

SOCO ADVISORY

**Department of Defense
Office of General Counsel
Standards of Conduct Office
(SOCO)**

**April 28, 2008
Number 08-03
soco@dodgc.osd.mil**

Special Edition: Guidance on Application of Statutory Requirement for Written Post Employment Advisory Letters

This memorandum provides guidance on applying section 847 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 ("Sec. 847"), which became effective on January 28, 2008. The purpose of this guidance is to foster uniformity of interpretation and application of that section throughout the Department.

Sec. 847 requires certain current and former DoD officials, within two years after leaving the Department, to request a written opinion from the appropriate DoD ethics counselor regarding the applicability of post-employment restrictions to activities that they may undertake on behalf of a DoD contractor. Sec. 847 amounts to a contingent compensation ban, as it prevents the DoD contractor from knowingly paying compensation to such an official unless the contractor first determines that the official either has received the requested written opinion, or has requested the opinion at least 30-days prior to receiving compensation. Like the procurement integrity law and regulation, DoD ethics counselors are required to provide the written letter within 30 days of the request. Other aspects of the law are discussed in the guidance and definitions, below.

1. Who are Covered Department of Defense Officials?

Current personnel, or personnel who left DoD on or after January 28, 2008, who expect to receive compensation from any DoD contractor within the two-year period from the date they left, and either:

A. Currently hold, or held when they left the Department, one of the following positions:

1. in the Executive Schedule, which is one appointed by the President and confirmed by the Senate;
2. in the Senior Executive Service¹; or
3. in a general or flag officer position (grade 0-7 and above) (not frocked); and

who either currently participate personally and substantially or participated personally and substantially at the time they left the Department in one of the above positions in an acquisition with a value in excess of \$10 million; or

B. Currently serve, or served at the time they left DoD service, in one of the following positions: program manager, deputy program manager, procuring contracting officer, administrative contracting officer source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in excess of \$10,000,000.

It may be rare to find personnel seeking employment who have not disqualified from participating in the duties described above at the time they leave DoD. Nevertheless, we expect ethics counselors to explore the official's duties at the time of the disqualification and to issue the appropriate post-employment letter if it would have been required prior to the disqualification.

The positions listed in B., above, are procurement integrity positions, but they are not inclusive of all such positions, omitting those responsible for personally making certain decisions involving contracts in excess of \$10,000,000. Unlike A., above, the positions in B. are not restricted to senior positions.

Personnel who have already left the Department are covered only if they left on or after January 28, 2008, the effective date of the statute, to avoid retroactive application.

2. What are the responsibilities of DoD ethics officials?

A. Each DoD Designated Agency Ethics Official (DAEO) is responsible for ensuring that departing personnel under his or her agency's jurisdiction are notified that they are required to make a written request for a written opinion if they are covered DoD officials.

Subsection 9-502 of DoD 5500.7-R, the Joint Ethics Regulation (JER), requires that DoD Components provide guidance on relevant Federal and DoD post-employment restrictions as part of out-processing procedures to all DoD personnel leaving Federal service. We recommend that the guidance be amended to include Sec. 847, alerting personnel as to who are covered officials, that those officials must make a written request for a written opinion if they want to receive compensation from a DoD contractor within two years from leaving DoD, and the information that they must include in the request.

DoD SOCO will amend the model certification required for Public Financial Disclosure Report filers by subsection 8 400 of the JER to include Sec. 847 and place it on our website for use throughout the Department. It will include a notice provision and the information that officials need to include in their written requests. Please remember, however, that this will cover only officials included at 1.A., above, and will not cover those at 1.B. DoD SOCO will also amend its post-employment model guidances to include a Sec. 847 notice and will replace them on the SOCO website for use throughout the Department. Finally, DoD SOCO will include a reference to Sec. 847 in its annual training, which will also be located on the website. This training, as in the past, may be appropriately modified and used by DoD components.

B. Each DoD DAEO is also responsible for ensuring that a requested written opinion is provided within 30 days of receipt of a written, signed, dated and complete request. See paragraph 3., below, for a discussion of the relevant information to be included in a request for a written opinion. If complete information is not included in the request, the DoD ethics counselor should request the missing information from the official and may consult with other DoD officials if applicable. The 30 day period will not start until complete information is received. In issuing a written opinion, the ethics counselor may rely on the accuracy of information furnished by the official unless he or she has reason to believe that the information is fraudulent, misleading, or otherwise incorrect. Sec. 847 requires that the opinion address the applicability or inapplicability of post-employment restrictions at 41 U.S.C. 423, 18 U.S.C. 207, and any other pertinent statute or regulation, which may include where applicable: 18 U.S.C. 203, 37 U.S.C. 908, 5 U.S.C. 3326, and 10 U.S.C. 973(b). Sec. 847 also requires that the opinion address the applicability of those restrictions to activities that the former official is expected to undertake on behalf of the contractor to the extent that they are known at the time of the request.

DoD SOCO has prepared a [model post-employment advice letter](#), which is available on our website. As

DoD contractors may not knowingly provide compensation to covered DoD officials within two years of their leaving DoD unless they first determine that those officials have received the required written opinion, or that the opinion has not yet been provided even though 30 days have elapsed since a compliant request was made, we anticipate that DoD contractors will not provide compensation to any DoD personnel who left DoD on or after January 28, 2008 unless they provide a letter that either states they are not covered officials or provides the required opinion. DoD ethics counselors should therefore expect an increase in the requests for written post-employment opinions. DoD SOCO recommends that DoD ethics counselors amend all their model written post-employment advisory letters to include a statement determining whether the requesting official is covered by Sec. 847.

3. What is the responsibility of DoD officials?

Covered DoD officials, as described in 1., above, must submit a written, dated, and signed request for an opinion to the DoD ethics official with responsibility for the organization in which they serve or served when they left DoD. The request must include actions taken concerning future employment, positions sought, and future job description(s) if available. DoD personnel who are not sure if they are covered officials may request the appropriate DoD ethics counselor for an opinion as to whether they are covered officials. Covered officials must submit the request at least 30 days prior to the date they expect to receive compensation from a DoD contractor.

4. How should the requests and opinions be retained?

Sec. 847 requires the Department to retain each written request and the applicable written opinion for at least five years from the date of the written opinion in a central database or repository. Each DoD DAEO is responsible for establishing a procedure or mechanism within their agency that will permit the timely retrieval of this data for required periodic reviews by the Department of Defense Inspector General.

Definitions:

Acquisition: Sec. 847 uses the term "acquisition" as defined in section 4(16) of the Office of Federal Procurement Policy Act, i.e., the process of acquiring, with appropriated funds, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency. Therefore, neither non-appropriated fund acquisitions, nor acquisitions by any method other than contract, such as cooperative agreements or pursuant to Other Transactions Authority, are included.

Activities...on behalf of a contractor: This wording includes activities that a consultant may perform on behalf of a contractor. Refer to the definition of "compensation" at section 3.104-1 of the FAR to determine if such activities are included.

Department of Defense Contractor: A DoD contractor listed on the most recent 25K list, and upon independent knowledge, an entity awarded a current DoD contract but not yet listed.

In excess of \$10,000,000: This term shall have the same meaning as section 3.104-1 of the FAR.

Participated personally and substantially: This term shall have the same meaning as the term "Participating personally and substantially" at section 3.104-1 of the FAR, including all subsections.

Program Manager and Deputy Program Manager: These terms shall have the same meaning as the

guidance issued August 10, 1999, i.e., that the affected personnel must perform the functions of a program manager with respect to a contract in excess of \$10 million.

Department of Defense: This term includes the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense.

¹ Positions in the intelligence agencies that are the equivalent of SES positions are not included in the statute. While the intelligence agencies may determine that it is appropriate to provide the Section 847 letters to this group of employees, failure of a DoD contractor to secure a written Section 847 opinion from such an employee will not constitute noncompliance with the requirements of Section 847.

Leigh Bradley
DoD Standards of Conduct Office
http://www.dod.mil/dodgc/defense_ethics/