

ETHICS FLASH — PART 2

POST-GOVERNMENT EMPLOYMENT

Fiscal, Ethics and
Administrative Law
Division
(SAF/GCA)

SAF/GCA Ethics Team

**Alternate Designated
Agency Ethics Official
(ADAEO)**

Ms. Shannon A. McGuire

**Deputy Designated Agency
Ethics Official (DDAEO)**

and

Director of Ethics

Ms. Meredith Pierce

Ethics Attorneys

Ms. Amy Braud

Ms. Catherine Chiappetta

Ms. Patricia Welch

Ms. Heather Gallery

Administrative Specialists

Mr. Justin Marby

Ms. Stacey Walker

CONTACT US

703-693-0417

SAF.GCA.Ethics.Workflow
@us.af.mil

**This Ethics Flash is
brought to you by:**

U.S. Const., Art. 1, sec. 9, cl. 8

10 U.S.C. § 989

18 U.S.C. §§ 203, 205

18 U.S.C. § 207(c)

41 U.S.C. §§ 2101-2107

5 CFR § 2635.607

Sec. 1117, FY 2022 NDAA

Sec. 1045, FY 2018 NDAA

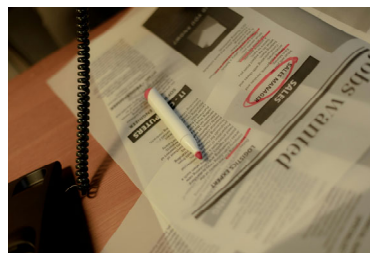
Sec. 847, FY 2008 NDAA

DoDI 1000.32

PREPARING FOR ANOTHER GPC: A (G)REAT (P)OST-GOVERNMENT (C)AREER!

We know you've been waiting on pins and needles for the PGE Ethics Flash sequel to drop ... and we're happy to oblige! As we promised in the last edition, this Flash will delve deeper into specialized PGE topics, including restrictions on senior personnel, the Procurement Integrity Act, working on terminal leave, and foreign government employment—plus a special treat for DAF hiring officials!

You may be wondering if it's worth it to keep reading if you don't think any of these would apply to you. It's up to you—time is valuable!—but



even if you, yourself, are not subject to these restrictions, it may be useful to be aware that these provisions exist.

Think about it. If you support a senior official as part of your duties, your being aware of these restrictions may help your principal avoid inadvertently supporting prohibited

conduct, such as by taking meetings with former DAF personnel subject to cooling-off restrictions. Or maybe you are a subject matter expert who could be asked to advise on a procurement in the future. Or maybe you have aspirations to become a senior official yourself!

In any event, just like in the last PGE Flash, we want to remind you that these restrictions are incredibly fact-specific, so we encourage you to reach out to an ethics counselor if you have questions about how these restrictions could apply to you or someone you love!

AM I A SENIOR OFFICIAL? WAS I ISSUED A MEMBERSHIP CARD?

With great power comes great responsibility, a wise man once said. While you may not have the power to shoot webs from your fingers (or maybe you do), you've reached a point in your career where you have been entrusted with significant responsibilities on behalf of the DAF. As you are familiar, this degree of added responsibility means additional rules for you to follow.

It should be no surprise then that the PGE multiverse also imposes additional rules on senior personnel. Therefore, the first thing to do is to confirm whether you qualify as a senior official for purposes of identifying restrictions.

For military members, it's

pretty straightforward—senior officials are general officers (O-7 to O-10).

For civilian employees, senior officials are personnel whose rate of pay is equal to or greater than 86.5 percent of the rate for level II of the Executive Schedule. That means it applies to civilian employees whose basic pay—without locality pay—is equal to or greater than \$191,943 (number as of this year).

Therefore, depending on salary, the label of senior official could apply to Presidentially-appointed, Senate confirmed (PAS) personnel, members of the Senior Executive Service (SES), Senior-Level (SL) & Scientific and Professional (ST) positions,

Defense Intelligence personnel (DISES/DISL), and some Intergovernmental Personnel Act (IPA) personnel and highly qualified experts (HQEs).

However, some rules we'll cover will apply only to certain categories of senior officials. So if you are a senior official considering departing the Government, we recommend you reach out to us in the early stages so that you are aware of which restrictions apply to you and which don't.

We'd put a picture of a famous web-slinging hero here, but we don't want the DAF's intellectual property lawyers to be upset with us...

ALL SENIOR OFFICIALS & OGE FORM 278 FILERS: STOCK ACT NOTIFICATIONS

You may remember from PGE Ethics Flash Part 1 that there are rules related to “seeking employment” that impose restrictions on personnel still employed by the Government who are looking for a post-Government job.

Well, by virtue of being an OGE Form 278 public financial disclosure filer, you have an additional obligation while searching for jobs before your departure. Specifically, you

are required to file with your ethics counselor what is known as a STOCK Act notification (named after its origin) within three days of commencing negotiations with a future non-governmental employer.

What does commencing negotiations mean? It is a step farther along in the process than seeking employment and involves mutual discussions between you and

an employer with a view toward reaching an agreement.

Okay, great—but what does that actually mean, lawyers? What it means is that you and the prospective employer are at the point of discussing the terms of employment—duties, salary, benefits, etc. Depending on the type of employment, this could occur before, during, or after an **application** or interview.

Do these communication restrictions mean that I'm not allowed to talk to my former colleagues at social occasions, like a mutual friend's retirement?

You are permitted to attend and talk to otherwise prohibited contacts at purely social situations such as these!

However, we recommend you be mindful that the conversation does not turn to prohibited communications.

ALL SENIOR OFFICIALS: 18 USC 207(C) ONE-YEAR COOLING-OFF PERIOD

We got positive feedback on the use of colors in the last edition, so they're back to explain a key restriction!

For *all* senior personnel listed on the previous page—for one year after leaving a senior position, you may not **represent anyone else**, with the **intent to influence**, before your former agency (the DAF, including both the Air Force and the Space Force), regarding any **official action**.

Why does this law (18 U.S.C. § 207(c)) exist? It is to diminish any appearance that Government decisions are being improperly influenced by former senior personnel.

But as always, specific definitions matter.

Represent: Representation includes communications and appearances. Even a non-speaking appearance can be a representation if an employee's presence could be seen as an effort to influence the agency.

Anyone else: This prohibits your acting on behalf of another entity. It does not prohibit you self-representation to DAF personnel (but be careful not to blur the lines if you are working for an employer or if you have set up your own business).

Intent to influence official action: If your communication or appearance would be to advance a position or encourage or affect a certain Government action, it would fall under this restriction.

This law does not prohibit a former senior official engaging in behind-the-scenes work to support others' contacts with the Government.

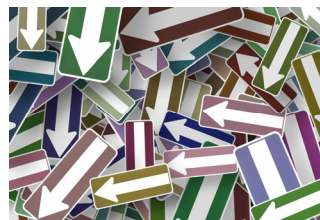
Due to how broadly this law is applied, we encourage you to exercise caution in your first year out if you are working for an organization that has DAF contracts or engagement in its portfolio.

SOME SENIOR OFFICIALS: SECTION 1045 “LOBBYING BAN”

Section 1045 of the 2018 NDAA enacted additional PGE restrictions for certain senior personnel: general officers and SES/DISES members.

These are called lobbying restrictions, but for the sake of plain language, we recommend you abandon all thoughts of traditional lobbying and think of these as additional representation or communication restrictions.

These prohibit departing personnel from: (1) communicating with covered officials in the DoD, and (2) from com-



municating with covered officials in non-DoD agencies regarding DoD matters and from engaging in behind-the-scenes efforts supporting others' communications to non-DoD covered officials. Covered officials include PAS personnel, GOs, and political

appointees, among others.

GOs in grades O-7 and O-8 and SES/DISES Tiers 1 and 2 are subject to these restrictions for one year. GOs in grades O-9 and O-10 and SES/DISES Tiers 3 and 4 are subject to these restrictions for two years.

The picture in this block is an adequate representation of this provision, so we just want you to be aware that this is out here and recommend you reach out for more information if you are a retiring GO or SES/DISES.

WORKING ON TERMINAL LEAVE FOR A CONTRACTOR—BE CAREFUL!



We're just going to say it up front—this ban is not a popular one. We know it can cause inconvenience for PGE, but so does jail time—and there's no wiggle room under these criminal laws.

18 U.S.C. §§ 203 and 205 prohibit Federal employees, including military officers on terminal leave, from representing another entity back to the Government.

In practice, this ban is applied very broadly. If you are subject to it, you are not permitted to work or appear in Federal workspaces, communicate with Federal personnel (in person or electroni-

cally), or represent your employer at meetings (in person or electronically).

What this comes down to in practice is that if you are working for a contractor on terminal leave, it needs to be behind-the-scenes, at the contractor's workplace (or another non-Federal location), and without interacting with Government personnel.

Please note that while this provision is often most relevant to military officers seeking to start their new non-Federal job during terminal leave, the restrictions are also applicable to military officers or civilian employees engaging in outside activities—whether compensated or not—at any time while employed by the Federal government.

But wait, you say! There are always exceptions to these draconian rules, right?

There are, but they are limited, and they tend not to be applicable in traditional work. For example, there is an exception if you are acting as a personal fiduciary (e.g., executor of a will). Or if you are engaging in purely ministerial communications—those where there is no potential for divergent views. If there is any potential for divergent views between the Government and your employer, your communications on behalf of your employer would be beyond the definition of ministerial and therefore prohibited.

So if you are thinking about a side hustle or are contemplating starting a new job for a contractor prior to your official retirement or separation date, make sure to be careful if it may involve communication with Government personnel or working in a Government space.

Fun Fact About Emoluments:

We tend to talk about the Emoluments Clause in relation to payment or other items of value, but it also applies to honorific titles from foreign governments. So make sure you get the necessary advance approval if a foreign government offers you an title, even as an “honorary member” of their armed forces or otherwise.

FOREIGN GOVERNMENT EMPLOYMENT—GET APPROVAL OR LOSE RETIREMENT PAY!

Under the Emoluments Clause of the U.S. Constitution, retired military officers, enlisted personnel, and reservists may not accept a payment from a foreign government without obtaining advance permission.

If you are a military member (active, reserve, or retired), you *must* obtain preapproval for employment with a foreign government—any foreign government, regardless of the U.S.'s relationship with that country. Unless you receive prior authorization from your service secretary *and* the Secretary of State, you may forfeit your military pay during the time you perform services for a foreign government.

What constitutes a “payment” under the Emoluments Clause? Things that



are obvious, like salaries, bonuses, or honoraria. But also travel reimbursements, gifts, and partnership distributions—even if you receive these indirectly rather than in consideration for your direct efforts.

You should also be mindful of whether a seemingly private entity owned or operated in a foreign country is actually an instrumentality of a foreign government. While the Emoluments Clause does not prohibit working for a privately-owned foreign com-

pany, failing to realize that a company is owned, controlled, and/or funded by a foreign government may inadvertently put you in violation of the Emoluments Clause.

Additionally, 10 U.S.C. § 989 (introduced in the FY 2024 NDAA) prohibits an individual who has retired or otherwise separated from an Active or Reserve Component of the Armed Forces to enter into post-service employment with the one of several “countries of concern” or any country that has been determined to act as a proxy for one of those named countries.

How do you request advance approval? Follow the procedures in DAFI 36-2913 or refer to <https://www.retirees.af.mil/Foreign-Government-Employment>.

PROCUREMENT INTEGRITY ACT & ETHICS LETTER REQUIREMENT

We harp on this a lot, so it should be no surprise that work relating to Government contracts requires detailed review under PGE rules, especially if you are planning to work for a defense contractor.

The Procurement Integrity Act (“PIA”) may be best known for prohibiting the release of source selection and contractor bid/proposal information. However, it also has several provisions relating to PGE that require affirmative steps on behalf of Government personnel seeking employment with a Government contractor.

First, no matter what your duty title is, if you are participating personally and substantially (remember that from PGE Ethics Flash Part 1?) in an acquisition valued over \$250k, and receive a PGE contact from a representative of a bidder/offeror, you must report that contact to your supervisor and your ethics official, and either re-

ject the employment or recuse yourself.

Second, if you fall into a covered position or have taken a covered action (set out in the column to the right) in relation to a company for a contract worth over \$10 mil-



lion, you are prohibited from accepting compensation from that company for one year from when you last held the position/made the decision.

And related to the PIA, the 2008 NDAA requires you to obtain an ethics opinion, if (1) in the two years prior to your departure from DoD, you held into one of the covered positions to the right or if you are

you are an ES positionholder, SES, or GO who participated personally and substantially in an acquisition valued in excess of \$10 million, and (2) you have an offer for compensation from a defense contractor.

If you are required by the 2008 NDAA to obtain an ethics opinion, you *must* do so using DoD’s AGEAR (After Government Advice Repository) online system. Once you have submitted via AGEAR, the request for an ethics opinion will be routed to your servicing ethics official for completion.

But—if the 2008 NDAA does not require you to get an ethics letter, but your future employer does, please do not submit a request via AGEAR (it’s required to be rejected) and instead reach out to your ethics counselor to obtain the local process for requesting an opinion.

Covered Positions (relevant to PLA and 2008 NDA):

- Procuring Contracting Officer (PCO)
- Source Selection Authority (SSA)
- Source Selection Evaluation Board or Team
- Chief of a financial or technical evaluation team
- Program Manager
- Deputy Program Manager
- Administrative Contracting Officer (ACO)

Covered Decisions (relevant to PLA):

- to award a contract or a subcontract over \$10 million.
- to award a modification of a contract or a subcontract over \$10 million.
- to award a task order or delivery order over \$10 million.
- to establish overhead or other rates applicable to a contract or contracts that are valued over \$10 million.
- to approve issuance of a contract payment or payments over \$10 million.
- to pay or settle a contract claim over \$10 million.

BONUS PGE-ISH QUESTION: HIRING FORMER GOVERNMENT CONTRACTORS?

Ok, we know we are being a bit sneaky—this Flash is about employment after leaving the Government and joining the private sector, not the opposite! But—listen up, DAF hiring officials! This law uses PGE language (think: recusal; particular matters) to impose limits on personnel who leave industry to work for the Government in matters related to their former employers.

Section 1117 of the 2022 NDAA, in part, creates a “former employer” recusal applicable to all DoD personnel. This provision prohibits DoD employees from participating in particular matters in which their former employer is involved, for two years after the DoD employee left that previous position.

It’s best explained by ex-

ample—Tom resigns his job at Big Defense Contractor on 1 May 2024 and starts his new position with the DAF on 8 May 2024. Tom has a two-year recusal under Section 1117 that prohibits him from participating in particular matters where Big Defense Contractor is (or represents) a party until 8 May 2026.

Section 1117 includes the possibility of an authorization, where an agency designee can authorize an employee to participate in 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.



WHAT’S UP NEXT!

Thanks for sticking with us through two issues of detailed rules! Luckily for you, it’s (almost) the most wonderful time of the year! Our next Flash will cover all things ethical around the holidays—think gifts, parties, and more. So warm up that mug of hot chocolate and get ready to read!

And finally, if you are wondering who is behind this issue’s headline—all about a (G)reat (P)ost-Government (C)areer—you can credit GCA’s very own senior official, Ms. Shannon McGuire!