ETHICS COUNSELOR'S DESKBOOK

Post-Government Service Employment Restrictions

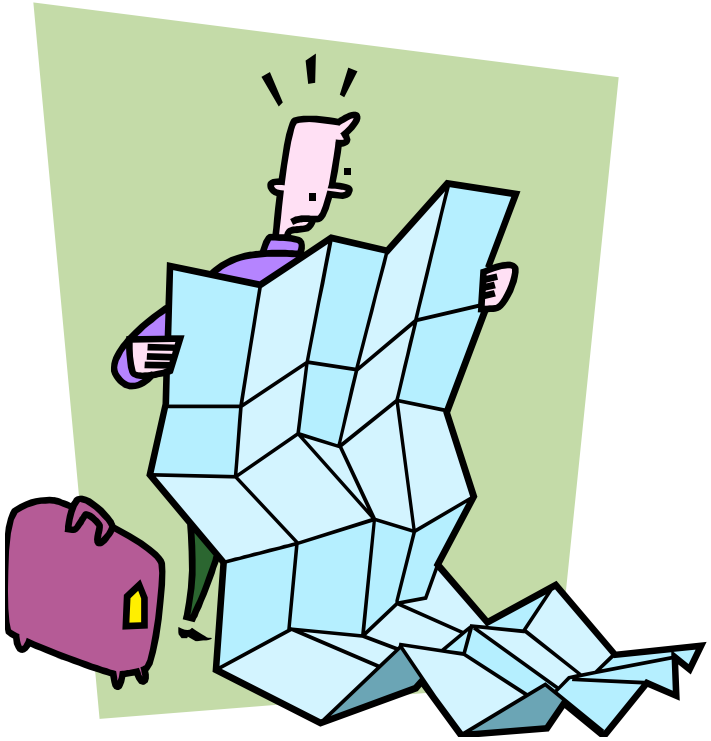
2016

It was six years ago today (2010) that Darleen Druyun, a former procurement executive in the Air Force, plead guilty to illegal job talks with Boeing and showing bias to the company in exchange for a $250,000/year vice president job and employment for her daughter and future son-in-law.

She later served nine months in jail, had a $5,000 fine, served 150 hours of community service and had seven months of community confinement after release.

Road Map

- Purpose of Restrictions
- Seeking Employment
- Federal Employment Restrictions
- Private Employment Restrictions
- Foreign Employment Restrictions



Seeking Employment

- Conflicts of Interest
- Gifts From Prospective Employers
- Working on Terminal Leave

Conflicts of Interest

18 U.S.C. § 208

5 C.F.R. § 2635.402

- You may not take any official action that affects a company with which you are negotiating for employment or have an arrangement concerning prospective employment
- JER 5-301 applies to National Guard and enlisted personnel

LOCKHEED MARTIN

Careers

BOEING

employment

Seeking Employment

- Discussion or communication with another person, or such person’s agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person

"Seeking Employment"

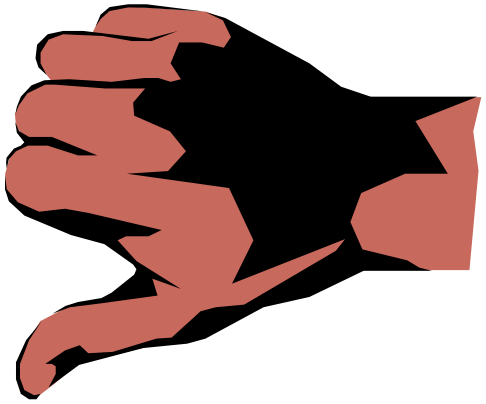
- 5 C.F.R.2635.603(b)
- You are "seeking employment" when you:
  - engage in negotiations
  - make unsolicited employment contact
    - includes sending resume
    - excludes requesting job application
  - respond to unsolicited proposal (except unconditional rejection)

Seeking employment

- Exclusion
  - Submitting a resume or other employment proposal affected by the performance or nonperformance of the employee’s duties only as part of an industry or other discrete class. The employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions (example 4 of .603 is sending 25 resumes)

Termination of Seeking Employment

- You are no longer “seeking employment” when:
  - either party rejects proposal and discussions have terminated, or
  - two months have passed after mailing resume and no response



Disqualification

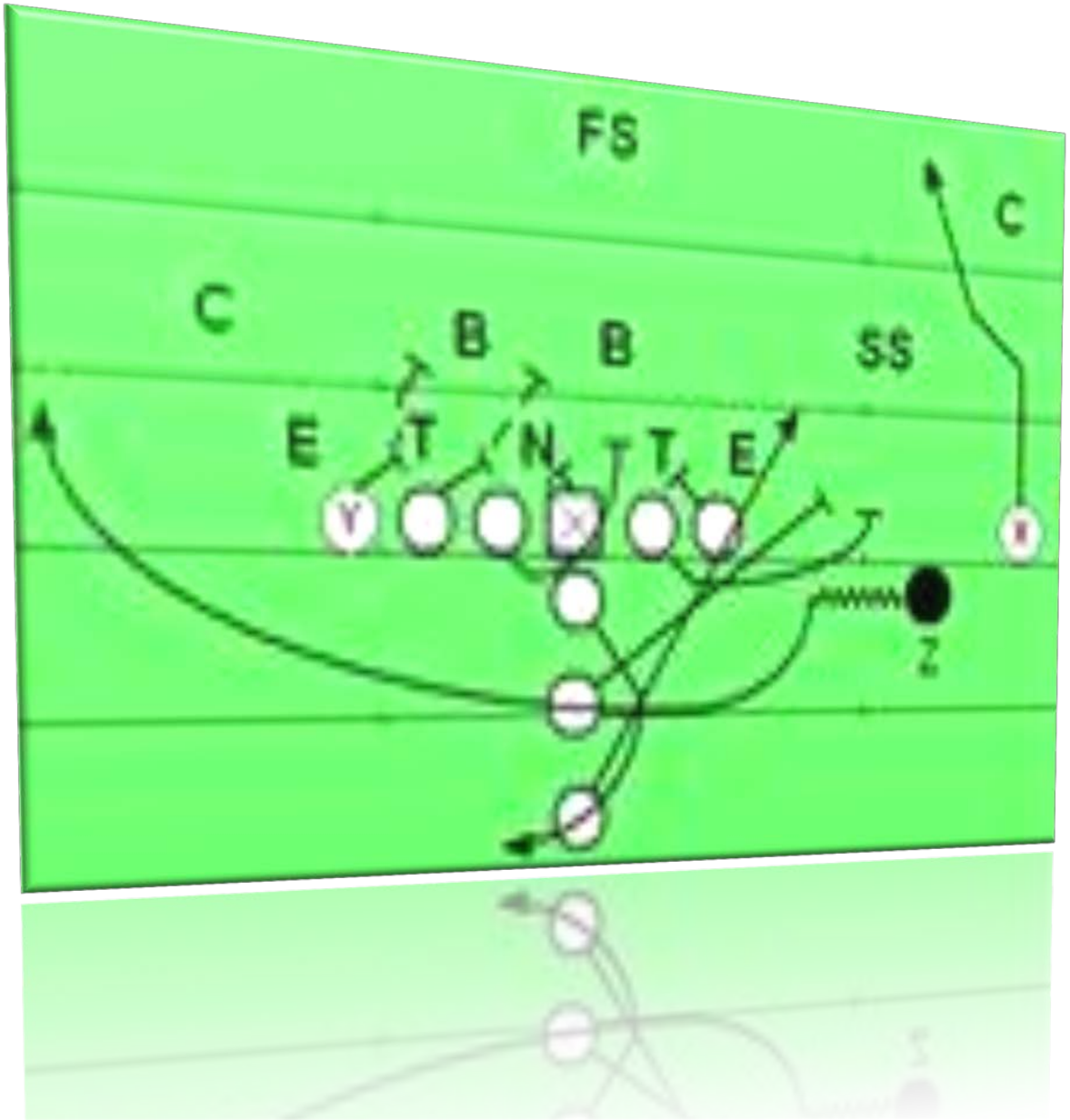
- To avoid violation:
  - Take no action
  - Written notice to supervisor (JER 2-204)
  - Supervisor response:
    - written
    - shielding procedures
    - copy to Ethics Counselor, subordinates

Former Procurement Integrity Act

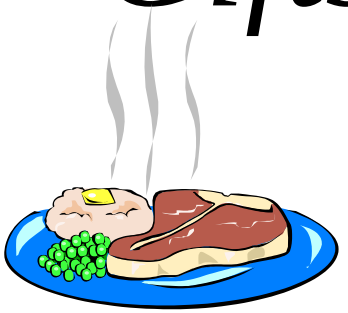
- Special reporting rules for procurement officials
  - Contacts with bidders/offerors in procurements ≥$150K
  - Written "contact report"
  - Special disqualification notice

- Pre-award disclosure of procurement information prohibited (present and former officials)

The Reverse



Gifts From Prospective Employers



5 C.F.R. § 2635.204(e)(3)

- Meals, lodging, transportation, etc. *customarily* offered
- Don't forget to disqualify - if necessary

Terminal Leave

- May work while on terminal leave
- Financial disclosure form filers (450/278) must obtain agency designee approval if employer will be prohibited source

- Active Duty Officers may not accept outside employment that will interfere with duty performance or require separation from service – 10 U.S.C. 973(a)

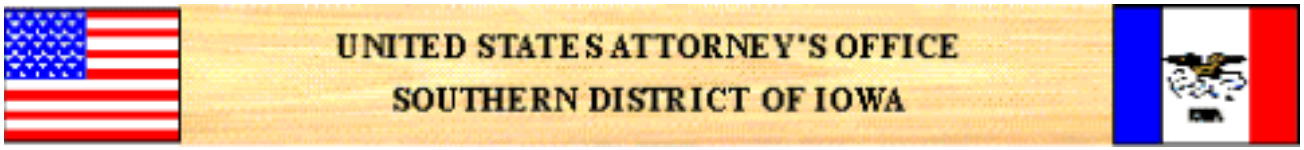
Federal Employment While on Terminal Leave

- If not a “civil office”
  - may receive pay for Federal position and military pay and allowances during terminal leave
  - 5 U.S.C. 5534a
  - DODD 1344.10

No Civil Offices During Terminal Leave!

- Civil Office Statute - 10 U.S.C. § 973
  - Active duty military officers may not hold civil office
    - Federal/State/Local
    - Exercise Sovereign Power
    - USA/DA/City Attorney
    - AUSA/ADA

City Attorney
Casey Gwinn



Can't Be an Agent While on Terminal Leave!

- 18 U.S.C. §§ 203/205
- Cannot act as an agent for another before any Federal agency

Retired At Last!!!

Restrictions on Federal Employment

- 6-month cooling-off period before working in DoD

6-Month Cooling-Off Period

- No civilian employment within DoD for 6 months (5 U.S.C. 3326)

- Applies to <u>all</u> retired military members

- Waivers available from Secretary of hiring component

Representational Restrictions

18 U.S.C. § 207

- Designed to curb "switching sides"
- ***DOES NOT*** prohibit acceptance of employment
- ***MAY*** restrict scope of former employee's activities

Representational Restrictions

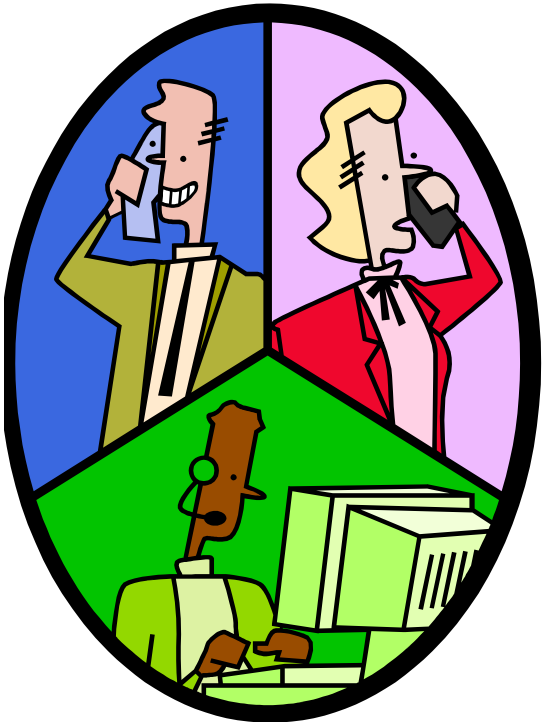
18 U.S.C. § 207; 5 C.F.R. 2641

- Prohibits representing another before U.S. Government with intent to influence
  - Lifetime ban
  - 2-year ban
  - 1-year cooling-off period for senior employees
  - 1-year ban on treaty negotiations
  - 1-year ban on senior employees representing foreign entities

"We represent the Lollipop Guild!"

Lifetime Ban

- 18 U.S.C. § 207(a)(1)
- May not:
  - Communicate/appear on behalf of another
  - With “intent to influence”
  - Regarding a “particular matter”
  - Involving specific parties
  - Where participated “personally and substantially” as Federal employee
  - Behind-the-scenes assistance permitted



Communication or Appearance

5 C.F.R. 2641.201(d)

- Communication – any oral, written, or electronic communication that former employee intends to be attributed to himself
- No requirement that former employee be recognized by current employee
- Appearance – Physically present
- Behind the scenes assistance – permitted but be careful of 3rd party intermediary communications

Intent to Influence

5 C.F.R. 2641.201(e)

- Present when made for the purpose of
  - Seeking a government ruling, benefit, approval, or other discretionary action or affecting government action in a matter involving a dispute or controversy
- Not Present when made for the purpose of
  - Making routine requests not involving a potential controversy, factual statements not involving element of dispute or effort to seek discretionary government, and social contacts

Intent to Influence (cont.)

- Mere physical presence – relevant factors set forth in 5 C.F.R. 2641.201(e)(4)

Particular matter involving specific parties

- Particular matter – includes a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, or investigation. Generally, does not include rulemaking, formulation of general policy, standards or objectives, or other matters of general application.

Particular matter involving specific parties

5 C.F.R. § 2641.201(h) (cont)

- Would not include matters of general applicability (legislation or rulemaking)
- International agreements – maybe depending on focus (e.g. specific claim)
- Must be specific parties at all relevant times (both when participating as a government employee and making the post-employment communication or appearance)

Same Particular Matter Involving Specific Parties

5 C.F.R. § 2641.201(h)(5)

- Contracts, grants, or agreements
  - Generally new particular matter does not arise simply because of a contract modification
  - Generally successive or otherwise separate contracts are new particular matters
  - Generally, a contract is a single particular matter
  - Individual delivery order or task order could be a separate particular matter in some cases

Before an Employee of the US

5 C.F.R. § 2641.201(f)

- Includes any current Federal employee
- Public Commentary – address at a public gathering, conference, seminar, or other similar forum as a speaker or panelist is not a prohibited communication if forum is
  - Not Government sponsored or co-sponsored
  - Attended by a large number of people
  - Significant portion of attendees are not US employees

On Behalf of Another Person

5 C.F.R. § 2641.201(g)

- "Person" broadly defined. It includes an individual, corporation, company, association, firm, partnership, society, joint stock company or any other organization, institution, or entity.

- It does not include the former employee himself or any sole proprietorship owned by the former employee

Personal and Substantial

- Participate <u>personally and substantially</u> – to participate directly and significantly by decision, approval, recommendation, rendering of advice or investigation. Includes actions of a subordinate if actually directed by the former employee.

Representational Restrictions

2-Year Ban

- *18 U.S.C. § 207(a)(2).* May not, <u>within 2 years</u> of termination of Government service
  - Communicate/appear on behalf of another
  - With "intent to influence"
  - Regarding a "particular matter"
  - Involving specific parties
  - Under "official responsibility" during last year of Government service

- Behind-the-scenes assistance permitted

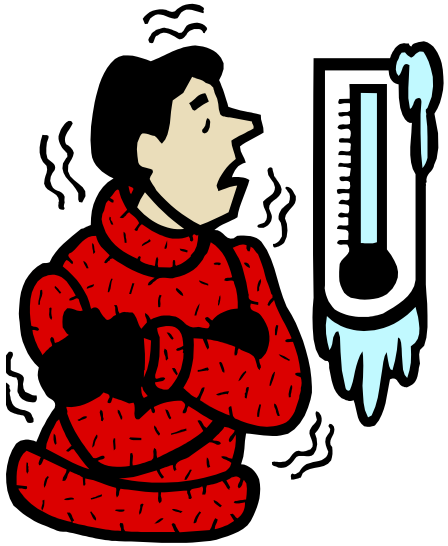
Representational Restrictions
Definitions

- Official responsibility – direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.
- "Acting" – official responsibility may be affected
- Leave status – official responsibility is not affected by annual, sick, or terminal leave, excused absence or leave without pay.
- Disqualification – official responsibility **is not affected**.

Representational Restrictions

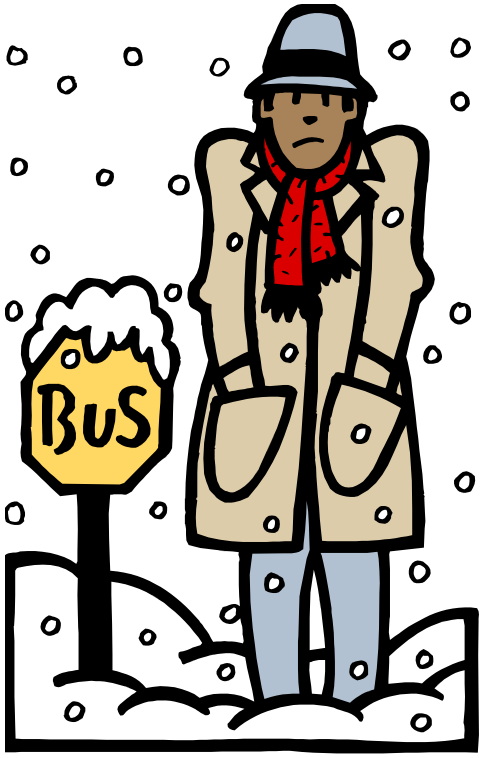
1-Year Cooling-Off Period

- *18 U.S.C. § 207(c)*
  - Applies to former senior employees (personnel whose basic pay exceeded 86.5 percent of the rate for level II of the Executive Schedule (EL II).
  - Prohibits communication or appearance before ***former agency***, on behalf of another with intent to influence, on <u>any matter</u> where official action is sought



1-Year Cooling-Off Period

- Behind-the-scenes assistance permitted
- Communications to other DoD components permitted
- Dual-Hatted



DoD 10 Separate Components

- Defense Information Systems Agency
- Defense Intelligence Agency
- Defense Logistics Agency
- Defense Threat Reduction Agency
- Department of the Air Force
- Department of the Army
- Department of the Navy
- National Geospatial-Intelligence Agency
- National Reconnaissance Office
- National Security Agency

Representational Restrictions

1-year Ban on Treaty Negotiations

- ***18 U.S.C. § 207(b).*** May not **represent, aid, or advise anyone** concerning ongoing treaty negotiations if:
  - participated personally and substantially in negotiations during last year of service

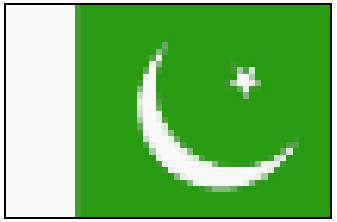
  - had access to inside information
  - representation, assistance, or advice is based on such inside information
- **<u>NO</u>** behind-the-scenes assistance allowed

Representational Restrictions

1-Year Ban Relating to Foreign Entities

- *18 U.S.C. § 207(f)*
  - Applies to former senior employees (personnel whose basic pay exceeded 86.5 percent of the rate for level II of the Executive Schedule (EL II).)

  - Prohibits, within 1 year of terminating Government service:



    - **representing foreign entity before any U.S. department, agency, etc. with intent to influence**
    - **aiding or advising foreign entity with intent to influence decision of U.S. official**
  - **NO** behind-the-scenes assistance

207 Exceptions/Waivers

- See table in 5 C.F.R. 2641.301(l) for specific applicability
- Include:
  - Acting on behalf of State or Local government, hospital or medical research organization, accredited degree granting institutions
  - Furnishing scientific or technological information
  - Testimony under oath

Procurement Integrity Act

- No longer has a name;
  codified on 1/4/11 at 41 U.S.C. 2101-2107
- Still Applies to employees who retire on or after 1 January 1997; just finally codified
- Bars acceptance of compensation from contractor for 1 year after certain participation in procurement of:
  - contracts, subcontracts, modifications, and other actions > $10M

Triggers

- Served as Procuring Contract Officer, Source Selection Authority, Source Selection Evaluation Board Member, Chief of Financial or Technical Evaluation Team for procurement > $10M
- Served as Program Manager, Deputy Program Manager, or Administrative Contracting Officer for procurement > $10M

- Personally made decision to:
  - award a contract, subcontract, modification, or task order > $10M
  - establish overhead or other rates applicable to contract > $10M
  - approve issuance of a contract payment > $10M
  - pay or settle a claim > $10M

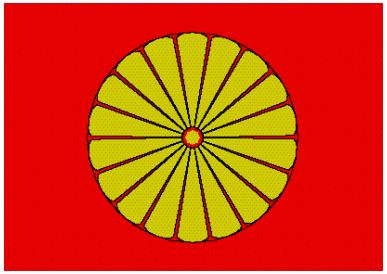
Executive Order 13490 and Pledge

- Applies to Political Appointees
- Senior Officials have 2-year cooling off
- No former political appointee can lobby current political appointees in the executive branch until administration is over

STOCK Act

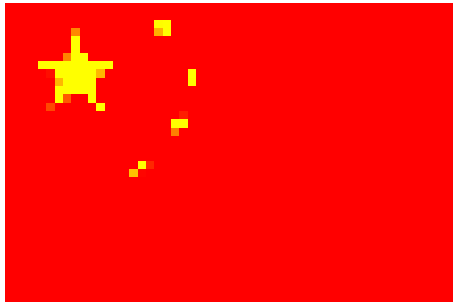
- Within 3 days of negotiating salary with a non-Federal employer, the public financial disclosure filer must file a notice of negotiation.

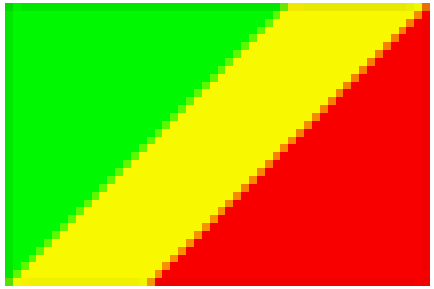
Foreign Entity



- Foreign government
- Person/group exercising sovereign political jurisdiction

- Foreign political parties
- Foreign commercial corporation if exercises the function of a sovereign





Foreign Employment

- Constitution, Article I, § 9, clause 8
  - No title of nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

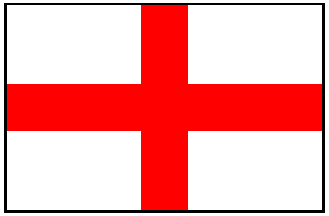
Foreign Employment
(Retired Military)

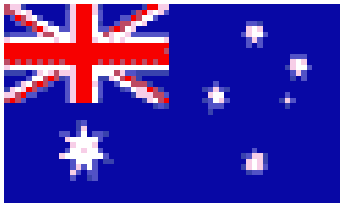
- Congressional Consent via Statute
  - Civil Employment
  - Military forces of "newly democratic nation"

- SEC of SERVICE <u>and</u> SECSTATE approval required for employment with a foreign government
  - includes any entity owned or controlled by a foreign government, e.g., commercial or educational entities

Foreign Employment

- May require registration as a Foreign Agent with Department of Justice
- Loss of Citizenship?
  - Generally means loss of military retiree pay
- POCs
  - ECC Deskbook for each service





Public Financial Disclosure Report Filers

- Must file termination OGE 278
  - not more than 30 days after retirement date

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JER CHANGES

- Must include discussion of post-employment and disqualification issues in annual ethics training
- Annual certification that public disclosure filers are aware of post employment laws
- Ethics officials provide post-employment counseling as part of exit briefing

OPM Notice

- Departments and agencies must notify all public filers subject to 18 U.S.C. 207(c) what the restrictions are, restrictions regarding 18 U.S.C. 207(f), and the penalties for violating 18 U.S.C. 207.
  5 C.F.R. part 730

Senate Armed Services Committee Requirement

- Maintain database of PSGE opinions for SES, General and Flag Officers paid at 0-7 or above, Procurement Officials set forth in 41 U.S.C. 423 which is now 41 U.S.C. 2101-2107, and those officials in an Executive Schedule position under subchapter II of Chapter 53, Title 5, United States Code (political appointees),

Senate Armed Services Committee Requirement (cont.)

- who, within two years after leaving service in the Department, expect to receive compensation from a defense contractor. P.L. 110-181, section 847

Senate Armed Services Committee Requirement (cont.)

- These officials must request the opinion in the situation where they participated personally and substantially in an acquisition in excess of $10,000,000.

Senate Armed Services Committee Requirement (cont.)

- Retain opinions for 5 years
- IG shall conduct periodic reviews to ensure opinions are provided and retained
- Centralized Database is AGEAR (After Government Employment Advisory Repository) (Must load 847 into AGEAR in a timely manner)

Materials

- PGE Service Employment Questionnaire DD Form 2945
- Form Letters

Questions