



## GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

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20 MAY 2020

The Honorable Katie Porter  
U.S. House of Representatives  
Washington, DC 20515-0545

Dear Representative Porter,

I am writing in response to your letter addressed to the Secretary of Defense dated April 30, 2020, requesting information about the Department of Defense's (DoD) proposal for limited amendments to Section 1045 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018 (Section 1045). I am responding on behalf of the Secretary. The legislative proposal submitted is designed to ensure former DoD uniform and civilian personnel are held to a similar standard as the longstanding post-Government employment restrictions that apply to former senior officials in all Executive Branch agencies.

DoD remains committed to ensuring all former senior DoD officials understand and abide by the laws designed to mitigate the potential for improper influence. In order for these laws to be effective, they must be consistent with one another and be clearly written so former Federal officials and their employers can ensure compliance. One of the purposes of DoD's legislative proposal is not to weaken ethics laws, but to resolve the inconsistencies between Section 1045 and the criminal post-Government employment restrictions that apply to all Federal personnel, thereby strengthening the comprehensive system of ethics laws and their implementing regulations.

DoD's proposal was submitted and vetted consistent with DoD's standard practice for submitting legislative proposals to Congress. It was coordinated with interagency officials, which included consultation with the Office of Government Ethics (OGE) and clearance by the Office of Management and Budget. The proposed changes would align Section 1045 with the well-established application of the existing criminal statute (18 U.S.C. Section 207(c)) on post-Government employment, while still extending those restrictions for up to two years for certain former senior DoD officials.

Section 1045 has created a patchwork of restrictions that differ in application based 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, the long-time criminal statute currently in effect 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. This dichotomy, which opens the door to contacts that may be permissible under Section 1045 but could cause a former senior DoD official to inadvertently violate the criminal statute, is resolved by DoD's proposed changes to Section 1045.



Consequently, DoD's legislative proposal is limited in scope. DoD's proposed changes align Section 1045 with the criminal statute without changing the existing two-year "cooling-off" period for general or flag officers who are in grades O-9 or O-10 at the time of their retirement or separation from service, and their civilian equivalents.<sup>1</sup>

References to the Lobbying Disclosure Act throughout Section 1045, have contributed significantly to inconsistencies between Section 1045 and the relevant criminal statute by introducing conflicting definitions of key terms and phrases into the complex network of existing post-Government employment restrictions. In particular, the use of the Lobbying Disclosure Act to define "lobbying activities" in Section 1045 prohibits some behind-the-scenes assistance, while the use of "lobbying contacts" does not. With the exception of the President's Ethics Pledge, which applies to former senior and non-senior political appointees, no other post-Government employment restriction prohibits former senior officials from participating in behind-the-scenes assistance. DoD's proposed change to use "lobbying contacts" throughout the statute is consistent with the well-established standards governed by the criminal statute that OGE has implemented through regulation for more than 30 years. These existing standards effectively mitigate conflicts of interest while allowing for circumstances that present little risk of potential influence.

Additionally, DoD's proposed changes would introduce OGE's definition of "separate agency components," which has been used in applying the criminal statute for many years to prevent undue influence by former senior officials.<sup>2</sup> This change would reasonably permit former senior DoD officials, with the exception of Presidential Appointees confirmed by the Senate, to communicate with covered executive branch officials<sup>3</sup> of a designated separate and distinct component of DoD other than the one in which the official served. Like the criminal statute, in order for an agency within an Executive Department to be designated a "separate agency component" under DoD's proposed change, the OGE Director must make an independent determination that there is "no potential for the use of undue influence or unfair advantage based on past Government experience."<sup>4</sup> These time-tested standards protect against undue influence without unreasonably interfering with the right of veterans and public servants to future employment.

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<sup>1</sup> Neither Section 1045 nor 18 U.S.C. 207(c) subjects an O-6 to a "cooling-off" period. Under Section 1045, former senior DoD officials who retire in the grade of O-9 or O-10, and their civilian equivalents, are subject to a two-year cooling-off period. Former senior DoD officials who retire in the grade of O-7 or O-8, and their civilian equivalents, are subject to a one-year "cooling-off" period.

<sup>2</sup> 5 C.F.R. 2641.302(a).

<sup>3</sup> A "covered executive branch official" is defined in the Lobbying Disclosure Act as: (1) the President or Vice President; (2) any officer/employee in the Executive Office of the President; (3) any officer/employee serving in a position in levels I-V of the Executive Schedule; (4) any member of uniformed services whose pay grade is at or above O-7; and (5) non-career officials in a confidential, policy-making position.

<sup>4</sup> 5 C.F.R. 2641.302(c)(2).

I appreciate you sharing your views. The Department's senior ethics attorneys are available for further discussion via a telephonic briefing upon request. DoD believes that good Government requires standards that are clear and easy to apply, and that these standards should be consistent throughout the Executive Branch. A similar letter will be sent to each of the signatories of your correspondence. Please know that DoD personnel remain committed to maintaining the highest standards of ethical conduct.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul Ney". The signature is written in a cursive style with a large, looping initial "P".

Paul C. Ney, Jr.  
DoD General Counsel