



DEFENSE INTELLIGENCE AGENCY

WASHINGTON, D.C. 20340-5100



October 8, 2014



VIA EMAIL



Dear LTG Flynn:

This letter responds to your request for a written opinion regarding the ethics restrictions that apply to you after your retirement from the United States Army.

As you know, now that you have retired, there are certain post-employment restrictions applicable to your activities, as well as to the work that you may do for a future employer. These restrictions generally do not bar you from accepting employment with any private or public employer. They do, however, impose certain limitations on communications that you may make as a representative of a third party back to the federal government, as well as on certain types of assistance that you may provide to third parties. These limitations do not generally restrict you from responding to requests for information or advice initiated by the federal government, if you are not representing a third party in your communications or the matter discussed. The purpose behind the restrictions is to prevent you from "switching sides" on a matter in which you were involved when you worked in the government, and to provide a "cooling off" period in which you are to refrain from seeking action from the Army or the Defense Intelligence Agency (DIA) on any matter on behalf of a third party.

  
 Accordingly, this letter serves as an overview of the post-government rules.

**1. Lifetime Ban -- 18 U.S.C. 207(a)(1)**

Section 207(a)(1) imposes a lifetime prohibition on representing, with intent to influence, any person, other than yourself, before the federal government, on any particular matter involving specific parties in which the United States is either a party or has a direct and substantial interest, and in which you "personally" and "substantially" participated at any time during your federal service. Examples of particular matters involving specific parties are contracts, investigations, or litigation.

However, matters of general applicability such as "[l]egislation or rulemaking of general applicability and the formulation of general policies, standards or objectives ..." are not covered by this prohibition. 5 C.F.R. 2641.201(h)(2). International agreements (e.g., treaties and trade

agreements), on the other hand, must be evaluated "in light of all relevant circumstances" to determine whether the prohibition would apply.

To participate "personally" in a matter means to participate directly, either on your own or in combination with others. As with 18 U.S.C. 207(a)(2) (discussed below), the participation of your subordinates is covered, although only insofar as you actually directed them in the relevant matter.

"Substantially" here means that your involvement was "of significance" to the matter, or created a reasonable appearance of significance. Your efforts need not have been determinative of the outcome; however, more is required than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.

This is a permanent restriction commencing upon your retirement from the Army and lasting for the life of all such matters as they existed during your tenure as an Army officer. New matters or matters in which you did not participate personally and substantially while on active duty fall outside the prohibition.

## **2. Two-Year Ban – 18 U.S.C. 207(a)(2)**

Under 18 U.S.C. 207(a)(2), you are further prohibited for two years from the date of your retirement from communicating with or appearing before "any officer or employee of any department, agency, court, or court-martial" of the federal government regarding any "particular matter" involving specific parties in which the United States has a direct and substantial interest, and which you know or reasonably should know was actually pending under your "official responsibility" during the year prior to your retirement.

Although 18 U.S.C. 207(i)(3) defines "particular matter" broadly for post-employment purposes to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." 18 U.S.C. 207(a)(2)(C) and the implementing regulations provide that only particular matters involving a specific party or parties falls within this prohibition, and

[s]uch a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

5 C.F.R. 2641.201(h). Matters not in existence at the time of your retirement – such as those entered into subsequently – fall outside the rule. "Official responsibility" is defined in 18 U.S.C. 202(b) as your "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct government actions." Accordingly, all particular matters involving specific parties handled by your subordinates, with or without your direct involvement, will be subject to the restrictions in 18 U.S.C. 207(a)(2).

Thus, for two years after retiring, you may not have any representational contacts with federal government employees on particular matters that were pending under your official responsibility in your last year of service.

### **3. One-Year Cooling-Off Period for Senior Employees – 18 U.S.C. 207(c)**

As a retired General Officer, you were a senior employee who is now subject to this restriction. *The law provides that you are prohibited, for a period of one year after your service in your senior position terminates, from communicating with or appearing before, on behalf of another with the intent to influence, officers and employees of the Army or DIA on any matter on which official action is sought.* This one-year “cooling-off” period is designed to diminish any appearance that government decisions might be unduly affected or influenced by the involvement of a recently-departed senior official. It is irrelevant for purposes of 18 U.S.C. 207(c) that you did not work on the matter while in government service. *Importantly, this restriction only bars your appearances before and communications with personnel of the Army and DIA.* You are free to appear before officials of any other armed service, other DoD intelligence agencies, any other DoD components or organizations, and the Office of the Secretary of Defense, provided that no Army or DIA officials are present at such appearances. In addition, this one-year ban does not apply to your communications with personnel of any non-DoD or non-government organization.

The cooling-off provision does not prohibit you from providing “behind the scenes” assistance to your new employer or other entity. In interpreting these restrictions, the Office of Government Ethics (OGE) advises that the prohibition against representational activities before your former organizations includes written or oral communications aimed at influencing the government, but does not prohibit you from giving assistance concerning such matters to your new employer. See 5 C.F.R. 2637.201(b)(6). OGE also advises that these restrictions do not apply to an appearance or communication to request publicly-available documents or purely factual information, or to provide such information to the government.

The one-year cooling-off restriction does not prohibit purely social contacts with your former colleagues or appearing before the government representing yourself.

### **4. One-Year Ban on Aiding or Advising in Any Ongoing Trade or Treaty Negotiation - 18 U.S.C. 207(b)**

Section 207(b) prohibits you, for one year after leaving federal service, from knowingly representing, aiding or advising an employer or any entity regarding ongoing trade or treaty negotiations based on information you had access to and that is exempt from disclosure under the Freedom of Information Act. This restriction begins upon retirement from government service and, unlike 18 U.S.C. 207(a)(1) and (2), discussed above, prohibits former officials from providing “behind the scenes” assistance on the basis of the covered information to any person or entity. The restriction applies only if you were personally and substantially involved in ongoing trade or treaty negotiations within the last year of your government service. It is not necessary that you had contact with the foreign parties in order to have participated personally and substantially in a trade or treaty negotiation. The treaty negotiations covered by this section are

those that result in international agreements that require the advice and consent of the Senate. 18 U.S.C. 207(b)(2)(B). The trade negotiations covered are those that the President undertakes under section 1102 of the Omnibus Trade and Competitiveness Act of 1988. 18 U.S.C. 207(b)(2)(A).

#### **5. One-Year Ban on Assistance to Foreign Governments – 18 U.S.C. 207(f)**

Section 207 of title 18 also contains a one-year restriction on aiding, advising, or representing a foreign government or foreign political party with the intent to influence the U.S. government. Unlike the other representational bans, this one does *not* permit “behind the scenes” assistance to a foreign government or political party *and* the representation prohibition applies to all branches of the federal government. This restriction, like 18 U.S.C. 207(c), only applies to senior employees. You were a senior employee for purposes of this provision of law. Thus, for a period of one year after your retirement, you may not knowingly represent a foreign government or foreign political party before an officer or employee of the federal government, or aid or advise such a foreign entity with the intent to influence a decision of such officer or employee. Again, no behind the scenes assistance is permitted.

Please note that retired military officers representing a foreign government *after* expiration of the one-year ban must register under the Foreign Agents Registration Act.

#### **6. Foreign Compensation Requires Advance Approval**

The Emoluments Clause of the U.S. Constitution, article I, section 9, clause 8, as interpreted in Comptroller General opinions and by the Department of Justice Office of Legal Counsel, *prohibits receipt of consulting fees, gifts, travel expenses, honoraria, or salary by all retired military personnel, officer and enlisted, regular and reserve, from a foreign government unless congressional consent is first obtained.* Consent is provided by Congress under 37 U.S.C. 908, which requires advance approval from the relevant service secretary *and* the Secretary of State before accepting employment, consulting fees, gifts, travel expenses, honoraria, or salary from a foreign government. The penalty for violating this law is suspension of retirement pay for military members during the period of the violation.

Accordingly, if you are ever in a position where you would receive an emolument from a foreign government or from an entity that might be controlled by a foreign government, be sure to obtain advance approval from the Army prior to acceptance.

The POC for Army approval is:

U.S. Army Human Resources Command  
ATTN: AHRC-PDR  
1600 Spearhead Division Avenue  
Department 420  
Fort Knox, KY 40122-5402  
Phone: 502-613-8980.

## **7. Statutory Exceptions to the Post-Employment Ethics Restrictions**

There are a number of statutory exceptions in 18 U.S.C. 207(j) to the restrictions on post-employment communications and representational activities. First, none of these restrictions applies to activities that you may perform on behalf of the United States or the District of Columbia or as an elected official of a state or local government. 18 U.S.C. 207(j)(1)(A). There is also an exception for certain acts that you may perform on behalf of tribal governments. *See id.* at 207(j)(1)(B). Second, the restrictions do not apply to you, if you are acting on behalf of an agency or instrumentality of a state or local government, an accredited degree-granting institution of higher education, or a hospital or medical research organization exempted under 26 U.S.C. 501(c)(3). *Id.* at 207(j)(2). Additional exceptions apply for the provision of testimony, the provision of scientific or technological information under certain circumstances, and the provision by a former employee of information about which the former employee has special knowledge when no compensation is received, *id.* at 207(j)(4)-(6). You should consult with legal counsel before relying on any of these exceptions.

## **8. Additional Restrictions and Reminders**

After your retirement, you remain subject to the restrictions of 18 U.S.C. 203, which bars all former federal officials and employees from sharing in fees for representational services rendered by another at the time of their federal government employment on matters in which the United States is a party or has a direct and substantial interest. This means that, should you enter into a partnership agreement or other arrangement involving equity participation, you must be especially mindful not to receive or accept any compensation for any representational services rendered by your new colleagues "in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" that was pending "before any department, agency, court, officer, or commission" during the time of your federal service.

As a general matter, there are few limitations on your ability to teach, write, or speak after you have finished your government service. However, you may not use nonpublic information in your teaching, speaking, and writing. Nonpublic information is information that you gained by reason of your federal employment and that you know or should know has not been made available to the general public. You should be careful not to use information in your future endeavors that: (1) is exempt from disclosure by statute, Executive Order or regulation; (2) is designated as non-public or classified by the United States; or (3) has not been disseminated to the general public and is not authorized to be made available to the public upon request. In other words, there is a lifetime ban on your ability to disclose private personnel information, national security information, or confidential government data to unauthorized persons. This, however, does not limit your ability to teach, speak, or write on a subject within your inherent area of expertise based on your educational background or experience even if the teaching, speaking, or writing deals generally with a subject within your former area of responsibility.

When participating in fundraising activities, it is generally permissible to reference your former official position. However, in that context, we recommend that you make reference to your former official position merely as one of many biographical details rather than giving it unique prominence over and above other personal information.

As a retiree, you may use your military rank in private, commercial, or political activities as long as your retired status is clearly indicated, no appearance of DoD (including the Army and DIA) or U.S. government endorsement is created, and DoD is not otherwise discredited by its use. Joint Ethics Regulation, paragraph 2-304. Also, as a retiree, you may wear your uniform only in accordance with Army regulations.

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[redacted]  
[redacted]  
[redacted] Should you pursue future employment opportunities, or have specific questions about the propriety of a proposed course of action in light of these rules, please do not hesitate to contact my office for more specific advice.

You are respectfully reminded that you are responsible for ensuring compliance with these post-government restrictions. Because these statutes carry criminal sanctions, if you have any doubts about the propriety of a particular course of action, you should obtain legal advice before acting to ensure that you do not unwittingly violate one of these statutes.

If you have Army-specific questions, please contact [redacted] in the Army Office of The Judge Advocate General at [redacted] or by email at [redacted]

If you have any questions regarding this letter or the application of these post-employment restrictions to future employment, please do not hesitate to contact me or [redacted] [redacted] in the DIA Office of the General Counsel.

Sir, congratulations on your retirement and your distinguished service to our country.

Very Respectfully,

[redacted signature box]