at the time of retirement or separation from the Armed Forces.

(B) A civilian employee of the Department of Defense who had a civilian grade equivalent to a military grade specified in subparagraph (A) at the time of the employee's retirement or separation from service with the Department.

(c) DEFINITIONS.—In this section:

(1) The term “lobbying activities with respect to the Department of Defense” means the following:

(A) Lobbying contacts and other lobbying activities with covered executive branch officials with respect to the Department of Defense.

(B) Lobbying contacts with covered executive branch officials described in subparagraphs (C) through (F) of section 3(3) of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602(3)) in the Department of Defense.

(2) The terms “lobbying activities” and “lobbying contacts” have the meaning given such terms in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602).

(3) The term “covered executive branch official” has the meaning given that term in section 3(3) of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602(3)).

Section 1117 of the FY 2022 NDAA

SEC. 1117. ENHANCEMENT OF RECUSAL FOR CONFLICTS OF PERSONAL INTEREST REQUIREMENTS FOR DEPARTMENT OF DEFENSE OFFICERS AND EMPLOYEES.

(a) **IN GENERAL.**—Except as provided in subsection (b), in addition to the prohibition set forth in section 208 of title 18, United States Code, an officer or employee of the Department of Defense may not knowingly participate personally and substantially in any particular matter involving specific parties where any of the following organizations is a party or represents a party to the matter:

(1) Any organization, including a trade organization, for which the officer or employee has served as an employee, officer, director, trustee, or general partner in the past 2 years.

(2) Any organization with which the officer or employee is seeking employment.

(b) **AUTHORIZATION.**—An agency designee may authorize the officer or employee to participate in a matter described in paragraph (a) based on a determination, made in light of all relevant circumstances, that the interest of the Government in the officer or employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

(c) **CONSTRUCTION.**—Nothing in this section shall be construed to terminate, alter, or make inapplicable any other prohibition or limitation in law or regulation on the participation of officers or employees of the Department of Defense in particular matters having an effect on their or related financial or other personal interests.

SEC. 1118. OCCUPATIONAL SERIES FOR DIGITAL CAREER FIELDS.

Not later than 270 days after the date of the enactment of this Act, the Director of the Office of Personnel Management shall, pursuant to chapter 51 of title 5, United States Code, establish or update one or more occupational series covering Federal Government positions in the fields of software development, software engineering, data science, and data management.

Section 988 of Title 10, United States Code

(a) PROHIBITION.—

Except as provided in subsection (b), a covered official of the Department of Defense may not own or purchase publicly traded stock of a company if that company is one of the 10 entities awarded the most amount of contract funds by the Department of Defense in a fiscal year during the five preceding fiscal years.

(b) EXCEPTIONS.—This section shall not apply to the purchase or ownership of a publicly traded stock of a company otherwise described in subsection (a) as follows:

- (1)** If the aggregate market value of the holdings of the covered official, and the spouse and minor children of the covered official, in the stock of that company, both before and after purchase (in the case of a purchase), does not exceed the de minimis threshold established in [section 2640.202\(a\)\(2\)](#) of title 5, Code of Federal Regulations.
- (2)** If the stock is purchased and owned as part of an [Excepted Investment Fund](#) or mutual fund.

(c) DEFINITIONS.—In this section:

(1) The term “covered official of the Department of Defense” means any of the following:

- (A)** A civilian appointed to a position in the Department of Defense by the President, by and with the advice and consent of the Senate.
- (B)** If serving in a key acquisition position (as designated by the Secretary of Defense or the Secretary concerned for purposes of this section), the following:
 - (i)** A member of the armed forces in a grade above O–6.
 - (ii)** A civilian officer or employee in a Senior Executive Service, Senior-Level, or Scientific or Professional position.

(2) The term “[Excepted Investment Fund](#)” means a widely-held investment fund described in section 102(f)(8) of the [Ethics in Government Act of 1978](#) (5 U.S.C. App.).

Section 847 of the FY 2008 NDAA

SEC. 847. REQUIREMENTS FOR SENIOR DEPARTMENT OF DEFENSE OFFICIALS SEEKING EMPLOYMENT WITH DEFENSE CONTRACTORS. 10 USC 1701 note.

(a) REQUIREMENT TO SEEK AND OBTAIN WRITTEN OPINION.—

(1) REQUEST.—An official or former official of the Department of Defense described in subsection (c) who, within two years after leaving service in the Department of Defense, expects to receive compensation from a Department of Defense contractor, shall, prior to accepting such compensation, request a written opinion regarding the applicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor.

(2) SUBMISSION OF REQUEST.—A request for a written opinion under paragraph (1) shall be submitted in writing to an ethics official of the Department of Defense having responsibility for the organization in which the official or former official serves or served and shall set forth all information relevant to the request, including information relating to government positions held and major duties in those positions, actions taken concerning future employment, positions sought, and future job descriptions, if applicable.

(3) WRITTEN OPINION.—Not later than 30 days after receiving a request by an official or former official of the Department of Defense described in subsection (c), the appropriate ethics counselor shall provide such official or former official a written opinion regarding the applicability or inapplicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor. Deadline.

(4) CONTRACTOR REQUIREMENT.—A Department of Defense contractor may not knowingly provide compensation to a former Department of Defense official described in subsection (c) within two years after such former official leaves service in the Department of Defense, without first determining that the former official has sought and received (or has not received after 30 days of seeking) a written opinion from the appropriate ethics counselor regarding the applicability of post-employment restrictions to the activities that the former official is expected to undertake on behalf of the contractor.

(5) ADMINISTRATIVE ACTIONS.—In the event that an official or former official of the Department of Defense described in subsection (c), or a Department of Defense contractor, knowingly fails to comply with the requirements of this subsection, the Secretary of Defense may take any of the administrative actions set forth in section 27(e) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(e)) that the Secretary of Defense determines to be appropriate.

(b) RECORDKEEPING REQUIREMENT.—

(1) DATABASE.—Each request for a written opinion made pursuant to this section, and each written opinion provided pursuant to such a request, shall be retained by the Department of Defense in a central database or repository for not less than five years beginning on the date on which the written opinion was provided.

(2) INSPECTOR GENERAL REVIEW.—The Inspector General of the Department of Defense shall conduct periodic reviews to ensure that written opinions are being provided and retained in accordance with the requirements of this section. The first such review shall be conducted no later than two years after the date of the enactment of this Act.

(c) COVERED DEPARTMENT OF DEFENSE OFFICIALS.—An official or former official of the Department of Defense is covered by the requirements of this section if such official or former official—

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

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

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

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

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

(d) DEFINITION.—In this section, the term “post-employment restrictions” includes—

(1) section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423);

(2) section 207 of title 18, United States Code; and

(3) any other statute or regulation restricting the employment or activities of individuals who leave government service in the Department of Defense.

Appendix B. Interviews of Current and Former DOD Officials

Interview on October 31, 2023: Former DOD civilian, PAS official, who served in acquisition positions.

Interview on November 1, 2023: Former DOD civilian, non-career SES, who served in acquisition positions.

Interview on November 6, 2023: Retired military, 1-Star officer, who served in acquisition positions.

Interview on November 6, 2023: Current DOD civilian, career SES official, serving in resource management positions.

Interview on November 7, 2023: Retired military, 2-Star officer, who served in acquisition positions.

Interview on November 7, 2023: Retired military, 1-Star officer, who served in other positions.

Interview on November 8, 2023: Retired military, O-6 officer, who served in resource management positions.

Interview on November 9, 2023: Retired military, 3-Star officer, who served in intelligence/IT/AI/cyber positions.

Interview on November 9, 2023: Former DOD civilian, career SES official, who served in resource management positions.

Interview on November 13, 2023: Retired military, 2-Star officer, who served in intelligence/IT/AI/cyber positions.

Interview on November 13, 2023: Current DOD civilian, career SES official, serving in intelligence/IT/AI/cyber positions.

Interview on November 13, 2023: Retired military, 2-Star officer, who served in other positions.

Interview on November 14, 2023: Former DOD civilian, career SES official, who served in other positions.

Interview on November 15, 2023: Former DOD civilian, career SES official, who served in acquisition positions.

Interview on November 15, 2023: Retired military, 2-Star officer, who served in intelligence/IT/AI/cyber positions.

Interview on November 15, 2023: Former DOD civilian, career SES official, who served in other positions.

Interview on November 16, 2023: Retired military, O-6 officer, who served in resource management positions.

Interview on November 17, 2023: Retired military, 1-Star officer, who served in resource management positions.

Interview on November 20, 2023: Retired military, 4-Star officer, who served in acquisition positions.

Interview on November 20, 2023: Current DOD civilian, ethics agency advisor.

Interview on November 20, 2023: Current DOD civilian, ethics agency advisor.

Interview on November 20, 2023: Former DOD civilian, career SES official, who served in resource management positions.

Interview on November 21, 2023: Former DOD civilian, PAS official, who served in acquisition positions.

Interview on November 21, 2023: Current DOD civilian, ethics agency advisor.

Interview on November 21, 2023: Current DOD civilian, ethics agency advisor.

Interview on November 21, 2023: Former DOD civilian, PAS official, who served in resource management positions.

Interview on November 21, 2023: Retired military, 3-Star officer, who served in resource management positions.

Interview on November 22, 2023: Current DOD civilian, ethics agency advisor.

Interview on November 22, 2023: Current DOD civilian, ethics agency advisor.

Interview on November 24, 2023: Retired military, 3-Star officer, who served in intelligence/IT/AI/cyber positions.

Interview on November 24, 2023: Current DOD civilian, ethics agency advisor.

Interview on November 27, 2023: Current DOD civilian, ethics agency advisor.

Interview on November 28, 2023: Retired military, 3-Star officer, who served in acquisition positions.

Interview on November 29, 2023: Former DOD civilian, non-career SES, who served in leadership positions.

Interview on November 30, 2023: Former DOD civilian, PAS official, who served in acquisition positions.

Interview on November 30, 2023: Former DOD civilian, PAS official, who served in leadership positions.

Interview on November 30, 2023: Current DOD civilian, ethics agency advisor.

Interview on November 30, 2023: Current DOD civilian, ethics agency advisor.

Interview on December 1, 2023: Former DOD civilian, non-career SES, who served in other positions.

Interview on December 1, 2023: Current DOD civilian, ethics agency advisor.

Interview on December 1, 2023: Former DOD civilian, career SES, who served in resource management positions.

Interview on December 4, 2023: Former DOD civilian, PAS official, who served in acquisition positions.

Interview on December 4, 2023: Retired military, 3-Star officer, who served in other positions.

Interview on December 4, 2023: Current DOD civilian, ethics agency advisor.

Interview on December 5, 2023: Retired military, 4-Star officer, who served in leadership positions.

Interview on December 6, 2023: Retired military, 4-Star officer, who served in leadership positions.

Interview on December 7, 2023: Former DOD civilian, PAS official, who served in acquisition positions.

Interview on December 14, 2023: Retired military, 2-Star officer, who served in other positions.

Interview on January 2, 2024: Retired military, 4-Star officer, who served in leadership positions.

Interview on January 3, 2024: Retired military, 3-Star officer, who served in resource management positions.

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Appendix C. Exceptions to Section 1045 and the LDA

19 Excepted Communications Permitted Under LDA and Section 1045

Communications made by a public official acting in the public official's official capacity.	Communications made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public.	Communications made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication.	Communications made on behalf of a government of a foreign country or a foreign political party and disclosed under the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.).	A request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official.
Communications made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act.	A disclosure by an individual that is protected under the amendments made by the Whistleblower Protection Act of 1989, under the Inspector General Act of 1978, or under another provision of law.	Information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information.	Communications required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, grant, loan, permit, or license.	Communications made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications.
Communications not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law.	Testimony given before a committee, subcommittee, or task force of the Congress, or submitted for inclusion in the public record of a hearing conducted by such committee, subcommittee, or task force.	Communications made in compliance with written agency procedures regarding an adjudication conducted by the agency under section 554 of title 5, United States Code, or substantially similar provisions.	A written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding.	A petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures.
Communications made on behalf of an individual with regard to that individual's benefits, employment, or other personal matters involving only that individual, except that this clause does not apply to any communication with: (I) a covered executive branch official, or (II) a covered legislative branch official (other than the individual's elected Members of Congress or employees who work under such Members' direct supervision), with respect to the formulation, modification, or adoption of private legislation for the relief of that individual.	Communications made to an official in an agency with regard to: (I) a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding; or (II) a filing or proceeding that the Government is specifically required by statute or regulation to maintain or conduct on a confidential basis, if that agency is charged with responsibility for such proceeding, inquiry, investigation, or filing.	Communications made by: (I) a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a Federal income tax return under paragraph 2(A)(i) of section 6033(a) of the Internal Revenue Code of 1986, or (II) a religious order that is exempt from filing a Federal income tax return under paragraph (2)(A)(iii) of such section 6033(a).	Communications between: (I) officials of a self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act) that is registered with or established by the Securities and Exchange Commission as required by that Act or a similar organization that is designated by or registered with the Commodities Future Trading Commission as provided under the Commodity Exchange Act; and (II) the Securities and Exchange Commission or the Commodities Future Trading Commission, respectively; relating to the regulatory responsibilities of such organization under that Act.	

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Appendix D. Comparison of Section 1117 and Related Provisions

Comparison of section 1117, Executive Order (EO) 19389, and executive-branch-wide regulations regarding recusal for employees based on past employment.

	Section 1117 of the FY 2022 NDAA.	Subpart E of 5 CFR § 2635	EO 13989
Applicability	All DoD personnel	All executive branch employees	All civilian political appointees
Covered Positions	Any organization, including a trade organization, in which the DoD officer or employee served as an employee, officer, director, trustee, or general partner. Section 1117(a)(1) of the FY 2022 NDAA	Any person for whom the employee served as an employee, officer, director, trustee, general partner, agent, attorney, consultant, or contractor. 5 CFR § 2635.502(b)(iv)	Any person for whom the DoD employee served as an employee, officer, director, trustee, general partner, agent, attorney, or consultant. EO 13989, sec 2, para (k) and (l)
Length of Recusal	Two years from the date the DoD officer or employee last served in a “covered position.” Section 1117(a)(1) of the FY 2022 NDAA	One year from the date the employee last served in a “covered position.” 5 CFR § 2635.502(b)(iv)	2 years from the date of appointment to the DoD position. EO 13989, sec 1, para 2
Restricted Activity	Participating personally and substantially in a particular matter involving specific parties where an organization, with whom the DoD officer or employee served in a “covered position” is or represents a party to the matter. Section 1117(a)(1) of the FY 2022 NDAA	Participating personally and substantially in a particular matter involving specific parties to which a person, with whom the employee served in a “covered position” is or represents a party to the matter. 5 CFR § 2635.502(a)	Participating personally and substantially in a particular matter involving specific parties to which a person, with whom the DoD employee served in a “covered position,” is or represents a party to the matter, including regulations and contracts. EO 13989, sec 2, para (m)

	Section 1117 of the FY 2022 NDAA.	Subpart E of 5 CFR § 2635	EO 13989
Authorization or Waiver	Agency designee may authorize a DoD officer or employee to participate in such a matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the officer or employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Section 1117(b) of the FY 2022 NDAA	Agency designee may authorize an employee to participate in such a matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the officer or employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. 5 CFR § 2635.502(d)	The Director of OMB, in consultation with the Counsel to the President, may grant a <i>written waiver</i> when the application of the restriction is inconsistent with the purpose or a waiver is in the public's best interest. EO 13989, sec 3, para (a)

Comparison of section 1117 and the executive-branch-wide regulations with regard to current employees who are seeking post-government employment.

	Section 1117 of the FY 2022 NDAA.	Subpart F of 5 CFR § 2635
Applicability	All DoD personnel.	All executive branch employees.
Length of Recusal	As long as the DoD officer or employee is "seeking employment."	As long as the employee is "seeking employment," as defined at 5 CFR § 2635.603(b)
Restricted Activity	Participating personally and substantially in a <i>particular matter involving specific parties</i> where an organization, with whom the DoD officer or employee is "seeking employment" is or represents a party to the matter. Section 1117(a)(2) of the FY 2022 NDAA	Participating personally and substantially in a particular matter that has a <i>direct and predicable effect</i> on the financial interests of a prospective employer with whom the employee is seeking employment. 5 CFR § 2635.604(a)
Authorization	Agency designee may authorize a DoD officer or employee to participate in such a matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the officer or employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Section 1117(b) of the FY 2022 NDAA	Agency designee may issue a <i>written authorization</i> for an employee to participate in such matters in accordance with the standards set forth in 5 CFR § 2635.502(d). See 5 CFR § 2635.605(b)

Appendix E. Formal Empirical Methodology for Estimating Retention

In the main body of this report, the raw retention differences are caveated with the note that formal regression analyses broadly support the assumptions made therein. This appendix briefly defines the regressions estimated in support of the project.

As previously noted, the Institute for Defense Analyses (IDA) used annual snapshots from its Defense Manpower Data Center (DMDC) data holdings to estimate annual loss rates at the individual level for individuals whose retention may have been affected by the change in duration of PGE restrictions at the end of 2017 (O-8s and either tier 3 SESs or SESs writ large, depending on the specification) and for the groups used as a baseline (O-7s, tier 1 and 2 SESs, and GS-15s, respectively). The graphs presented in the main part of this paper focused on raw loss rates. For the regression analysis, additional demographics were included. In particular, the regressions include whether the individual was female, the service in which the individual was employed (including the Office of the Secretary of Defense (OSD) if civilian), and a variable measuring the relevant experience level: time in grade for general officers and flag officers (GOFOs) and age for civilians.

The linear regression equation below illustrates this methodology for uniformed personnel. The suffixes i and t denote an individual in a given year. The variable $Loss$ is a variable that takes a value of 1 if person i left in year t and takes a value of 0 otherwise. $Affected\ group$ is 1 if individual i was in one of the groups of interest in year t . Some of the individuals in our sample leave the baseline group and enter the affected group as they get promoted. A variable indicating the time period after the implementation of section 1045 is also included: $I(Year_{it} \geq 2018)$. The coefficient of interest in the regression is β_3 , which captures the estimated change in loss rates for people in the affected groups after the policy was implemented. The variable $female$ is 1 if the individual is female. The regression allows for separate coefficients on $Service$ and $Time\ in\ Grade$ (here denoted 1...S and 1...G for ease of reading). An error term is represented by ϵ_{it} - because errors may be correlated within a service and year, the regression clusters standard errors by year and service.

$$\begin{aligned} Loss_{it} = & \beta_0 + \beta_1 I(Affected\ group_{it} = 1) + \beta_2 * I(Year_{it} \geq 2018) + \\ & \beta_3 * I(Affected\ group_{it} = 1) * I(Year_{it} \geq 2018) + \beta_4 (female_{it}) + \\ & \sum_{s=1}^S \beta_{5s} I(Service_{it} = s) + \sum_{g=1}^G \beta_{6g} I(Time\ in\ grade_{it} = g) + \epsilon_{it} \end{aligned}$$

The discussion in the main body of the text noted that one of the challenges of this approach is that time-specific shocks may make a direct comparison of pre- and post-policy change difficult. While the use of a control group should account for these differences, an alternative specification is also implemented that separately estimates an average for each year in the sample to capture the impact of political administration changes, economic changes, and so forth. These values are captured by the β_{7m} coefficients in the alternate specification:

$$\begin{aligned}
Loss_{it} = & \beta_0 + \beta_1 I(Affected\ group_{it} = 1) + \beta_2 * I(Year_{it} \geq 2018) + \\
& \beta_3 * I(Affected\ group_{it} = 1) * I(Year_{it} \geq 2018) + \beta_4 (female_{it}) + \\
& \sum_{s=1}^S \beta_{5s} I(Service_{it} = s) + \sum_{g=1}^G \beta_{6g} I(Time\ in\ grade_{it} = g) + \\
& \sum_{m=2007}^{2021} \beta_{7m} I(Year_{it} = m) + \epsilon_{it}
\end{aligned}$$

The regressions for civilians are nearly identical. Instead of a series of times in grade, a series of ages are included to capture potential baseline propensity to leave. As was shown in the graphs in the main body of the text, a different time period was used for civilians as well: 2014–2021 instead of 2007–2021.

In all specifications, the coefficient of interest, β_3 , was small and not statistically significant.

Appendix F. Data Used for the Retention Analyses

This appendix will, in detail, discuss the data to which the Institute for Defense Analyses (IDA) had access and the resulting limitation on the analyses performed. Several sources of data were used to implement the methodology described in Appendix E. Uniformed personnel was extracted from the Defense Manpower Data Center (DMDC) Active Duty Master File. This data set consists of monthly snapshots of each Active Duty individual in the Department of Defense (DOD). While data-sharing agreements limit the personally identifiable information available to the IDA team,¹ other variables can be used to uniquely identify people across time. As these people progress through their careers, the IDA team can see changes in a variety of their personal and career characteristics including, crucially, their paygrades and time in grade². Losses are observed by identifying when individuals are no longer listed in the Active Duty Master File. For these purposes, since section 1045 was implemented in mid-December (meaning that changes would be expected no sooner than January given typical delays in the resignation process), the IDA team focused on January year-over-year results. Attrition and retention are measured by identifying, for each January beginning in 2014, whether the individual was still present in the data set the following January. Average retention (or attrition) by paygrade by year is calculated by using the listed paygrades and aggregating across individuals.

There are two caveats to this data.

- First, IDA's data only lists when an officer actually leaves the military, not when (or if) the officer has filed retirement or separation paperwork. This approach introduces a lag in the ability to observe decisions.
- Second, the number of general officer and flag officer (GOFO) losses each year is relatively low, meaning the ability to draw formal statistical conclusions via rigorous regression analysis is limited.

The IDA team partially counteracted the small per-year GOFO loss rate by including several years of data before and after the policy change (at the risk of introducing unaccounted-for factors that can affect retention). However, even with this time expansion, the sample size is modest.

Two main data sources are used to analyze civilian personnel. The primary data source is the civilian analog to the data used for uniformed personnel: DMDC's Civilian Master File. As with

¹ We do not observe individual Social Security numbers (SSNs) or names, the latter of which prevents us from linking these data to other data described later in this report.

² Discussions with senior DOD personnel suggest that, for GOFOs, we should focus on retention after two years in grade to avoid service obligations.

the Active Duty Master File, the Civilian Master File consists of monthly administrative personnel snapshots with information about various relevant characteristics including age, pay scale, service, annualized pay amount, and so forth. Data-sharing and privacy agreements prevent the IDA team from accessing individuals' names or SSNs for identification purposes, but the data set does include a unique identifier that allows the IDA team to track individuals across time. As with the data on uniformed personnel, annual January snapshots of the employed civilian force are used, with attrition identified by finding individuals in each January snapshot who are not present in the following January snapshot. If Senior Executive Service (SES) personnel leave DOD and then return in the future, the individuals will be counted as a losses in the years in which they leave—assuming they are not employed by DOD on at least the first of January.

One notable and significant difference between the uniformed and civilian personnel data sets is the ability to directly identify the populations of interest. In the uniformed data, GOFOs of different ranks can be identified directly. The data differentiates O-8s from O-9s. In the civilian data, this identification is less straightforward for SES personnel. SES personnel can be distinguished from General Schedule (GS) civilians (and GS-14s from GS-15s), but the data set does not directly identify SES tier.

To help in the identification of SES tier, the IDA team also used data received from DOD listing all SES losses since 2014. This data includes the SES tier and the pay rate of each individual when he or she left DOD. However, this data is not itself sufficient to identify SES attrition. This calculation would need the number of people in each tier who left DOD *and* the number who did not. Since the annual number of SESs who did not leave DOD cannot be identified by tier in either the DOD or the DMDC data, the loss data cannot be directly used for the analysis.³

DOD-provided SES loss data does provide a crucial piece of information, however. While SES pay levels do not generally identify the individual's SES tier, and thus does not allow the assumption that more-highly paid SESs are tier 3 SESs, there are consistently three pay levels each year that do overwhelmingly match single SES tiers. These levels correspond with that year's Executive Level III pay, Executive Level II pay (which also happens to be the maximum permitted SES pay), and the approximate midpoint between the two. An examination of the people at each of these pay levels in the SES loss data reveals the following:

- SESs who make the lowest of these pay levels (Executive Level III pay) are overwhelmingly tier 1 SES.
- SESs who make the middle of these pay levels (approximate midpoint between Executive Level III and II pay) are overwhelmingly tier 2 SES.
- SESs who make the highest of these pay levels (Executive Level II pay) are overwhelmingly tier 3 SES.

³ Similar reasoning prevents us from identifying SES tier by linking the loss data to our DMDC data. We would only be able to identify SES tiers for those SESs whom we observe leave.

These three pay levels are also observable in the DMDC data. While pay rates typically vary with no more than a handful of people at any one time earning the same amount, these three salary amounts are common across a much larger set of people. Since these pay rates correspond to tiers, the IDA team was able to perform our desired comparative analysis on people at these specific pay levels. It is worth caveating here, however, that it is possible that these SESs differ systematically from the remaining SESs in their tier in ways other than just income.

With these caveats made, the two civilian data sets provide two main avenues for analysis.

- First, IDA compared SESs with large to GS-15s. While the SESs who are directly impacted by section 1045 (those who are above the salary threshold) make up a minority of total SESs, other SESs may be indirectly impacted. SESs of any rank may decide to work for a different federal agency to keep upward career mobility without risking enhanced PGE restrictions if they get promoted.
- Second, IDA used the subsample of SESs whose tier can be largely inferred from their salary to perform a direct comparison of retention changes for SESs of tier 3 and for SES of tiers 1 and 2.

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Appendix G. Draft Legislation

Legislative Option 3

Amend section 1045 to conform the terminology to section 207, but leave the policies of section 1045 substantively unchanged

SEC. ____ . CLARIFICATION OF POST-EMPLOYMENT RESTRICTIONS APPLICABLE TO CERTAIN OFFICERS OF THE ARMED FORCES AND CIVILIAN EMPLOYEES OF THE DEPARTMENT

**(a) AMENDMENT TO SECTION 1045 OF THE NATIONAL DEFENSE
AUTHORIZATION ACT FOR FY 2018.** – Section 1045 of the National Defense
Authorization Act for Fiscal Year 2018 is amended to read as follows:

“SEC. 1045. RESTRICTION ON POST-GOVERNMENT EMPLOYMENT ACTIVITIES OF CERTAIN FORMER OFFICERS AND EMPLOYEES THE DEPARTMENT OF DEFENSE.

“(a) TWO-YEAR PROHIBITION. –

“(1) PROHIBITION. – In addition to the restrictions set forth in section 207 of title 18, United States Code, an individual described in paragraph (2) may not, within 2 years after retirement or separation from service in the Armed Forces or employment in the Department of Defense, knowingly engage in activities described in subsection (c).

“(2) COVERED INDIVIDUALS. – An individual described in this paragraph is the following:

“(A) An officer of the Armed Forces in a grade at or above O-9 at the time of retirement or separation from the Armed Forces.

“(B) A civilian employee of the Department of Defense who had a civilian grade equivalent to a military grade specified in subparagraph (A) at the time of the employee’s retirement or separation from service with the Department.

“(b) ONE-YEAR PROHIBITION. –

“(1) PROHIBITION. – In addition to the restrictions set forth in section 207 of title 18, United States Code, an individual described in paragraph (2) may not, within 1 year after retirement or separation from service in the Armed Forces or employment in the Department of Defense, knowingly engage in activities described in subsection (c).

“(2) COVERED INDIVIDUALS. – An individual described in this paragraph is the following:

“(A) An officer of the Armed Forces in a grade of O-7 or O-8 at the time of retirement or separation from the Armed Forces.

“(B) A civilian employee of the Department of Defense who had a civilian grade equivalent to a military grade specified in subparagraph (A) at the time of the employee’s retirement or separation from service with the Department.

“(c) PROHIBITED ACTIVITIES. – The following activities are prohibited by this section:

“(1) ACTIVITIES WITH RESPECT TO DOD OFFICERS AND EMPLOYEES. – An individual described in subsection (a) or subsection (b) may not, within the period of time specified in such subsection, knowingly make, with the intent to influence, any communication to or appearance before any officer or employee of the Department of Defense on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the Department.

“(2) ACTIVITIES WITH RESPECT TO OFFICERS AND EMPLOYEES OF OTHER DEPARTMENTS AND AGENCIES. – An individual described in subsection (a) or subsection (b) may not, within the period of time specified in such subsection –

“(A) knowingly make, with the intent to influence official action, any communication to or appearance before any officer or employee of any Department or agency of the federal government other than the Department of Defense on behalf of any other person (except the United States), in connection with a particular matter involving specific parties pending in the Department of Defense; or

“(B) knowingly aid or advise any other person (except the United States) with regard to a communication or appearance described in subparagraph (A), with the intent to influence a decision of any officer or employee of any department or agency of the United States (other than the Department of Defense) in connection with a particular matter involving specific parties pending in the Department of Defense.

“(d) ACTIVITIES NOT PROHIBITED. – Prohibited activities described in subsection (c) shall not include communications or appearances described in section 207(j) of title 18, United States Code.

(b) EFFECTIVE DATE. This amendment shall be effective upon the date of the enactment of this Act and shall apply to activities taking place on or after such date, without regard to the date on which a covered individual may have retired or separated from service in the Armed Forces or employment in the Department of Defense.

Legislative Option 4

Amend section 1045 to conform the terminology to section 207, but leave the policies of section 1045 substantively unchanged, except for the problematic restriction on behind-the-scenes work

SEC. __. CLARIFICATION OF POST-EMPLOYMENT RESTRICTIONS APPLICABLE TO CERTAIN OFFICERS OF THE ARMED FORCES AND CIVILIAN EMPLOYEES OF THE DEPARTMENT

(a) AMENDMENT TO SECTION 1045 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2018. – Section 1045 of the National Defense Authorization Act for Fiscal Year 2018 is amended to read as follows:

“SEC. 1045. RESTRICTION ON POST-GOVERNMENT EMPLOYMENT ACTIVITIES OF CERTAIN FORMER OFFICERS AND EMPLOYEES THE DEPARTMENT OF DEFENSE.

“(a) TWO-YEAR PROHIBITION. –

“(1) PROHIBITION. – In addition to the restrictions set forth in section 207 of title 18, United States Code, an individual described in paragraph (2) may not, within 2 years after retirement or separation from service in the Armed Forces or employment in the Department of Defense, knowingly engage in activities described in subsection (c).

“(2) COVERED INDIVIDUALS. – An individual described in this paragraph is the following:

“(A) An officer of the Armed Forces in a grade at or above O-9 at the time of retirement or separation from the Armed Forces.

“(B) A civilian employee of the Department of Defense who had a civilian grade equivalent to a military grade specified in subparagraph (A) at the time of the employee’s retirement or separation from service with the Department.

“(b) ONE-YEAR PROHIBITION. –

“(1) PROHIBITION. – In addition to the restrictions set forth in section 207 of title 18, United States Code, an individual described in paragraph (2) may not, within 1 year after retirement or separation from service in the Armed Forces or employment in the Department of Defense, knowingly engage in activities described in subsection (c).

“(2) COVERED INDIVIDUALS. – An individual described in this paragraph is the following:

“(A) An officer of the Armed Forces in a grade of O-7 or O-8 at the time of retirement or separation from the Armed Forces.

“(B) A civilian employee of the Department of Defense who had a civilian grade equivalent to a military grade specified in subparagraph (A) at the time of the employee’s retirement or separation from service with the Department.

“(c) **PROHIBITED ACTIVITIES.** – The following activities are prohibited by this section:

“(1) **ACTIVITIES WITH RESPECT TO DOD OFFICERS AND EMPLOYEES.** – An individual described in subsection (a) or subsection (b) may not, within the period of time specified in such subsection, knowingly make, with the intent to influence, any communication to or appearance before any officer or employee of the Department of Defense on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the Department.

“(2) **ACTIVITIES WITH RESPECT TO OFFICERS AND EMPLOYEES OF OTHER DEPARTMENTS AND AGENCIES.** – An individual described in subsection (a) or subsection (b) may not, within the period of time specified in such subsection knowingly make, with the intent to influence official action, any communication to or appearance before any officer or employee of any Department or agency of the federal government other than the Department of Defense on behalf of any other person (except the United States), in connection with a particular matter involving specific parties pending in the Department of Defense.

“(d) **ACTIVITIES NOT PROHIBITED.** – Prohibited activities described in subsection (c) shall not include communications or appearances described in section 207(j) of title 18, United States Code.

(b) **EFFECTIVE DATE.** This amendment shall be effective upon the date of the enactment of this Act and shall apply to activities taking place on or after such date, without regard to the date on which a covered individual may have retired or separated from service in the Armed Forces or employment in the Department of Defense.

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Appendix J. Abbreviations

AFARS	Army Federal Acquisition Regulation Supplement
AGEAR	After Government Employment Advice Repository
AI	artificial intelligence
API	Application Programming Interface
BENS	Business Executives for National Security
CAC	Common Access Card
CFR	Code of Federal Regulations
CEO	Chief Executive Officer
CICA	Competition in Contracting Act
DAEO	Designated Agency Ethics Official
DFARS	Defense Federal Acquisition Regulation Supplement
DIU	Defense Innovation Unit
DMDC	Defense Manpower Data Center
DOD	Department of Defense
DOD IG	DOD Inspector General
DOJ	Department of Justice
EIF	enhanced index fund
EO	Executive Order
FAC	Federal Acquisition Circular
FAR	Federal Acquisition Regulation
FDA	Food and Drug Administration
FFRDC	Federally Funded Research and Development Center
FR	Federal Register
FRLA	Federal Regulation of Lobbying Act
FY	fiscal year
GAO	Government Accountability Office
GOFO	general officer and flag officer
GS	General Schedule
GSA	General Services Administration
HQE	highly qualified expert
IDA	Institute for Defense Analyses
IT	information technology
JAIC	Joint Artificial Intelligence Center
JER	Joint Ethics Regulation
JRAC	Joint Rapid Acquisition Cell
LDA	Lobbying Disclosure Act
LLC	Limited Liability Corporation
MIT	Massachusetts Institute of Technology
NASA	National Aeronautics and Space Administration
NDAA	National Defense Authorization Act

NFE	non-federal entity
NSIN	National Security Innovation Network
OGE	Office of Government Ethics
OGC	Office of General Counsel
OIP	office of Information Policy
OPM	Office of Personnel Management
OSD	Office of the Secretary of Defense
PAS	Presidentially Appointed, Senate-Confirmed
PGE	post-government employment
POGO	Project on Government Oversight
PPBE	Planning, Programming, Budgeting and Execution
R&D	research and development
RFP	requests for proposal
ROTC	Reserve Officers' Training Corps
S&T	science and technology
SASC	Senate Armed Services Committee
SCO	Strategic Capabilities Office
SES	Senior Executive Service
SL	Senior Level
SME	subject matter expert
SOCO	Standards of Conduct Office
SSN	Social Security number
ST	Senior Technical
U.S.C.	United States Code
USAF	United States Air Force
USCFC	United States Court of Federal Claims
USMC	United States Marine Corps
VP	Vice President

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