

substantive or procedural, enforceable at law by any person against the U.S., its agencies, its officers or employees, or any other person.

§ 84.2 Definitions.

(a) *Administrative officer.* The individual responsible for the administrative control of personnel within a unit or office, including assistance with training, travel, or personnel actions for individuals of the unit or office.

(b) *Agency.* A DoD component as follows: Department of the Army; Department of the Navy; Department of the Air Force; Defense Commissary Agency; Defense Contract Audit Agency; Defense Finance and Accounting Service; Defense Intelligence Agency; Defense Investigative Service; Defense Logistics Agency; Defense Mapping Agency; Defense Nuclear Agency; Defense Information Systems Agency; National Security Agency; Office of the Inspector General of the Department of Defense (IG, DoD); and the Uniformed Services University of the Health Sciences. Employees of DoD components not designated as separate agencies, including employees of the Office of the Secretary of Defense (OSD), shall be treated as employees of DoD which shall be treated as a separate agency.

(c) *Agency designee.* The first supervisor who is a commissioned military officer or a civilian above GS/GM-11 in the chain of command or supervision of the DoD employee concerned. Except in remote locations, the agency designee may act only after consultation with his local Ethics Counselor. For any military officer in grade 0-7 or above who is in command and any civilian Presidential appointee confirmed by the Senate, the agency designee is his Ethics Counselor.

(d) *Alternate Designated Agency Ethics Official (Alternate DAEO).* An employee of a DoD agency who has been appointed by the DoD component Head to serve in the absence of the DoD component Designated Agency Ethics Official (DAEO).

(e) *Competing defense contractor.* See Federal Acquisition Regulation.¹ 48 CFR 3.104-4(b) or 41 U.S.C. 423(p)(2).

(f) *Conduct of a procurement.* See 48 CFR 3.104-4(c) or 41 U.S.C. 423(p)(1).

(g) *DAEO or designee.* This phrase refers to the Designated Agency Ethics Official, or to the Alternate Designated Agency Ethics Official, Deputy Designated Agency Ethics Official, or Ethics Counselor who has been delegated specific written authority by the DoD component DAEO to perform specific functions on behalf of the DoD component DAEO.

(h) *Defense contractor.* For purposes of 10 U.S.C. 2397, 2397a, and 2397b, any individual, firm, corporation, partnership, association, or other legal non-Federal entity that enters into a contract directly with DoD or a DoD component to furnish services, supplies, or both, including construction. Subcontractors are excluded unless they are separate legal non-Federal entities that contract directly with DoD or a DoD component in their own names. Foreign governments or representatives of foreign governments that are engaged in selling to DoD or a DoD component are defense contractors when acting in that context.

(i) *Deputy Designated Agency Ethics Official (Deputy DAEO).* An employee of a DoD agency who has been appointed, in writing, by the DoD component DAEO and who has been delegated written authority by that DoD component DAEO to act on his behalf.

(j) *Designated Agency Ethics Official (DAEO).* A DoD employee appointed, in writing, by the Head of the DoD agency to administer the provisions of the Ethics in Government Act of 1978, Public Law 95-521 (5 U.S.C. App.), and this part.

(k) *DoD component.* OSD; the Military Departments; the Chairman of the Joint Chiefs of Staff and the Joint Staff; the Unified and Specified Commands; IG, DoD; the Uniformed Services University of the Health Sciences;

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the Defense Agencies; the DoD Field Activities; the Combined Commands and Agencies; and the Special Activities, including non-appropriated fund instrumentalities. See paragraph (b) of this section for those DoD components that are agencies.

(1) *DoD employee.* (1) Any DoD civilian officer or employee (including special Government employees) of any DoD component (including any non-appropriated fund activity).

(2) Any active duty regular or reserve military officer, including warrant officers.

(3) Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.

(4) Any reserve or National Guard member on active duty under orders issued pursuant to title 10, United States Code.

(5) Any reserve or National Guard member performing official duties, including while on inactive duty for training or while earning retirement points, pursuant to title 10, United States Code, or while engaged in any activity related to the performance of a Federal duty or function.

(6) Any faculty member in a civil service position or hired pursuant to title 10, United States Code, and any student (including a cadet or midshipman) of an academy, college, university, or school of DoD.

(7) Consistent with labor agreements and international treaties and agreements, and host country laws, any foreign national working for a DoD component except those hired pursuant to a defense contract.

(m) *DoD supplement.* Section 84.6 contains the cross-reference to the DoD Supplement of 5 CFR part 2635.

(n) *Employment.* See 5 CFR 2635.603(a).

(o) *Ethics Counselor.* The DoD component DAEO, Alternate DAEO, Deputy DAEO, or a DoD employee appointed in writing by the DoD component DAEO or designee to generally assist in implementing and administering the DoD component command's or organization's ethics program and to provide ethics advice to DoD employees of the DoD component command or organization in accordance with this part. Except for a DoD component DAEO, Alternate DAEO, or Deputy DAEO, a DoD

employee appointed as an Ethics Counselor shall only serve as a "DAEO or designee" when he has been delegated specific written authority by the DoD component DAEO to perform specific functions on behalf of the DoD component DAEO. Except for a DoD component DAEO, Alternate DAEO, or Deputy DAEO, a DoD employee appointed as an Ethics Counselor shall be an attorney, Legal assistance officers (or equivalent) who also serve as Ethics Counselors must clearly separate these roles. Communications received in an Ethics Counselor capacity are not protected by the attorney-client privilege while communications received in a legal assistance capacity may be. Attorneys who serve as Ethics Counselors must advise individuals being counseled as to the status of that privilege prior to any communications. The term "Ethics Counselor" includes "agency ethics official" as used by the Office of Government Ethics (OGE). See 5 CFR 2635.102.(c).

(p) *Ethics Oversight Committee (EOC).* A working group composed of the DoD component DAEO, or their representatives, and representatives of the Chairman of the Joint Chiefs of Staff, and the Judge Advocates General of the Military Departments.

(q) *Former DoD employee.* Any individual defined in §84.2(l), after termination of active duty or termination of DoD service, including reserve military officers who served on active duty for more than 130 days and who are no longer on active duty, or who are in an inactive or retired status.

(r) *Gratuity.* Gifts as defined in 5 CFR 2635.203(b).

(s) *He, his, him, himself.* These pronouns include she, hers, her and herself.

(t) *Head of DoD component command or organization.* A commander, commanding officer, or other military or civilian DoD employee who exercises command authority within a DoD component.

(u) *Major defense contractor.* Any non-Federal entity which, during the preceding fiscal year, received defense contracts in a total amount equal to or greater than \$10 million.

(v) *Major defense system.* For purposes of 10 U.S.C. 2397b, a combination of elements that will function together to produce the capability required to fulfill a mission need. Elements may include hardware, equipment, software, or any combination thereof, but excludes construction or other improvements to real property. A list is published in the FEDERAL REGISTER. See 10 U.S.C. 2302. A system shall be considered a major defense system if:

(1) DoD is responsible for the system and the total expenditures, for research, development, test, and evaluation for the system, are estimated to exceed \$75 million (based on fiscal year 1980 constant dollars) or the eventual total expenditure for procurement exceeds \$300 million (based on fiscal year 1980 constant dollars); or

(2) The system is designated a "major system" by the Head of the DoD agency responsible for the system.

(w) *Majority of working days.* More than 50% of days actually worked, excluding holidays, weekends, sick days, and leave days of the two-year period in question.

(x) *Negotiation.* For purposes of 10 U.S.C. 2397b only, the exchange of views between Federal Government and defense contractor representatives regarding respective entitlements, liabilities and responsibilities on a particular defense contract, modification, or claim over \$10 million, including deliberations regarding contract specifications, terms of delivery, allowability of costs, and pricing of change orders. Other statutes using this term may define it differently.

(y) *Non-Federal entity.* A non-Federal entity is generally a self-sustaining, non-Federal person or organization, established, operated and controlled by any individual(s) acting outside the scope of any official capacity as officers, employees or agents of the Federal Government. A non-Federal entity may operate on DoD installations if approved by the installation commander or higher authority under applicable regulations. See 32 CFR part 212.

(z) *Non-public information.* Information generally not available to the public, obtained in the course of one's official DoD duties or position which would normally not be releasable under

the Freedom of Information Act, 5 U.S.C. 552. The term "non-public information" includes "inside information," "proprietary information," and "source selection information." See 5 CFR 2635.703, 32 CFR part 285, and 48 CFR 3.104-4(j) and (k) and 3.104-5.

(aa) *Office of Government Ethics.* The Federal Government agency responsible for overall direction and leadership concerning Executive Branch policies related to ethics in the Federal Government. See 5 CFR part 2638.

(bb) *Personal and substantial.* See 5 CFR 2635.402(b)(4).

(cc) *Personal commercial solicitation.* Any effort to contact an individual to conduct or transact matters involving unofficial business, finance, or commerce. This does not include off-duty employment of DoD employees employed in retail establishments. See 32 CFR part 43.

(dd) *Primary Government representative.* For purposes of 10 U.S.C. 2397b, acting as a "representative" requires personal and substantial participation in the matter by personal presence, telephone conversation, or similar involvement with representatives of a defense contractor. At any time, more than one individual may act as a primary representative for a single matter.

(ee) *Procurement official.* See 48 CFR 3.104-4(h).

(ff) *Procurement function.* For purposes of 10 U.S.C. 2397b, any function relating to:

(1) The negotiation, award, administration, or approval of a contract;

(2) The selection of a defense contractor;

(3) The approval of a change in a contract;

(4) The performance of quality assurance, operational and developmental testing, the approval of payment, or auditing under a contract; or

(5) The management of a procurement program.

(gg) *Prohibited source.* See 5 CFR 2635.203(d).

(hh) *Qualified individual.* See 5 CFR 2638.702(a)(2).

(ii) *Reserve military officer.* An individual who currently holds an appointment in the reserve of a Military Department, or is a military officer of the

National Guard with Federal Government recognition.

(jj) *Retired military officer.* Any military officer entitled to receive military retired pay, even though such pay may be waived or pending.

(kk) *Senior DoD official.* For purposes of 18 U.S.C. 207, a DoD employee is defined as stated in 10 U.S.C. 207(c)(2).

(ll) *Special Government employee.* An individual who is retained, designated, appointed, or employed to perform, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days, temporary duties either on a full-time or intermittent basis. The term also includes a reserve military officer who is serving on active duty involuntarily or for training for any length of time, and one who is serving voluntarily on active duty for training for 130 days or less. It does not include enlisted members; however, for the purposes of this part, enlisted members shall be considered special Government employees to the same extent that military officers are included in the meaning of the term.

(mm) *Travel benefits.* Travel related gifts, including in kind subsistence and accommodations and payments or reimbursements of expenses, from non-Federal sources.

§ 84.3 General policy.

DoD policy. It is DoD policy that:

(a) A single, uniform source of standards of ethical conduct and ethics guidance shall be maintained within DoD, and each DoD agency shall implement and administer a comprehensive ethics program to ensure compliance with such standards and guidance;

(b) Although OGE regulations, cross-referenced in this part, do not apply to enlisted members of DoD, the provisions of 5 CFR parts 2634, 2635, 2638, 2639, 2640, and 2641, are determined to be appropriate for enlisted members and are hereby made applicable to enlisted members as if the terms “employee,” and “special Government employee,” as used in those OGE regulations, include enlisted members to the same extent that military officers are included within the meaning of those terms. The following exception applies to certain criminal statutes, 18 U.S.C.

203, 205, 207, 208, 209 and 218, and related provisions of OGE regulations, do not apply to enlisted members. Provisions similar to those of 18 U.S.C. 208 and 209 apply to enlisted members as follows:

(1) Except as approved by the DoD component DAEO or designee, an enlisted member, including an enlisted special Government employee, shall not participate personally and substantially as part of his official DoD duties, in any particular matter in which he, his spouse, minor child, partner, entity in which he is serving as officer, director, trustee, partner, or employee, or any entity with which he is negotiating or has an arrangement concerning prospective employment, has a financial interest;

(2) An enlisted member, except an enlisted special Government employee, shall not receive any salary or supplementation of his Federal Government salary, from any entity other than the Federal Government or as may be contributed out of the treasury of any State, county, or municipality, for his services to the Federal Government.

(c) DoD employees shall become familiar with all ethics provisions, including the standards set out in Executive Order 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215–218, and comply with them;

(d) DoD employees shall become familiar with the scope of and authority for the official activities for which they are responsible. Sound judgment must be exercised. All DoD employees must be prepared to account fully for the matter in which that judgment has been exercised;

(e) If the propriety of a proposed action or decision is in question for any reason, DoD employees shall seek guidance from a DoD component legal counsel, the DoD component DAEO or designee, or Ethics Counselor, as appropriate;

(f) Individual conduct, official programs and daily activities within DoD shall be accomplished lawfully and ethically;

(g) DoD employees shall adhere strictly to DoD policy of equal opportunity, regardless of race, color, religion, gender, age, national origin, or