

conclusive presumption that the receipt of compensation from a particular defense contractor is not a violation of the law.

(v) A copy of each 10 U.S.C. 2397b written opinion shall be retained by the DoD component DAEO or designee for three years.

(4) *DoD interpretation of 10 U.S.C. 2397b.* (i) If a DoD employee had been conducting all negotiations with a \$10 million defense contractor on a major defense contract action of \$10 million or more, but a superior DoD employee intervened directly in the negotiating process, both DoD employees would be considered “primary” representatives for that defense contract action.

(ii) 10 U.S.C. 2397b does not prohibit any former DoD employee from accepting compensation from any defense contractor that, during the fiscal year preceding the fiscal year in which compensation is accepted, was not a defense contractor or was a defense contractor whose contracts totalled less than \$10 million.

(iii) 10 U.S.C. 2397b prohibits employment with particular defense contractors, not subcontractors, but former DoD employees cannot avoid its consequences merely by forming their own company and then “subcontracting” themselves to otherwise prohibited defense contractors.

(b) *41 U.S.C. 423—(1) Restrictions.* This statute restricts a former DoD employee who was a procurement official with respect to a particular procurement from knowingly:

(i) Participating in any manner on behalf of a competing contractor in any negotiations leading to the award or modification of a defense contract for such procurement; or

(ii) Participating personally and substantially on behalf of the competing contractor in the performance of such defense contract.

(2) *Period of restrictions.* Both restrictions apply for a period of two years from the date of the former DoD employee’s last personal and substantial participation in the procurement on behalf of the Federal Government. Neither applies unless the individual was a DoD employee of the Federal Government at the time he served as a procurement official.

(3) *Written opinion.* (i) A DoD employee or former DoD employee who is or was a procurement official is, by statute, entitled to a written opinion regarding the applicability of this statute to his specific circumstances. A request for such an opinion shall be submitted in writing to the Ethics Counselor serving the DoD component command or organization the DoD employee is leaving or from which he has separated. The request shall set forth all information relevant to the request. See 48 CFR 3.104–8(e).

(ii) Ethics Counselors who have not been delegated specific authority in writing to issue 41 U.S.C. 423 written opinions shall promptly forward the request to the DoD component DAEO or designee who has such authority.

(iii) Written opinions shall be issued within 30 days of receiving the request, together with all necessary information.

(iv) Where the DoD employee or former DoD employee relies in good faith on a written opinion that this statute is not applicable to a specific situation, the DoD employee or former DoD employee shall not be found to have knowingly violated the restrictions of the statute.

(v) A copy of each 41 U.S.C. 423 opinion shall be retained by the DoD component DAEO or designee for three years.

§ 84.33 Restrictions on retired military members.

(a) *18 U.S.C. 281(a).* This statute restricts the selling activities of retired military officers. The provisions of this statute were suspended by the Federal Acquisition Streamlining Act of 1994 through December 31, 1996.

(1) *Restrictions.* A criminal statute, 18 U.S.C. 281(a), provides that for a period of two years after retiring, no retired military officer may receive compensation for representing any other individual in the sale of anything to the Federal Government through the department in which he holds a retired status.

(i) The term “department” refers to individual DoD components, not DoD as a whole, insofar as it concerns retired military officers. For example, this statute does not prohibit retired

Navy and Marine Corps officers from selling to the Departments of the Army or Air Force.

(ii) The term “anything” in the phrase “sale of anything” has been construed by DoJ to encompass both goods and services.

(iii) DoD has determined that this statute does not prohibit the sale of personal services when the retiree is only representing himself. However, sale of personal services may not include the work product of a closely held corporation where individuals other than the retiree contribute to the services provided.

(2) *Definition of “selling.”* (i) For the purpose of this statute, “selling” means:

(A) Signing a bid, proposal, or contract;

(B) Negotiating a contract;

(C) Contacting a DoD employee to obtain or negotiate defense contracts, negotiate or discuss changes in specifications, price, cost allowances, or other terms of a defense contract, or settle disputes concerning performance of a defense contract; or

(D) Any other liaison activity with a view toward the ultimate consummation of a sale although the actual defense contract is negotiated subsequently by another person.

(ii) Activities which are not considered “selling” include:

(A) Purely social contacts, as long as there is an independent basis for the social relationship and no promotion of a product or attempt to influence a procurement;

(B) Technical contacts for the purpose of conferring with non-contracting technical specialists to acquire information this is available to all prospective defense contractors, provided that these contacts do not otherwise involve “selling” as discussed in paragraph (a)(2)(i) of this section. See 42 Comp. Gen. 236.241;

(C) Contacts subsequent to the execution of a defense contract relating to performance or progress, if they do not include modification of the defense contract or “selling” as discussed in paragraph (a)(2)(i) of this section.

(b) *18 U.S.C. 281(b).* For a period of two years after terminating service with the Federal Government, a retired

military officer may not act as an agent or attorney for the prosecution or assist in the prosecution of any claim against the United States involving the department in which he holds a retired status or which concerns a subject with which the military officer was directly connected while on active duty. A violation on this statute is punishable by a \$10,000 fine and one year imprisonment.

(c) *Restrictions on Federal Government employment—(1) Dual compensation laws.* A retired member of any uniformed service who holds a civilian position with the Federal Government is subject to reduction of retired pay while receiving pay from a Federal Government civilian position. The term “retired member” means anyone, officer or enlisted, entitled to receive retired pay. The term “retired pay” includes both retired and retainer pay. The current law generally applies to retired regular officers, retired at any time, and to all former members of the uniformed services who left active duty after January 11, 1979. See 5 U.S.C. 5532 for exceptions to this general rule.

(i) *The dual compensation reduction formulas.* There are two provisions in the current dual compensation law which may operate to reduce the retired pay of retired members of the uniformed services who hold Federal Government civilian positions.

(A) *The first reduction provision.* The first reduction provision applies only to retired regular officers who retired at any time. This provision operates to reduce the retired pay of a retired regular military officer receiving pay from a Federal Government civilian position regardless of the amount of salary from that civilian position. It provides that such retired military officer is entitled to receive the full pay of the civilian position, but retired pay will be reduced to an annual rate equal to base amount plus one-half of the remainder of the retired pay, if any. The base amount is increased periodically to reflect changes in the Consumer Price Index, See 5 U.S.C. 5532(b).

(B) *The second reduction provision.* The second reduction provision applies, in general, to all retired military members who first received retired pay after January 11, 1979. The reduction

depends upon the amount of pay received from the Federal Government civilian position. This provision operates to reduce the retired pay of a retired member when the annual rate of pay for the civilian position combined with the annual rate of retired pay (reduced in the case of retired regular officers as discussed in § 84.33(c)(1)(i)(A)) exceeds the annual rate of basic pay for level V of the Executive Schedule. Reductions are computed as follows:

(1) If the combination of pay from the civilian position and retired pay exceeds the amount currently paid for level V of the Executive Schedule, the retired pay will be reduced to keep the total at the level V limit.

(2) Reductions to retired pay are made per pay period whenever the combination of the two salaries for the pay period exceeds the pay for a level V position for that pay period. Reductions made in such pay periods are not refundable even when the combined pay amounts for the total year is less than the annual rate for level V of the Executive Schedule;

(3) The amount of retired pay may not be reduced to an amount less than the amount deducted from the retired pay as a result of participation in any survivor's benefits in connection with retired pay or veterans insurance programs and no reductions shall be made to retired pay based, in whole or in part, upon disability incurred in the line of duty as a direct result of armed conflict or during a period of war.

(ii) *Waivers.* (A) A retired member may, in certain limited circumstances, obtain a waiver so that his retired pay would not be reduced while holding a Federal Government civilian position. See 5 U.S.C. 5532(g). The circumstances under which a waiver may be granted are:

(1) On a case by-case basis for a retired member holding a Federal Government civilian position for which there is exceptional difficulty in recruiting or retaining a qualified employee; or

(2) For temporary employment that is necessary due to an emergency involving a direct threat to life or property, or under other unusual circumstances.

(B) The Director, OPM, may grant a waiver at the request of the Head of an Executive agency. Additionally, the Director, OPM, may delegate to an agency the authority to grant waivers for the temporary employment of retired members during emergencies or other unusual circumstances, but not for employment necessitated by exceptional difficulties in recruiting or retaining qualified individuals. The Director, OPM, has delegated to DoD authority to approve dual compensation restriction waivers in certain circumstances at installations scheduled for closure.

(C) Waivers are to be the exception, not the rule. If appropriate, however, a waiver may be obtained for either or both of the dual compensation reductions. See 5 CFR part 553 for procedures for obtaining a waiver.

(2) *Post-military service employment in DoD under 5 U.S.C. 3326.* As of November 6, 1992, the suspension of this provision ended. See DoD Directive 1402.1.²³ To avoid appearances of favoritism or preferential treatment, retired military members may not be selected to fill civil service positions in DoD (including non-appropriated fund instrumentalities within 180 days following retirement unless:

(i) The appointment is authorized by the Secretary of a Military Department or designee, or by OPM if the position is in the competitive service;

(ii) The minimum rate of basic pay for the position has been increased under 5 U.S.C. 5305; or

(iii) A state of national emergency exists.

(d) *Foreign employment restrictions.* (1) Article I, Section 9, Clause 8, of the Constitution of the United States prohibits any person holding any office of profit or trust under the Federal Government from accepting any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state without the consent of Congress.

(i) This provision prohibits employment of all retired military members,

²³ See footnote 4 to § 84.7(d).

both officer and enlisted and both regular and reserve, by a foreign government unless Congressional consent is first granted. See 44 Comp. Gen. 130.

(ii) Employment by educational or commercial institutions owned, operated, or controlled by a foreign government is included within the scope of this restriction.

(iii) The penalty for violation is withholding the retired military member's retired pay in an amount equal to the foreign salary illegally received. See 61 Comp. Gen. 306.

(2) Congress has consented to the acceptance of civil employment with a foreign government by, among others, retired regular military members and reserve military members, if both the Secretary of the Military Department and the Secretary of State approve the employment. See 37 U.S.C. 908. Because approval is prospective only, foreign civil employment should not be accepted until approval has been obtained. Retired military members who wish to accept such employment should submit a written request for approval to the Secretary of their Military Department through appropriate channels. The request must fully describe the contemplated employment and the nature and extent of the involvement with the foreign government.

(3) A former military member desiring employment with a foreign government or any foreign business interest may be required to register as an agent of a foreign principal under the Foreign Agents Registration Act of 1938, 22 U.S.C. 611 *et seq.* Any person who acts as an agent of a foreign principal must file a registration statement with the U.S. Attorney General.

[59 FR 13214, Mar. 21, 1994, as amended at 60 FR 20030, 20032, Apr. 24, 1995]

§ 84.34 Restrictions on former senior appointees.

Executive Order 12834 (58 FR 5911) requires contractual ethics commitments regarding post-Government service employment from full-time, non-career Presidential, Vice-Presidential or agency Head appointees in an Executive agency whose rate of basic pay is not less than the rate for level V of the Executive Schedule, except for those appointed as members of the senior for-

eign service or solely as uniformed service commissioned officers. See Executive Order 12834 and OGE Form 203,²⁴ "Senior Appointee Pledge," January 1993, and OGE Form 204,²⁵ "Trade Negotiation Pledge," January 1993.

[59 FR 13214, Mar. 21, 1994, as amended at 60 FR 20030, Apr. 24, 1995]

§ 84.35 Restrictions on dealing with current or former DoD employees.

(a) *General rule.* Current DoD employees shall not knowingly deal, on behalf of the Federal Government, with current or former DoD employees whose participation in the transaction violates any statute or DoD directive, regulation or policy.

(b) *Terminal leave.*

(1) Military members on terminal leave may accept civilian employment with the Federal Government and are entitled to the pay of that civilian position in addition to the pay and allowances to which entitled while on terminal leave. See 5 U.S.C. 5534a.

(2) A military officer on active duty may not accept a civil office with a State or local government, nor may he perform the duties of such an office. See 10 U.S.C. 973(b)(3). This applies while the military officer is on terminal leave. See 56 Comp. Gen 855.

§ 84.36 Reports of DoD and defense related employment (DD form 1787).

(a) *Individuals required to file.* The following former DoD employees are required by 10 U.S.C. 2397 to file DD Form 1787 with their former DoD component:

(1) Each former DoD employee of a DoD component who:

(i) Served at a pay rate equal to or greater than the minimum rate for a GS/GM-13, or served on active duty at least ten years and held the grade of 0-4 or above at any time during his service;

(ii) Within the two-year period immediately following termination of service or employment with the DoD component, is employed by a defense contractor who, during the preceding one-

²⁴Copies are available from U.S. Office of Government Ethics, 1201 New York Avenue NW., Suite 500, Washington, DC 20005-3917.

²⁵See footnote 23 to § 84.34.