



## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2641

### RIN 3209-AA58

## Post-Employment Conflict of Interest Restrictions; Revision of Departmental Component Designations

**AGENCY:** Office of Government Ethics.

**ACTION:** Proposed rule.

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**SUMMARY:** The U.S. Office of Government Ethics (OGE) is issuing a proposed rule to revise the component designations of one agency for purposes of the one-year post-employment conflict of interest restriction for senior employees. Specifically, based on the recommendation of the Department of Defense, OGE is proposing to designate one new component to its regulations.

**DATES:** Written comments are invited and must be received on or before [insert date 30 days after date of publication in the FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, in writing, to OGE on this proposed rule, identified by RIN 3209-AA58, by any of the following methods:

Email: [usoge@oge.gov](mailto:usoge@oge.gov). Include the reference “Proposed Rule Revising Departmental Component Designations” in the subject line of the message.

Instructions: All submissions must include OGE’s agency name and the Regulation Identifier Number (RIN), 3209-AA58, for this proposed rulemaking. All

comments, including attachments and other supporting materials, will become part of the public record and be subject to public disclosure. OGE may post comments on its website, [www.oge.gov](http://www.oge.gov). Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:** Kimberly L. Sikora Panza, Associate Counsel, Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005-3917; Telephone: (202) 482-9300; TTY: (800) 877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Substantive Discussion; Addition of New Departmental Component**

The Director of OGE (Director) is authorized by 18 U.S.C. 207(h) to designate distinct and separate departmental or agency components in the executive branch for purposes of 18 U.S.C. 207(c), the one-year post-employment conflict of interest restriction for senior employees. Under 18 U.S.C. 207(h)(2), component designations do not apply to persons employed at a rate of pay specified in or fixed according to subchapter II of 5 U.S.C. chapter 53 (the Executive Schedule). Component designations are listed in appendix B to 5 CFR part 2641.

The representational bar of 18 U.S.C. 207(c) usually extends to the whole of any department or agency in which a former senior employee served in any capacity during the year prior to termination from a senior employee position. However, 18 U.S.C. 207(h) provides that whenever the Director determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and there exists no

potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate component of that department or agency. As a result, a former senior employee who served in a designated component of a parent department or agency is barred from communicating to or making an appearance before any employee of that component, but is not barred as to any employee of the parent, of another designated component, or of any other agency or bureau of the parent that has not been designated. Likewise, a former senior employee who served in a “parent” department or agency is not barred by 18 U.S.C. 207(c) from making communications to or appearances before any employees of any designated component of that parent, but is barred as to employees of that parent or of other components that have not been separately designated.

The Director regularly reviews the component designations listed in appendix B to part 2641, and in consultation with the department or agency concerned, makes such additions and deletions as are necessary. Specifically, the Director “shall, by rule, make or revoke a component designation after considering the recommendation of the designated agency ethics official.” 5 CFR 2641.302(e)(3). Before designating an agency component as distinct and separate for purposes of 18 U.S.C. 207(c), the Director must find that there exists no potential for use of undue influence or unfair advantage based on past Government service, and that the component is an agency or bureau within a parent agency that exercises functions which are distinct and separate from the functions of the parent agency and from the functions of other components of that parent. 5 CFR 2641.302(c).

Pursuant to the procedures prescribed in 5 CFR 2641.302(e), one agency has forwarded a written request to OGE to amend its listing in appendix B to part 2641. After carefully reviewing the requested change in light of the criteria in 18 U.S.C. 207(h)

as implemented in 5 CFR 2641.302(c), OGE is proposing to grant this request and amend appendix B as explained below.

The Department of Defense (DoD) has requested that OGE designate the Defense Advanced Research Projects Agency (DARPA) in appendix B to part 2641 as a separate component of DoD for purposes of 18 U.S.C. 207(c) because it exercises functions that are distinct and separate from the functions of the parent agency and other components. DARPA was created under the statutory authority of the Secretary of Defense in 1958, *see* DoD Directive No. 5105.15 (Feb. 7, 1958), in response to the unforeseen launch of the world's first satellite by the Soviet Union. DARPA "serves as the research and development (R&D) organization in DoD with a primary responsibility of maintaining U.S. technological superiority over our adversaries." *See* DoD Directive 5134.10 (May 7, 2013, as amended Sept. 22, 2017)(outlining DARPA's roles and responsibilities). Directive 5134.10 provides independent authority for DARPA to carry out its uniquely-focused mission using its imagination and innovativeness to project what capabilities the military might want in the future, and sponsor high-risk, high payoff research to deliver those capabilities. DARPA has special hiring authorities and separate and distinct contracting authorities that help it exercise this mission.

DARPA is a small component, both in absolute terms and in relative terms as compared to the DoD as a whole. DARPA currently has about 220 employees, while the DoD civilian workforce is approximately 750,000 individuals and the entirety of DoD has almost 3 million individuals. Although the Director of DARPA reports to the DoD Undersecretary of Defense for Research and Engineering, the Director of DARPA is delegated broad authority and responsibility to act independently and with minimal supervision in carrying out the organization's mission and directing its research strategy and execution. Directive 5134.10 delegates to the Director of DARPA the fiscal,

contracting, and acquisition authority necessary to carry out the organization's responsibilities, as well as authority to communicate directly with other domestic and foreign entities. *See* Directive 5134.10, paragraph 7. DARPA has a separate and distinct budget, and conducts its budgeting process independently of the Office of the Secretary of Defense or any DoD component, including decisions regarding which programs to fund that support the development of breakthrough technologies and capabilities for national security. DARPA's budget independence demonstrates that it does not exercise significant responsibilities that cut across organizational lines within DoD.

According to DoD, designating DARPA as a separate component will not create the potential for undue influence or unfair advantage based on past government service. DARPA independently determines what R&D projects to pursue, and those projects are separate and unique from the rest of DoD and do not cut across organizational lines. Other DoD components do not typically get involved in DARPA's R&D work because the component's mission contemplates developing radically new technologies that do not exist at present and are not known to other DoD components. The typical senior employee who departs DARPA has worked on projects that are entirely outside of and beyond the work of the Office of the Secretary of Defense and other DoD components.

OGE is proposing to grant the request of DoD and amend the agency's listing in appendix B to part 2641 to add DARPA as a new component for purposes of 18 U.S.C. 207(c). DARPA is separate and distinct from its parent organization and other DoD components, and given the manner in which DARPA works independently from other component agencies and the general management of the DoD, there exists no potential for the use of undue influence or unfair advantage based on past Government service.

As indicated in 5 CFR 2641.302(f), a designation "shall be effective on the date the rule creating the designation is published in the FEDERAL REGISTER and shall be

effective as to individuals who terminated senior service either before, on or after that date.” Initial designations in appendix B to part 2641 were effective as of January 1, 1991. The effective date of subsequent designations is indicated by means of parenthetical entries in appendix B. The new component designation of DARPA made in this proposed rule would be effective on the date the final rule is published in the FEDERAL REGISTER.

## **II. Matters of Regulatory Procedure**

### Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it affects only Federal departments and agencies and current and former Federal employees.

### Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this proposed rule because it does not contain information collection requirements that require the approval of the Office of Management and Budget.

### Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed rule would not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

## Congressional Review Act

The proposed rule is not a major rule as defined in 5 U.S.C. chapter 8, Congressional Review of Agency Rulemaking.

## Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select the regulatory approaches that maximize net benefits (including economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. In promulgating this proposed rule, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in Executive Orders 12866 and 13563. This proposed rule has not been reviewed by the Office of Management and Budget under Executive Order 12866 because it is not a “significant” regulatory action for the purposes of that order.

## Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this proposed rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

## **List of Subjects in 5 CFR Part 2641**

Conflict of interests, Government employees.

Approved: November 17, 2020.

Emory Rounds,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend 5 CFR part 2641, as set forth below:

**PART 2641—POST-EMPLOYMENT CONFLICT OF INTEREST  
RESTRICTIONS**

1. The authority citation for part 2641 continues to read as follows:

**Authority:** 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 207; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

2. Amend appendix B to part 2641 by adding the listings for the Department of Defense to read as follows:

**Appendix B to Part 2641 – Agency Components for Purposes of 18 U.S.C. 207(c)**

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Parent: Department of Defense

Components:

Defense Advanced Research Projects Agency (DARPA) (EFFECTIVE UPON  
PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER).

Department of the Air Force.

Department of the Army.

Department of the Navy.

Defense Information Systems Agency.

Defense Intelligence Agency.

Defense Logistics Agency.

Defense Threat Reduction Agency (effective February 5, 1999).

National Geospatial-Intelligence Agency (formerly National Imagery and Mapping Agency) (effective May 16, 1997).

National Reconnaissance Office (effective January 30, 2003).

National Security Agency.

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[FR Doc. 2020-25750 Filed: 11/30/2020 8:45 am; Publication Date: 12/1/2020]