

Revisions to the Department of Defense “Revolving Door” Rules

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Election and Political Law

Buried in the 2018 National Defense Authorization Act (NDAA) is an obscure, and quite significant, change to the post-employment restriction on U.S. Department of Defense (DoD) civilian and uniformed personnel. This new provision could have a substantial impact on defense contractors and others who recruit DoD personnel to work on policy and procurement matters before the DoD or the Executive Branch.

What Is Prohibited?

As of December 12, 2017, Section 1045 of the 2018 NDAA prohibits certain former DoD military officers and civilian officials from engaging in either “lobbying contacts” or behind-the-scenes “lobbying activities” with respect to the DoD. Both terms derive from the Lobbying Disclosure Act. While these officers and senior civilian employees have long been covered by a restriction on certain contacts with their former employer, this change also appears to bar “behind-the-scenes” work that had previously been specifically permitted, expands the period of coverage for some officials, and for those presidential appointees who signed the Trump ethics pledge, it converts those terms from a contractual agreement to a statutory bar. Of all of these changes, the most consequential will be the prohibition on these former government officials and officers engaging in preparation and planning activities, research, and other background work that is intended, at the time it is performed, for use in lobbying contacts.

In addition to the prohibition on behind-the-scenes activity, Section 1045 is broader than the existing criminal revolving door statute, 18 U.S.C. §207, because it covers activities with respect to the entire DoD, rather than the DoD component in which the former officer or official worked.

However, Section 1045 is not a complete ban on all lobbying activities. Covered former personnel may still lobby and participate in behind-the-scenes work related to lobbying Congress, as well as certain non-DoD Executive Branch officials.

To Whom Does the Ban Apply?

This new lobbying activities ban applies to former officers in grade O-7 or O-8, as well as their civilian equivalents for one year, and to former officers in grade O-9 and above, and their civilian equivalents for two years after leaving service. The statute does not provide clear guidance on who is a “civilian equivalent” under the ban, though we anticipate the DoD will shortly issue guidance to clarify this question.

Section 1045 also does not address whether the restrictions apply to covered military officers and civilians who terminated service before the ban took effect on December 12, 2017, but who remain in the one and two year periods where certain conduct is prohibited. There are strong

arguments that this provision should not be applied retroactively, and we anticipate the DoD will also issue guidance on this point shortly.

Congress left no legislative history or enforcement mechanism, and used several undefined terms, so there will be a fair amount of interpretive advice to come. Covington is closely monitoring developments.

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