

**STATEMENT OF  
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BEFORE THE  
PERSONNEL SUBCOMMITTEE OF THE  
U.S. SENATE ARMED SERVICES COMMITTEE**

**APRIL 26, 2023**

Chair Warren, Ranking Member Scott, distinguished members of the Senate Armed Services Committee Personnel Subcommittee: Thank you for the opportunity to testify today.

I would also like to thank my colleagues the General Counsels of the Military Departments who are testifying alongside me – Carrie Ricci, Army General Counsel; Sean Coffey, Navy General Counsel; and Peter Beshar, Air Force General Counsel.

The Department of Defense (DoD) is deeply committed – from the very top of the Department down – to ensuring that all personnel carry out their duties and responsibilities ethically. Existing Executive Branch-wide ethics laws establish clear, consistent, and balanced standards for our personnel to follow from the time they are hired and continuing after they depart. DoD works extraordinarily hard to promote compliance with both the letter and spirit of these laws, and we have earned a strong reputation for administering effective training and compliance programs across the Department.

Today, I look forward to showcasing DoD's strong ethics program and explaining the comprehensive ethics rules that apply to current and former DoD personnel. My colleagues will also be happy to discuss the screening processes implemented by the Military Services when approving requests from military retirees to engage in foreign government employment—approval processes that culminate in final review and approval by the Secretary of State.

## DoD's Commitment to Ethical Conduct

As the largest Government agency, with approximately three million military and civilian personnel who fill nearly 675 distinct occupations across the globe, DoD does business with close to 30,000 organizations that range from traditional defense contractors and universities to non-profit organizations.<sup>1</sup> DoD personnel work in offices and laboratories, shipyards and airfields, medical facilities, and schools. They serve in the Army, Marine Corps, Navy, Air Force, Space Force, and Defense Agencies while supporting a common mission: “to deter war and ensure our nation’s security.”<sup>2</sup>

Across this vast and varied enterprise, DoD remains deeply committed to ensuring that all of our personnel carry out their duties and responsibilities ethically and free from actual and perceived conflicts of interest. It is imperative to uphold the highest ethical standards and maintain public trust as we execute our vital mission.

DoD’s highly regarded ethics program helps ensure that we live up to these high standards. Alongside my many other duties, I serve as the primary Designated Agency Ethics Official (DAEO) for the Department of Defense. DoD has sixteen additional DAEOs throughout the Department. The DAEOs are the most senior attorneys in their respective DoD departments and agencies. My Standards of Conduct (SOCO) team has deep expertise and provides additional connective tissue for the DAEOs and ethics officials throughout DoD. I am very proud of their commitment to excellence. Together, we oversee an ethics program comprised of more than 3,000 ethics attorneys embedded at every level across DoD, around the globe and at sea.

To assist DoD employees in following existing ethics laws and regulations, we implement extensive training programs across the Department. We also administer strong

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<sup>1</sup> See, e.g., “DoD Vendors with Contracts Over \$25,000,” January 2023, available at <https://dodsoco.ogc.osd.mil/Portals/102/Documents/Conflicts/2023%2025K%20covering%20FY2022.pdf?ver=f7CHvUlbGeU%3d>.

<sup>2</sup> See U.S. Dep’t of Defense, “About,” available at <https://www.defense.gov/About/>.

compliance programs. When there is reason to believe that there has been a failure to comply with applicable ethics laws and regulations, DoD policies establish clear guidelines for transmitting such cases to the Inspectors General or criminal investigative services, who investigate and, where appropriate, refer the matter to the Department of Justice for prosecution.

The DoD ethics program embraces a “tone from the top” model, with participation from the highest levels of DoD leadership. The Secretary of Defense consistently communicates his expectations regarding ethical conduct and values-based decision making. Shortly after his confirmation, the Secretary issued an ethics message to the DoD workforce on the importance of practicing and exercising ethical decision making in the same manner and with the same alacrity that we practice and exercise other professional skills.<sup>3</sup> The Secretary followed this with a video ethics message, a series of training sessions for senior leaders which he personally led, and regular meetings with ethics officials.

Our extensive ethics training program helps realize the Secretary’s vision. Office of Government Ethics (OGE) regulations require ethics officials to provide every new Executive Branch employee, including military officers, with initial ethics training within three months of joining the Executive Branch.<sup>4</sup> DoD has extended this training requirement to all enlisted personnel, who must complete initial ethics training within 180 days of entering active duty. In 2021, DoD ethics officials provided initial ethics training to more than 160,000 new DoD personnel.<sup>5</sup>

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<sup>3</sup> Secretary of Defense Memorandum, “Reaffirming Our Values and Ethical Conduct,” March 1, 2021, available at <https://media.defense.gov/2021/Mar/02/2002591989/-1/-1/1/SECRETARY-OF-DEFENSE-REAFFIRMING-DOD-VALUES-AND-ETHICAL-CONDUCT.PDF>.

<sup>4</sup> See 5 C.F.R. § 2638.304; see also DoD 5500.07-R, “Joint Ethics Regulation,” § 1-209 (2011) [hereinafter JER]. OGE’s regulation requires Senate confirmed Presidential appointees (“PAS” officials) to receive in-person initial ethics training within 15 days of appointment. See 5 C.F.R. § 2638.305. Ethics Agreements for DoD PAS officials require this training within seven days.

<sup>5</sup> OGE publishes DAEO agency responses to the OGE Annual Agency Ethics Program Questionnaire on its website. These Questionnaires are submitted to OGE on February 1 of each year and cover data for the preceding calendar year. Data for the 2023 Questionnaires (covering calendar year (CY) 2022) has not yet been published, as OGE reviews and processes the information prior to publication. Some data used in this statement therefore derives from Questionnaires submitted by DoD DAEOs in February 2022 (covering CY 2021). These numbers do not include personnel assigned to certain intelligence agencies, as information concerning the number and composition of such personnel is classified.

OGE regulations also require that personnel who file a financial disclosure report receive annual ethics training on conflict of interest and other ethics laws.<sup>6</sup> DoD further requires all Defense Acquisition Workforce personnel to receive annual ethics training, regardless of whether they are required to file a financial disclosure report.<sup>7</sup> In 2021, DoD ethics officials delivered annual ethics training to more than 140,000 financial disclosure filers.

DoD's extensive financial disclosure program helps employees, supervisors, and ethics officials detect and prevent potential conflicts of interest. The program focuses on individuals whose position or duties create a potential for conflicts of interest, such as senior personnel or those involved in the acquisition process. These personnel are required to file a report within 30 days of assuming their position and on an annual basis thereafter. In 2021, these DoD personnel filed approximately 150,000 financial disclosure reports (OGE Forms 278e and 450). All senior personnel are required to report certain transactions no later than 45 days after the transaction occurs,<sup>8</sup> and last year they filed more than 3,600 of these periodic transaction reports (OGE Form 278T).

OGE regulations require ethics officials to review and certify all financial disclosure reports within 60 days of receipt.<sup>9</sup> DoD goes further by requiring that a supervisor, who is most familiar with the employee's duties, first review each report.<sup>10</sup> Ethics officials follow up with employees when potential conflicts of interest are identified, taking steps to ensure that any such conflicts are avoided or resolved. If a supervisor or other official receives credible information indicating that an employee violated the conflict of interest rules, the matter is referred to the appropriate authorities.

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<sup>6</sup> See 5 C.F.R. §§ 2638.307, 308.

<sup>7</sup> See Under Secretary of Defense (Acquisition, Technology & Logistics) Memorandum, "Mandatory Annual Ethics Training for the Defense Acquisition Workforce," January 15, 2014.

<sup>8</sup> See 5 U.S.C. § 13105(l).

<sup>9</sup> See 5 C.F.R. § 2634.605.

<sup>10</sup> See JER, *supra* note 4, §§ 7-206, 7-306.

All senior DoD personnel who file public financial disclosure reports must certify annually that they are both aware of post-Government employment disqualification requirements and that they have not violated them.<sup>11</sup> And the Defense Federal Acquisition Regulation Supplement (DFARS) requires contractors to certify that former employees working on a DoD contract are complying with applicable post-Government employment ethics laws.<sup>12</sup>

To assist current and former DoD employees with comprehending the often intricate and overlapping patchwork of post-Government employment laws, DoD ethics counsel devote considerable resources to providing written guides, meeting individually with current and former personnel, and issuing formal opinions when current employees arrange for new employment. When DoD personnel leave the Department, DoD ethics officials help ensure that they are aware of the relevant post-Government employment ethics laws, including by providing tailored exit briefings and written advice. Former DoD personnel continue to reach back to DoD ethics officials for advice on the application of post-Government employment laws after their departure.

In 2021, GAO released a report on DoD's post-Government employment restrictions.<sup>13</sup> The report recognized the effectiveness of DoD's compliance measures for preventing violations of laws and regulations relating to post-Government employment. The report did not suggest that additional DoD-specific restrictions are either necessary or in the Government or public interest. Instead, GAO noted that "both DoD and defense contractors benefit from the contractors' employment of former Government officials. For example, contractors benefit from the knowledge and skills that former DoD officials developed at DoD. DoD benefits from improved communication."<sup>14</sup> Moreover, GAO found that fewer than two percent of former DoD senior and acquisition officials work for the 14 biggest defense contractors. Between 2014 and 2019, approximately 1.5 million people left employment with DoD, and only about 1,700 (0.1%)

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<sup>11</sup> *See id.* § 8-400.

<sup>12</sup> *See* DFARS § 252.203-7005.

<sup>13</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-104311, Post-Government Employment Restrictions: DOD Could Further Enhance Its Compliance Efforts Related to Former Employees Working for Defense Contractors (2021).

<sup>14</sup> *Id.* at 6.

of those were former senior or acquisition officials who worked at one of the 14 biggest defense contractors.

### **Existing Comprehensive Ethics Laws and Regulations**

Executive Branch-wide ethics laws and regulations create a clear, consistent, and balanced framework that is appropriately tailored to promote integrity and prevent conflicts of interest when Executive Branch personnel enter and exit government employment.

All Executive Branch employees are subject to a number of ethics statutes and regulations intended to prevent conflicts of interest. For example, the governing Federal criminal statute, 18 U.S.C. § 208 (Section 208), prohibits Executive Branch employees from participating in any particular matter that could affect their financial interests. OGE regulations, 5 C.F.R. §§ 2635.501–03, prohibit Executive Branch employees from participating in matters that could cause the public to question their impartiality. Both the criminal statute and the impartiality regulation require a nexus between an employee’s duties and the financial interest for a conflict of interest to arise.

Section 208 broadly prohibits any Executive Branch employee from participating personally and substantially in any particular matter in which the employee knows that they have a financial interest that would be directly and predictably affected by the matter, or in which the employee knows that a person whose interests are imputed to the employee has a financial interest directly and predictably affected by that matter. An imputed financial interest can arise from a spouse, minor child, general partner, or any organization in which the Executive Branch employee serves as an officer, director, trustee, general partner, or current/prospective employee.

Any waiver of Section 208’s requirements requires approval by a supervisor, in consultation with an ethics official and OGE.<sup>15</sup> OGE requires agencies to report, as part of an annual ethics program questionnaire, the number of statutory conflict of interest waivers granted

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<sup>15</sup> See 5 C.F.R. § 2640.301 (providing the requirements for issuing an individual waiver under 18 U.S.C. § 208(b)(1)).

in the previous calendar year. In DoD, such waivers are generally available only when no other reasonable alternative exists and are granted infrequently. For example, between 2017 and 2022, only one very limited waiver was granted.<sup>16</sup>

In addition, the longstanding cornerstone of Executive Branch-wide restrictions related to post-Government employment, 18 U.S.C. § 207, permanently prohibits all former Executive Branch personnel from representing a non-federal entity (NFE) to any officer or employee of any agency within the executive, legislative, or judicial branches, as well as to any federal court or court martial on a particular matter involving specific parties in which the former employee personally and substantially participated during Government service.<sup>17</sup> And for two years after leaving Government service, all former Executive Branch personnel are prohibited from representing an NFE to any officer or employee of any agency within the executive, legislative, or judicial branches, as well as to any federal court or court martial on a particular matter involving specific parties that was pending under the former employee's official responsibility during the last year of Government service.<sup>18</sup>

My SOCO team has prepared Attachment A, which contains a more detailed overview of the ethics compliance regime that applies to DoD personnel in relation to four topics: (1) incoming employee restrictions; (2) stock ownership; (3) seeking future employment in the course of Government service; and (4) post-Government employment.

### **Importance of Clear, Consistent, and Balanced Ethics Laws**

Clear, consistent, and balanced ethics laws are essential to ensuring compliance and maintaining the public's trust. Clear laws are easy for personnel to understand and follow. Consistent laws fit within the overall statutory framework for regulating ethical conduct within

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<sup>16</sup> This waiver was granted for approximately one month to bridge the period between when the employee initiated divestiture of an investment fund with potentially conflicting holdings and the final redemption date.

<sup>17</sup> See 18 U.S.C. § 207(a)(1).

<sup>18</sup> See *id.* § 207(a)(2).

the Executive Branch using common terminology and definitions to prevent confusion. Balanced laws are carefully tailored to avoid conflicts and preserve public trust, respect an individual's ability to use their professional education and experience after leaving Government service, and acknowledge the Government's interest in recruiting and retaining personnel with requisite experience and skills.

The existing Executive Branch-wide ethics laws generally satisfy these criteria. On top of this longstanding body of law, we also benefit from years of detailed interpretive guidance provided by OGE, the Department of Justice, and the Federal courts. These time-tested standards protect against undue influence without unreasonably interfering with the ability of veterans and other public servants to use their education, skills, and experience to earn a living and support their families following service to the country. Other laws, such as the Procurement Integrity Act, are aligned with the intent and language used in these criminal conflict of interest laws and provide additional protections. Together, these laws take a clear, consistent, and balanced approach to preventing conflicts of interest while preserving DoD's ability to leverage the expertise of current and former personnel.

There is always room for improvement, of course, and DoD supports well-coordinated and integrated efforts to enhance Executive Branch-wide ethics laws. We have concerns, however, that additional DoD-specific ethics laws<sup>19</sup> can be counterproductive. 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 they may ultimately undermine rather than promote our shared commitment to ethical conduct. DoD-specific laws may also put the Department at a disadvantage in recruiting and retaining expertise and can deter the top talent we need from participating in public-private talent exchanges.

Recognizing that DoD-specific ethics laws could adversely affect DoD's participation in talent and knowledge exchange, recruitment, and retention, Congress has directed an independent review of the application and impact that DoD-specific ethics laws may have on

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<sup>19</sup> See Attachment A (describing the DoD-specific statutes in more detail).



these capabilities. As required by the FY 2023 NDAA, we have entered into an agreement with an independent Federally Funded Research and Development Center to conduct this study. The study will consider whether the enactment of DoD-specific ethics laws harms DoD's ability to share knowledge between Government and industry; is consistent with existing laws that apply to all Executive Branch employees; creates confusion; and could impact recruiting and retention.

Once this comprehensive review is complete, I look forward to sharing the results with the Committee.

### **Foreign Government Employment**

The U.S. Constitution places restrictions on the acceptance of foreign government employment by retired military personnel. The Emoluments Clause of the Constitution prohibits any person holding an "office of profit or trust" – which includes Service members even after they retire from the Service – from accepting compensation from a foreign government, or an entity controlled by a foreign government, without congressional consent.<sup>20</sup>

Congress has consented to the receipt of foreign government compensation by military retirees in some circumstances. Federal law allows the Military Department Secretaries to approve requests from military retirees to accept foreign government employment, subject to final review and approval by the Secretary of State.<sup>21</sup> Congress requires DoD to report annually the number of retired Flag and General Officers who have received approval to accept foreign government employment. Since 2015, the Military Services have approved an average of 10 requests from retired Flag and General Officers each year.<sup>22</sup>

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<sup>20</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>21</sup> See 37 U.S.C. § 908. In most cases, the Secretaries of the Military Departments have delegated their approval authority to another senior official.

<sup>22</sup> 37 U.S.C. § 908, as amended in 2019, requires the Secretaries of the Military Departments, in consultation with the Secretary of State, to report the number of General and Flag Officers who receive approval to accept foreign government employment, including the name of the foreign government, the duties to be performed, and the total amount of compensation. The Military Departments reported 68 approvals for General and Flag Officers from CY 2015 through CY 2019; 5 in CY 2020; 5 in CY 2021; and 3 in CY 2022.

### ***Military Service Procedures***

Each Military Service has implemented its own process for reviewing requests from military retirees for approval to accept foreign government employment. At a minimum, each Service requires review by a legal counsel and a senior human resources officer or other senior official prior to forwarding to the Secretary of State for final approval. The Secretary of State is the ultimate approval authority for foreign government employment. Applications not approved by the Services are not forwarded to the Secretary of State for review.

To help ensure a consistent approach throughout the Department, the Undersecretary of Defense for Personnel and Readiness recently directed the Military Services to assess their processes for reviewing requests for approval of foreign government employment by military retirees. The Military Services were directed to report the results of this assessment within 90 days, including any recommendations for improvement. The Department looks forward to briefing the Committee on the results of this assessment.

Compliance with the Emoluments Clause is an individual responsibility and penalties for non-compliance are a personal financial liability. If the Department becomes aware of a potential violation of the Emoluments Clause, that potential violation is investigated by the Military Service. If a determination is subsequently made that the individual failed to obtain required advance approval for foreign government employment, that individual will owe a debt to the United States equal to the amount of compensation the individual received from the foreign government. Collection action, which may include offset of retiree pay, can be taken to satisfy the debt.

### ***Other Foreign Government Employment Laws***

The primary criminal statute that governs post-Government employment, 18 U.S.C. § 207, prohibits former senior and very senior Executive Branch personnel from representing or aiding a foreign entity with the intent to influence any employee of the Government or Member of Congress, and prohibits behind-the-scenes assistance, for one year after leaving the relevant

position, office, or employment.<sup>23</sup> Any U.S. citizen who provides defense services to a foreign government may also be required to comply with State Department's International Traffic in Arms Regulations (ITAR).<sup>24</sup> And Congress has required the Intelligence Community (IC) to restrict certain Executive Branch personnel and contractors assigned to IC elements from accepting employment with foreign governments, with oversight provided by the Director of National Intelligence and regular reporting to Congress.<sup>25</sup>

### **Conclusion**

DoD shares this Committee's commitment to maintaining the public's trust as we defend the Nation. My colleagues and I look forward to answering your questions.

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<sup>23</sup> See 18 U.S.C. § 207(f); see also 5 C.F.R. § 2641.206(a) (implementing the basic prohibition in 18 U.S.C. § 207(f)).

<sup>24</sup> See 22 U.S.C. § 2278; see also 22 C.F.R. Parts 120–130. For an overview of ITAR and the underlying authorities published by the State Department, see [https://deccs.pmddtc.state.gov/deccs?id=ddtc\\_public\\_portal\\_itar\\_landing](https://deccs.pmddtc.state.gov/deccs?id=ddtc_public_portal_itar_landing).

<sup>25</sup> See, e.g., 50 U.S.C. § 3073a.

## Attachment A

This Attachment details the ethics compliance regime that applies to DoD personnel in four areas: (1) incoming employee restrictions; (2) stock ownership; (3) seeking future employment in the course of Government service; and (4) post-Government employment.

### *Incoming Employee Restrictions*

Restrictions related to former employment seek to balance the need to maintain public trust with the Government's need to benefit from the knowledge and expertise that employees bring from prior employment with industry, academia, and other non-Federal entities (NFEs).

A criminal statute, 18 U.S.C. § 208 (Section 208) provides that a conflict of interest can arise from former employment if an Executive Branch employee retains a financial interest in their former employer, such as owning company stock.<sup>26</sup>

Even absent a criminal conflict of interest, OGE regulations recognize that certain circumstances involving a member of an employee's household, or other "covered relationships," could cause the public to question the employee's impartiality. All Executive Branch employees are prohibited from participating in a particular matter involving specific parties that they know is likely to affect the financial interests of a member of their household, or in which they know a person with whom they have a "covered relationship" is or represents a party to the matter if the employee or an agency designee determines that a reasonable person would question their participation.<sup>27</sup> The regulatory definition of a "covered relationship" is broad and includes, *inter alia*, former and prospective employers of certain family members.<sup>28</sup> If an Executive Branch employee raises an impartiality concern, an agency designee, generally a supervisor, can authorize that employee to participate in the matter only when the Government

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<sup>26</sup> See 18 U.S.C. § 208(a).

<sup>27</sup> See 5 C.F.R. § 2635.502.

<sup>28</sup> See *id.* § 2635.502(b)(1).

interest in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations.<sup>29</sup>

Without prior authorization, Executive Branch employees may not work on matters where their former employer is, or represents, a party for one year—the “cooling off” period.<sup>30</sup> For civilian political employees, the current Administration’s Ethics Pledge imposes a further two-year restriction on participating in particular matters involving a former employer or client for whom the employee performed services in the two years prior to appointment.<sup>31</sup>

In the National Defense Authorization Act (NDAA) for fiscal year (FY) 2022, Congress enacted an additional two-year statutory prohibition specific to DoD personnel.<sup>32</sup> That statute bars DoD personnel from participating in a matter in which their former employer is a party for two years and appears to combine standards from Section 208 and the OGE impartiality regulations.<sup>33</sup> Combining language from the criminal statute and the impartiality regulation creates a new and distinct standard substantively different from the standards that apply to all Executive Branch employees. While DoD has provided interpretive guidance and training to help personnel understand how the overlapping recusal standards apply, multiple standards create confusion and make it difficult even for well-intentioned employees to implement and understand applicable recusal requirements.<sup>34</sup>

As required by OGE regulations, financial conflicts of interest and impartiality responsibilities are addressed in the ethics training that new employees receive upon joining

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<sup>29</sup> *See id.* § 2635.502(d).

<sup>30</sup> *See id.* § 2635.502(b)(1)(iv).

<sup>31</sup> Exec. Order No. 13989, 86 Fed. Reg. 7029 (Jan. 25, 2021).

<sup>32</sup> *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 1117, 135 Stat. 1541, 1955–1956 (2021) [hereinafter FY 2022 NDAA].

<sup>33</sup> *See id.*

<sup>34</sup> *See* SOCO Advisory 22-01, “Guidance Regarding Section 1117 of the National Defense Authorization Act for Fiscal Year 2022,” (Jan. 11, 2022), available at <https://dodsoco.ogc.osd.mil/Ethics-Program-Resources/DoD-Ethics-Guidance/SOCO-Advisories/2022-SOCO-Advisories/>.

DoD.<sup>35</sup> In accordance with OGE policy guidance, very senior personnel of the Executive Branch who have broad responsibilities inform their staffs in writing of their recusal from matters involving a former employer and implement rigorous screening processes to ensure that such matters are assigned to another appropriate employee.<sup>36</sup>

### *Stock Ownership*

Existing conflict of interest laws, together with DoD's robust training and screening processes, maintain an appropriate balance between individual property ownership rights and the public interest in avoiding conflicts.

Section 208 provides that a criminal conflict of interest can arise when an Executive Branch employee, or their spouse or minor child, owns more than a *de minimis* amount<sup>37</sup> of stock in a company and the employee is asked to take an official action that could affect the financial interest of that company. All Executive Branch employees have a duty to monitor their financial interests for any potential conflicts of interest that may arise between their financial holdings and their official duties. When a potential conflict of interest is identified, Executive Branch employees must either recuse themselves from taking any action that could affect the financial interest of the company in which they hold stock or divest the stock holding.

DoD civilian officials appointed by the President, by and with the advice and consent of the Senate and DoD personnel in key acquisition positions face additional restrictions. These personnel are prohibited from owning more than a *de minimis* amount of stock in the largest ten defense contractors based on contract awards.<sup>38</sup> Linking this restriction to a publicly available

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<sup>35</sup> 5 C.F.R. § 2638.304(e).

<sup>36</sup> OGE Memorandum DO-04-012 (June 1, 2004).

<sup>37</sup> Federal regulations allow Executive Branch employees to participate in particular matters when the disqualifying financial interest arises from stock ownership with an aggregate market value that is less than an established regulatory *de minimis* amount, to include the holdings of the employee, the employee's spouse, and minor child(ren). *See* 5 C.F.R. § 2640.202.

<sup>38</sup> In 2019, Congress enacted 10 U.S.C. § 988, which memorialized some of the Senate Armed Services Committee (SASC) policies requiring these personnel to divest of certain stock holdings. These personnel may not own or

list of contracts awarded by DoD provides transparency and consistency, while allowing these personnel and their financial advisors to effectively ensure compliance with the requirement.

Merely owning stock in a defense company is not enough to create a potential conflict of interest for DoD personnel—there must be some nexus between an employee’s financial interests and their official duties. For example, a senior official at the Defense Commissary Agency may have conflicts with a major dairy supplier but has no conflict of interest with an aircraft manufacturer. Imposing broader divestiture requirements in addition to existing conflicts laws can create confusion without advancing important Government or public interests. Such requirements can also potentially prevent DoD from recruiting and retaining top talent and expertise.

### *Seeking Employment*

Several statutes and regulations that apply across the Executive Branch seek to prevent even the appearance of partiality once Executive Branch personnel have had contact with an NFE regarding post-Government employment.

Section 208 provides that a criminal conflict of interest can arise when Executive Branch personnel begin negotiating for future employment with an NFE.<sup>39</sup> “Negotiation” means “discussion or communication with another person, or such person’s agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person.”<sup>40</sup> Once negotiations have commenced, and during any time in which an

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purchase, above OGE’s regulatory “de minimis” amount, the “stock of a company that 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.” Referencing contracts awarded rather than revenue received allows the Department and its employees to consult a list of companies that the General Services Administration compiles annually and is publicly available. The list of companies who are among the top ten defense contractors captures all entities holding more than 1.5% of the total contracting dollars awarded by DoD. It generally includes some combination of the same 11 contractors, though unanticipated events—like the COVID-19 pandemic—may occasionally result in changes.

<sup>39</sup> See 18 U.S.C. § 208(a).

<sup>40</sup> 5 C.F.R. § 2625.603(b)(i) (noting that the same definition also applies for 18 U.S.C. § 208(a)).

employee has an arrangement for future employment with an outside organization, they are prohibited from participating in any particular matter that could affect the financial interests of that organization.

In addition to the statutory prohibition, ethics regulations require Executive Branch employees to recuse from matters that could affect the financial interests of any NFE with whom they are seeking employment.<sup>41</sup> “Seeking” is a lower threshold than “negotiating” and includes, *inter alia*, “unsolicited communication to any person, or such person’s agent or intermediary, regarding possible employment with that person.”<sup>42</sup>

Two additional statutes cover certain Executive Branch personnel seeking employment with an NFE. First, senior Executive Branch personnel must file a statement notifying their ethics counselor of any negotiation or agreement for future employment or compensation within three business days after commencement of the negotiation or execution of the agreement.<sup>43</sup> Second, the Procurement Integrity Act imposes restrictions on Executive Branch personnel who personally and substantially participate in procurement for a contract in excess of the simplified acquisition threshold (currently \$250,000) and are contacted by a bidder regarding non-Federal employment, or are seeking employment with a bidder. Such personnel must report the contact in writing and either reject the offer or disqualify themselves from further personal and substantial participation in that procurement.<sup>44</sup>

When seeking employment, as in other contexts, DoD personnel face additional restrictions specific to the Department. Section 1117 of the FY 2022 NDAA (Pub. Law No. 117-

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<sup>41</sup> See 5 C.F.R. § 2635.604(a)(1).

<sup>42</sup> 5 C.F.R. § 2635.603(b) (excluding unsolicited communication “for the sole purpose of requesting a job application” from this example).

<sup>43</sup> See Stop Trading on Congressional Knowledge (STOCK) Act of 2012, Pub. L. No. 112-105, § 17, 126 Stat. 291, 293–94 (2012) (5 U.S.C. § 13103, note).

<sup>44</sup> See 41 U.S.C. § 2103 (explaining that the agency could authorize the official to resume participation in the procurement, in accordance with 18 U.S.C. § 208, on the grounds that: (1) the person is no longer a bidder or offeror in that procurement; or (2) all discussions regarding possible employment with the bidder or offeror have been terminated without an agreement or arrangement for employment).



81) prohibits DoD personnel from participating in a matter in which a prospective employer is or represents a party to the matter.<sup>45</sup> The Executive Branch-wide restrictions discussed above already prohibit DoD personnel from participating in any matter that could affect the financial interest of a prospective employer.

### ***Post-Government Employment***

All former Executive Branch personnel are subject to ethics restrictions that aim to prevent improper influence<sup>46</sup> and use of non-public information<sup>47</sup> following Government service. These laws seek to both preserve public trust and allow former Government personnel to appropriately use their professional experience after leaving Government service.

Executive Branch-wide restrictions related to post-Government employment are extensive. As discussed above, 18 U.S.C. § 207 prohibits all former Executive Branch personnel from representing an NFE on a particular matter involving specific parties to any officer or employee of any agency within the executive, legislative, or judicial branches on which the former employee personally and substantially participated during Government service. And for two years after leaving Government service, all former Executive Branch personnel are prohibited from representing an NFE to any officer or employee of any agency within the executive, legislative, or judicial branches, as well as to any federal court or court martial on a particular matter involving specific parties that was pending under the former employee's official responsibility during the last year of Government service.<sup>48</sup>

For one year after leaving the Government, former senior Executive Branch officials may not represent an NFE to any personnel at their former agency, regardless of the matter.<sup>49</sup> This

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<sup>45</sup> See FY 2022 NDAA, Pub. L. No. 117-81, 135 Stat. 1541, 1955–56 (2021).

<sup>46</sup> See 18 U.S.C. §§ 203, 207; see also 41 U.S.C. § 2104; 5 C.F.R. § 2641.

<sup>47</sup> See 18 U.S.C. § 1905; see also 18 U.S.C. §§ 641, 793, 794; 50 U.S.C. § 783.

<sup>48</sup> See 18 U.S.C. §§ 207(a)(1), (a)(2).

<sup>49</sup> See *id.* § 207(c).

one-year period extends for an additional year (to two years total) for any former Secretary of Defense, as well as other very senior personnel of the Executive Branch.<sup>50</sup> During the covered periods, the law broadly restricts any communication or appearance by former Executive Branch personnel with the intent to influence official action. For one year after leaving Government, former senior and very senior Executive Branch officials may also not knowingly aid, advise, or represent a foreign government or foreign political party, with the intent to influence any officer or employee of the United States or any Member of Congress.<sup>51</sup>

Outside of 18 U.S.C. § 207, procurement integrity laws provide additional restrictions for certain former Government personnel. Former Government personnel are prohibited from accepting compensation from a contractor for one year if they served in certain positions or made certain decisions relative to an acquisition valued greater than \$10 million.<sup>52</sup> The current Administration's Ethics Pledge imposes further post-Government employment restrictions on all civilian political appointees.<sup>53</sup>

While extensive, these Executive Branch-wide laws are appropriately and narrowly targeted to prevent conflicts of interest between a former employee's position and duties and their subsequent non-Federal employment. Especially for a Department with nearly 675 distinct occupations across the globe, a targeted approach is critical. A former senior Air Force acquisition official in post-Government employment with an aircraft manufacturer presents vastly different potential conflict of interest concerns than a former senior official from the Defense Human Resources Agency seeking post-Government employment with the same company.

Former DoD personnel are also subject to additional DoD-specific statutory requirements.

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<sup>50</sup> *See id.* § 207(d).

<sup>51</sup> *See id.* § 207(f).

<sup>52</sup> *See* 41 U.S.C. § 2104.

<sup>53</sup> *See* Exec. Order No. 13,989, 86 Fed. Reg. 7029 (Jan. 25, 2021).

For example, former DoD personnel who served in certain positions or took certain actions on an acquisition valued over \$10 million during their last two years of service are required to obtain a written ethics opinion before accepting compensation from any defense contractor regardless of whether there was a nexus between the former employee’s duties and their prospective employer.<sup>54</sup> There are currently nearly 30,000 defense contractors. The written opinions are maintained for five years in a central DoD database called the After Government Employment Advice Repository. Maintaining these opinions in a secure Government system ensures their ready availability to ethics officials and Inspectors General, while protecting the privacy and security interests of current and former DoD personnel.

Former senior DoD personnel are also subject to additional restrictions on certain communications back to the Government. Section 1045 of the FY 2018 NDAA created a confusing patchwork of DoD-specific restrictions for “covered individuals” who are former DoD officers in the grade of O-7 and above, or an equivalent civilian level.<sup>55</sup> The applicability of the restrictions depends upon the subject and nature of the proposed contact; the appointment status of the person to whom the contact is directed; and the agency within which the intended recipient works. By contrast, 18 U.S.C. § 207 bars communication with all Federal personnel in the former senior official’s prior agency without regard to the appointment status of the person to whom the contact is directed.

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<sup>54</sup> See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 847, 122 Stat. 3, 243–44 (2008).

<sup>55</sup> See National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1045, 131 Stat. 1283, 1555–56 (2017).