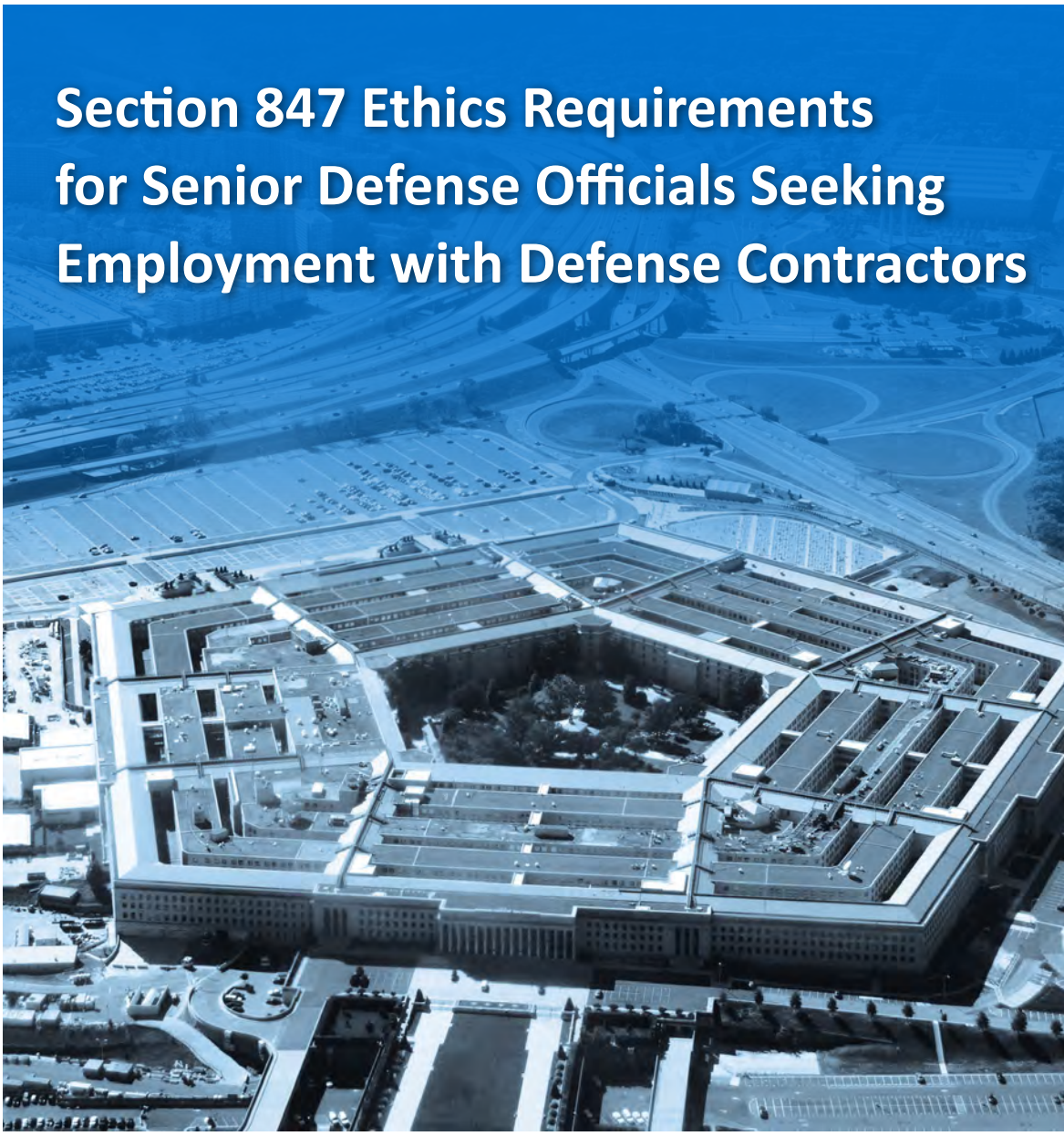
Report No. DODIG-2014-050

INSPECTOR GENERAL

U.S. Department of Defense

MARCH 31, 2014

Section 847 Ethics Requirements for Senior Defense Officials Seeking Employment with Defense Contractors



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Results in Brief

Section 847 Ethics Requirements for Senior Defense Officials Seeking Employment with Defense Contractors

March 31, 2014

Objective

Our objectives were to (1) address the central database and DoD IG oversight provisions of Public Law 110-181, "The National Defense Authorization Act for Fiscal Year 2008," Section 847, "Requirements for Senior Department of Defense Officials Seeking Employment with Defense Contractors," January 28, 2008; (hereinafter referred to as "section 847") (2) address subsequent direction from the House Armed Services Committee (HASC); and (3) accordingly determine:

- Whether written legal opinions required by section 847 were "being provided and retained in accordance with the requirements of this section." (Public Law 110-181, section 847 [b][2]).
- "The Department of Defense's record of compliance with section 847 of Public Law 110-181." (HASC Report on the National Defense Authorization Act For Fiscal Year 2013).
- Quantitative data specified by the HASC, as follows:
  - "the total number of opinions issued,
  - the total number of opinions retained in accordance with section 847,
  - any instances in which a request for a written opinion pursuant to section 847 lacked a corresponding written opinion, or

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Objective continued

  - in which the written opinion was not provided to the requesting official or former official of the Department of Defense by the appropriate ethics counselor within 30 days after the request for a written opinion."

Observations

The DoD did not retain all required section 847 records in its designated central repository, the After Government Employment Advice Repository (AGEAR).

This occurred because the Department did not:

- implement the 2010 DoD Inspector General (IG) report recommendation to transfer historical records into AGEAR when the database became operational,
- centrally supervise section 847 activities by its decentralized Components, and
- comply with Deputy Secretary guidance making AGEAR use mandatory as of January 1, 2012.

As a result:

- The AGEAR database was incomplete with limited or no use by specific DoD organizations with significant contracting activity.
- Individual section 847 records were located in multiple or decentralized locations, and in a number of cases were inaccurate, incomplete, and not readily accessible for examination.

Discussion

On January 28, 2008, Public Law 110-181, "The National Defense Authorization Act for Fiscal Year 2008," was enacted. Section 847 of the law, "Requirements for Senior Department of Defense Officials

Seeking Employment with Defense Contractors," required all officials covered by the law request an ethics opinion from a DoD ethics counselor before starting employment with a DoD contractor. Defense contractors are required to ensure that covered officials have received the required opinions before employing them. The law's recordkeeping requirement also mandated that DoD retain in a "central database or repository for not less than 5 years":

- All opinion requests pursuant to the section.
- All opinions provided pursuant to those requests.

On June 18, 2010, DoD IG report, *Review of Department of Defense Compliance with Section 847 of the National Defense Authorization Act for Fiscal Year 2008* (Report No. SPO-2010-003) concluded that the DoD Office of General Counsel (OGC) Standards of Conduct Office (SOCO), had initiated but not completed development and implementation of a central DoD repository to record requests for written opinions and to store copies of opinion letters issued. The report recommended that DoD OGC-SOCO:

- expeditiously develop the repository,
- obtain from DoD Components all requests and opinions rendered since section 847 became law, and
- when the repository became operational, transfer all records into it.

The DoD OGC concurred with this report, explained they were working with information technology experts to develop the AGEAR, and that after AGEAR rollout, they would transfer all existing records into it.

On September 19, 2011, the Deputy Secretary of Defense announced that the Army OGC had developed AGEAR to "capture and store opinions required under section 847;" designated the Secretary of the Army as the DoD Executive Agent to operate, maintain, manage, and fund the system; and made DoD-wide AGEAR use mandatory effective January 1, 2012.

On May 11, 2012, the HASC directed that DoD Office of Inspector General (OIG) "review the database established pursuant to section 847 of Public Law 110-181," report on DoD's "record of compliance with section 847 of Public Law 110-181," and determine specified quantitative data as previously noted in the "Objectives" section.

As indicated in the "Observation" section, the database was incomplete, and individual records were located in multiple or decentralized locations, and were, in a number of cases, inaccurate, incomplete, and not readily accessible or available for examination. Those conditions existed because the Department did not centrally supervise section 847 compliance, implement the 2010 DoD IG report recommendation to transfer historical records into the AGEAR central repository when the database became operational, or comply with the 2011 Deputy Secretary's directive that made DoD-wide AGEAR use mandatory as of January 1, 2012.

The DoD OGC-SOCO acknowledged that DoD did not upload pre-existing records when AGEAR became operational in 2010, and did not centrally supervise section 847 compliance by DoD's decentralized Components. In explanation, OGC-SOCO asserted that:

- AGEAR roll out was an unfunded mandate during a time of critically constrained resources.
- The Federal regulatory scheme decentralized the DoD ethics program and allowed records to be stored in multiple locations.
- "In the ethics realm," for personnel assigned outside of the Office of the Secretary of Defense, the role of the Secretary of Defense, and hence SOCO, is generally one of "policy setting," not "central supervisory authority."
- The U.S. Office of Government Ethics (OGE) had designated 17 "independent" DoD Components responsible to OGE for performance, and subject to OGE audit.

In a follow-on meeting with senior OGE officials and in subsequent written explanation to DoD OIG, OGE explained that with regard to DoD ethics programs:

- they did not supervise DoD or its Components,
- they did not decentralize the DoD ethics program or establish independent DoD Components, and
- they had concurred with a DoD request to appoint a designated agency ethics official (DAEO) in each of the separate DoD Components.

The OGE also emphasized that, regardless of the separate DAEO structure, OGE "viewed DoD as one agency" with the Secretary of Defense as the "head of the agency," and that the separate DAEO structure did not relieve the Secretary of Defense of supervisory responsibility for DoD ethics programs.

Conclusion

The assessment team concluded that the AGEAR database was not complete, that required section 847 records were located in multiple and decentralized locations, and that the records were not readily available for examination.

We concluded that AGEAR was of marginal value for management of DoD section 847 ethics opinions, and, therefore, that DoD may not have fully complied with the intent of this law.

As a result, we could not use AGEAR to reliably determine the quantitative data requested by the HASC.

Recommendation, Management Comments, and Our Response

Recommendation a.

The Deputy Secretary of Defense seek clarification regarding the intent of Public Law 110-181 section 847 with respect to the requirement to retain ethics opinions in a centralized database or repository—specifically whether the law intended a single central database or "multiple 'central' databases."

General Counsel of the Department of Defense on Behalf of the Deputy Secretary of Defense

Management nonconcurred with the recommendation to seek clarification because they asserted section 847 was clear. Despite their nonconcurrence, management acknowledged that "the Department does not take the position that multiple databases or repositories maintained by the various individual components…constitutes compliance with Section 847." In a March 12, 2014 memorandum, the DoD General Counsel noted that SOCO had recently issued a memorandum to the Department DAEOs requesting that they upload historical records into AGEAR from the date of section 847 enactment on January 28, 2008 until AGEAR deployment on January 1, 2012.

Our Response

We note management's nonconcurrence with our recommendations, but consider as responsive management's acknowledgement that multiple databases or repositories do not constitute compliance with Section 847. We also agree with management's position that all section 847 requests for opinions, and their corresponding opinions, both predating and postdating the effective date of AGEAR on January 1, 2012, should be entered into AGEAR. We will request an update on this effort in 6 months.

Recommendation b.

The Deputy Secretary of Defense delegate to an appropriate DoD official/office the responsibility and authority to centrally supervise Departmental section 847 compliance sufficient to meet the intent of the law, and determine and assign the needed resources.

General Counsel of the Department of Defense on Behalf of the Deputy Secretary of Defense

Management partially concurred with our recommendation and explained that the DoD SOCO had been providing leadership, education, training, legal interpretation, and guidance regarding Section 847 compliance since the law was enacted. Management also explained that SOCO would continue to exercise this leadership role in the future, and asserted that delegating

supervisory responsibility to another DoD official/office was unnecessary. However, management qualified SOCO's leadership role and explained that SOCO was "not equipped, nor should it be tasked with, discharging the ethics programs responsibilities of the separate DAEO components."

Our Response

We note management's partial concurrence and consider it partially responsive. In particular, we take note of management's clarifying comments with respect to the SOCO role in providing leadership, education, training, and legal interpretations and guidance regarding Section 847 compliance. With respect to what management characterizes as "taking over line supervision" or "delegating supervisor responsibility," we agree with management that SOCO does not now have, nor should be delegated this authority and we did not recommend this. We also agree that "taking over line supervision" of the DAEOs or "delegating supervisor responsibility [of the DAEOs to] another DoD official/office" would be unnecessary and we did not recommend this, either.

Lines of supervision already exist. Pursuant to DoD Directive 5145.01, "General Counsel of the Department of Defense," and DoD Directive 5145.04, "Defense Legal Services Agency", many lines of supervision run through Defense Legal Services Agency to the DoD General Counsel. However, others, such as the DoD OIG DAEO, do not. Therefore, to assist us in identifying and, if need be, assessing the effectiveness of these lines of supervision, we request that, as a follow-up to this review, the Department submit to the OIG, by organization, the position names (positions) of all Department DAEOs and the Department positions to whom those DAEOs directly report, with the exception of the DAEO for the DoD OIG.

Recommendations Table

Office of Primary Responsibility	Recommendations Requiring Additional Comment/ Information	No Additional Comments Required at this Time
Deputy Secretary of Defense	b.	a.

Please provide comments by April 30, 2014


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4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22350-1500

March 31, 2014

MEMORANDUM FOR DEPUTY SECRETARY OF DEFENSE
DIRECTOR, DEPARTMENT OF DEFENSE STANDARDS OF CONDUCT OFFICE

SUBJECT: Ethics Requirements for Senior Defense Officials Seeking Employment with Defense Contractors (Report No. DODIG-2014-050)

We are providing this final report for review and comment. We considered management comments to a draft when preparing this final report.

We request additional comments and information by April 30, 2014, on Recommendation b. Specifically, we request that as a follow-up to our review, and with the exception of the Designated Agency Ethics Official (DAEO) for the DoD Office of Inspector General, the Department submit to us, by organization, the position titles of all Department DAEOs, and the Department position to whom those DAEOs directly report.

Copies of your comments must have the actual signature of the authorizing official for your organization. We are unable to accept the / Signed / symbol in place of the actual signature. If you arrange to send classified documents electronically, they must be sent over the SECRET Internet Protocol Router Network (SIPR).

We appreciate the courtesies extended to our staff. Please direct questions to [redacted].

Kenneth P. Moorefield
Deputy Inspector General
Special Plans and Operations


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Introduction

Background

Members of Congress, Administration officials, various independent public policy research organizations, and the media have periodically raised concern that some former government officials, who left positions of significant contracting responsibility in the Government and subsequently worked for government contractors, may have improperly influenced the Government from their government contractor positions.

As a result, numerous government and non-government entities have reported extensively on conflict of interest concerns. For more information on prior reporting regarding this issue, please refer to Appendix A, "Prior Reporting" of this report.

In addition, Congress has periodically enacted legislation intended to provide transparency with respect to former government officials who seek employment with government contractors and to prevent conflict of interest.

2008—"Section 847"

On January 28, 2008, President George W. Bush signed Public Law 110-181, "The National Defense Authorization Act for Fiscal Year 2008." Section 847 of the law, "Requirements for Senior Department of Defense Officials Seeking Employment with Defense Contractors," defined a "covered" official as:

- A general or flag officer, member of the senior executive service, or Executive Schedule employee, who participated personally and substantially in an acquisition exceeding $10 million.
- A program or deputy program manager, procuring or administrative contracting officer, source selection authority or source selection evaluation board member, or chief of a financial or technical evaluation team for a contract exceeding $10 million.

Additionally, the law also required that:

- covered officials request written opinions regarding post-employment restrictions to activities that they may undertake on behalf of defense contractors prior to accepting position with those contractors,

- defense contractors ensure that covered officials have received the required opinions before employing them,
- DoD ethics counselors provide written ethics opinions to covered officials not later than 30 days after receiving requests,
- DoD retain each request for a written opinion, and each written opinion provided, in a central database or repository for not less than 5 years, and
- the DoD Office of Inspector General (OIG) conduct periodic reviews to ensure that written opinions are being provided and retained in accordance with the requirements of the section.

Government Accountability Office Audit

In 2008, at the direction of Congress, the Government Accountability Office (GAO) audit, *Defense Contracting: Post-Government Employment of Former DoD Officials Needs Greater Transparency* (Report No. GAO-08-485, May 21, 2008), addressed the scope of the conflict of interest transparency issue as it pertained to the Department of Defense. The audit, using Defense Manpower Data Center and Internal Revenue Service data, concluded that:

- During the period between 2004 and 2006, 52 major defense contractors employed 2,435 former DoD senior and acquisition officials who served as generals, admirals, senior executives, program managers, contracting officers, or in other acquisition positions which made them subject to restrictions on their post-DoD employment.
- While stipulating that the post-government hiring of the 2,435 former officials may have been justified, the GAO audit estimated that, based on a random sample, at least 422 of the 2,435 could have been working on defense contracts directly related to their former DoD agencies. In addition, the GAO estimated that at least nine of the officials could have worked on the same defense contract over which they had previously exercised direct oversight or decision-making authority.

The audit also concluded that information derived from contractor data regarding the employment of former DoD officials varied significantly from information derived from Internal Revenue Service and Defense Manpower Data Center data, with contractor data identifying just 1,263—or only about half—of the 2,435 former officials identified by the GAO as being employed by contractors. The audit explained that this differential existed because:

- Legislation preceding section 847 did not require DoD officials or former officials to seek an opinion from a DoD ethics counselor before accepting employment with a defense contractor.
- Legislation preceding section 847 did not require defense contractors to determine if prospective employees were DoD officials or former officials who were mandated to seek and receive an ethics opinion–nor were contractors required to ask for them.
- No laws or regulations required DoD to maintain visibility of employment with defense contractors by former senior officials after they left government service.
- DoD's record-keeping for its written ethics opinions was decentralized at the many defense ethics offices that issued them.

In a May 7, 2008 letter offering technical comment on the GAO Audit Report, Acting DoD General Counsel Daniel J. Dell'Orto—specifically referring to the section 847 "central database" provision—stated that there were numerous designated agency ethics officials (DAEOs), each with "separate, independent authority," and "accordingly, there are, and must be, multiple 'central' databases," with "thousands of post-employment ethics advisory letters." Notwithstanding his statement, Mr. Dell'Orto provided insight into DoD General Counsel plans for implementing section 847 and explained:

- His Standards of Conduct Office (SOCO) was attempting to establish "one global database" for "all" DoD post-employment records, and was working with information technology experts to develop a viable mechanism for collecting and retaining the information.
- If DoD efforts to develop "one global database" were unsuccessful, then DoD would "rely on the existing system," of "multiple 'central' databases."

Mr. Dell'Orto also asserted that as contemplated by section 847, either the single "global database" or the system of "multiple "central' databases," would allow the DoD IG to efficiently retrieve required information for periodic DoD IG reviews. Mr. Dell'Orto's letter, in its entirety, is contained at Appendix B of this report.

2010—DoD Office of Inspector General Report

On June 18, 2010, in conjunction with its responsibilities under the law, the DoD OIG issued report, *Review of Department of Defense Compliance with Section 847 of the National Defense Authorization Act for Fiscal Year 2008,* (Report No. SPO-2010-003).

The report found that, although DoD disseminated information on section 847 requirements to promote compliance within DoD and the defense contracting community, the Department had initiated, but not completed, development and implementation of a central DoD repository to record requests for written opinions and to store copies of opinion letters issued. As a result, section 847 record-keeping remained decentralized. The DoD OIG therefore recommended that the Office of General Counsel (OGC) SOCO:

- Continue the development and implementation of a central DoD repository in an expeditious manner in order to meet the statutory requirement.
- Ensure that all Component Ethics offices are informed regarding SOCO's development of a centralized database application, and their roles and responsibilities for meeting the statutory requirement for a DoD-wide central repository.
- Implement procedures to obtain from Component ethics offices copies of requests for written opinions pursuant to section 847, as well as each written opinion provided pursuant to such a request, until such time as the After Government Employment Advice Repository (AGEAR) is operational.
- Ensure that these existing requests for written opinions and copies of written opinions issued are transferred into AGEAR, at such time that AGEAR is operational.

The DoD OGC concurred with the recommendations and stated that:

- The DoD had "multiple DAEOs" each with "separate, independent authority and responsibility."
- In 2008, they advised all Component DAEOs to retain all written requests and opinions for at least 5 years to permit timely retrieval for periodic IG reviews.
- To facilitate the OIG review, they sent a data call to all DoD Components and asked that the Components forward all existing section 847 records to the DoD SOCO.
- They are working with information technology experts to fashion a viable mechanism for transferring and retaining existing requests for written opinions and copies of written opinions upon completion of AGEAR operational tests and rollout.

2012—After Government Employment Advice Repository Mandatory Use

On September 19, 2011, Deputy Secretary of Defense William Lynn announced that the Army OGC had developed AGEAR to "capture and store opinions required under section 847;" designated the Secretary of the Army as the DoD Executive Agent to operate, maintain, manage, and fund the system; and made DoD-wide AGEAR use mandatory effective January 1, 2012. Secretary Lynn's memorandum did not assign central supervisory responsibility for section 847 compliance by the DoD Components to any DoD entity. Secretary Lynn's memorandum is included at Appendix C of this report.

2012—DoD Office of Inspector General Follow-up

On March 27, 2012, in response to a formal DoD OIG follow-up inquiry, the DoD SOCO Director stated:

> "…to ensure that pre-existing requests for written opinions and copies of written opinions issued are transferred into AGEAR, the implementation rollout includes a procedure and instructions on transferring and retaining this historical information within AGEAR."

The Director also forwarded the AGEAR instruction developed to allow "any agency ethics official" to input a historical opinion previously maintained outside AGEAR.

In reliance on the SOCO Director's statement and the AGEAR rollout instruction, the DoD OIG closed all further follow-up on the 2010 DoD IG report. The SOCO Director's remarks are included in their entirety at Appendix D of this report.

2012—House Armed Services Committee Report

On May 11, 2012, the House Armed Services Committee (HASC) Report on the National Defense Authorization Act for Fiscal Year 2013 explained that the HASC wished to be apprised of DoD's "record of compliance with section 847 of Public Law 110-181," and therefore directed the DoD OIG to review "the database established pursuant to section 847 of Public Law 110-181."

The HASC also requested that the DoD OIG include specified quantitative reporting data as follows:

- "the total number of opinions issued and

- the total number of opinions retained in accordance with section 847 of Public Law 110-181; and
- any instances in which a request for a written opinion pursuant to section 847 of Public Law 110-181 lacked a corresponding written opinion, or
- in which the written opinion was not provided to the requesting official or former official of the Department of Defense by the appropriate ethics counselor within 30 days after the request for a written opinion."

Objective

In accordance with section 847 of Public Law 110-181, additional direction specified in the HASC Report on the National Defense Authorization Act For Fiscal Year 2013, and consistent with our responsibilities under the Inspector General Act of 1978, as amended, the objectives of our assessment were to:

- Determine whether written opinions were "being provided and retained in accordance with the requirements of the section." (Public Law 110-181 section 847 [b][2])
- Determine "the Department of Defense's record of compliance with section 847 of Public Law 110-181." (HASC Report on the National Defense Authorization Act For Fiscal Year 2013)
- Determine the quantitative data specified by the HASC, as outlined above. (HASC Report on the National Defense Authorization Act For Fiscal Year 2013)

Scope and Methodology

We conducted this assessment from April 2013 to March 2014 in accordance with the Council of the Inspectors General on Integrity and Efficiency Quality Standards for Inspection and Evaluation. Those standards require that we plan and perform the assessment to obtain sufficient, appropriate evidence to provide a reasonable basis for our observations and conclusions based on our assessment objectives. We believe that the evidence obtained provides a reasonable basis for our observations and conclusions based on our assessment objectives.

To achieve the assessment objectives, we analyzed relevant provisions of law, congressional guidance, and professional standards; spoke with stakeholders at all levels, including the Deputy Director for Compliance, United States Office of

Government Ethics (OGE), the Director of the DoD OGC-SOCO, the Army Deputy General Counsel (Ethics and Fiscal) (representing the DoD Executive Agent), congressional staff, and others; we examined section 847 records which the Department retained both inside and outside of AGEAR; and assessed data reliability and completeness to address the quantitative data the HASC specified.


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Observation

The DoD did not retain all required section 847 records in its designated central repository—the AGEAR.

This condition existed because the Department did not centrally supervise section 847 activities by its decentralized Components, implement the 2010 DoD IG report recommendation to transfer historical records into AGEAR when the database became operational, or comply with Deputy Secretary's guidance making AGEAR use mandatory as of January 1, 2012.

As a result, we concluded that AGEAR was of marginal value as a management control system, and that DoD may not have fully complied with the intent of the law. Moreover, we could not determine the quantitative data regarding ethics opinions requested by the HASC.

Pre-2012 Records

Despite the SOCO Director's March 27, 2012 assurance that AGEAR rollout procedures included instructions to ensure historical records were transferred into AGEAR, our examination of the AGEAR database found only limited records from January 28, 2008, when section 847 became law, through December 31, 2011, after which AGEAR use became mandatory.

Responding to our inquiries about this condition, SOCO acknowledged that they had not implemented the 2010 DoD IG report recommendation and uploaded pre-2012 records. SOCO explained that because of manpower and insufficient funding, they assigned the task a "less-than-mission-critical priority," and separately maintained pre-2012 opinions in an electronic folder in their office. On June 28, 2013, we requested all such records.

On July 2, 2013, in response to our request, SOCO gave us a compact disc containing 251 electronic files. On August 5, 2013, SOCO provided an additional 71 files. We examined all records and noted:

- duplicate documents;
- records with multiple other records imbedded in them;
- general ethics opinion letters that seemed unrelated to section 847, and instead, seemed to address other provisions of post-government ethics law;
- unsigned, undated, and potentially draft documents;

- documents with multiple requests and opinions;
- requests without corresponding opinions or explanations as to why;
- opinions without corresponding requests; and
- various other recordkeeping inconsistencies suggesting a lack of active supervision or quality control.

On August 6, 2013, we met with the SOCO Director to discuss our observations and explain that as a result of quality control and decentralized recordkeeping issues, it would be difficult for us to develop the data the HASC requested. With regard to uploading pre-2012 opinions, the SOCO Director responded that SOCO must comply with the law, but emphasized that:

- uploading prior opinions into AGEAR was an unfunded mandate the SOCO Director believed unnecessary, and
- the SOCO could not spend time uploading opinions when they were in furlough status.

The SOCO Director also questioned who and why someone would need prior records uploaded, and explained that, given constrained resources, the SOCO director would need an official request through both the DoD OIG and DoD OGC to upload the historical records.

On September 10, 2013, responding to our further inquiry, the SOCO Director echoed the May 2008 comments of the Acting DoD General Counsel concerning "multiple 'central' databases." Specifically, the SOCO Director said that there were 17 separate and independent DAEOs, and explained that after section 847 was enacted in 2008:

- "SOCO had no way to instantaneously create a repository across the entire Department."
- While awaiting AGEAR, the Department had to rely on a "central database" in each of the individual ethics offices.

The SOCO Director also explained that "while this less than perfect 'central' database" in each of the individual ethics offices was "cumbersome," it seemed sufficient to make "Section 847 opinions available on call" and had met "the needs of the OIG in two earlier

audits."[1] The SOCO Director's remarks, in their entirety, are contained at Appendix E of this report.

Notwithstanding the SOCO Director's remarks, the pre-2012 records SOCO separately retained outside AGEAR:

- were not centrally located with other records,
- were not readily available for examination, and
- reflected significant data reliability and quality control issues.

As a result, we concluded the pre-2012 records SOCO maintained outside AGEAR were not useful or reliable in our efforts to "review the database" established pursuant to section 847 as the HASC had requested, or to determine the quantitative data the HASC specified.

Post-2012 Records

In May 2013, responding to our request, the DoD AGEAR Executive Agent analyzed the AGEAR database and addressed the quantitative data specified by the HASC. A graphic presentation of the AGEAR analysis for the 16-month period beginning January 1, 2012, when DoD-wide AGEAR use became mandatory, and ending May 3, 2013, when the Executive Agent terminated the analysis, is presented in Table 1 below.

Table 1. DoD AGEAR Executive Agent Analysis – HASC Specified Data

Action	Total Opinion Requests	Records Retained in Database	Responses Within 30 Days	Opinions Exceeding 30 Days
Total Opinion Requests	379	379		
Requests Rejected	64	64	Not Applicable	Not Applicable
Opinions Issued	300	300	234	66
Responses Pending	15	15	3	12
Total Records		**379**	**237**	**78**

Source: DoD Executive Agent AGEAR data for the period January 1, 2012—May 3, 2013

The Executive Agent stated:

- AGEAR is the statutorily-mandated database within DoD for post-government employment opinions issued pursuant to Section 847.

[1] For further information on the Director's reference to two earlier audits, see the "2010—Department of Defense Inspector General Report," and "2012—DoD Inspector General Follow-up" in the Background section of this report.

- Only requests for post-government employment opinions meeting the criteria of section 847 are processed and stored in AGEAR.
- The vast majority of post-government employment opinions issued to DoD officials and former officials were not issued pursuant to section 847 and are not in AGEAR.
- Ethics counselors should reject requests that do not meet section 847 criteria.
- Rejection reasons include, but are not limited to, a requestor not meeting the statutory definition of "covered DoD official," or the requestor not having an expectation of compensation from a DoD contractor for activities that the official or former official might undertake on behalf of that contractor.

The Executive Agent explained that during the analysis period, DoD officials or former officials submitted a total of 379 requests, DoD ethics counselors rejected 64 requests and issued 300 opinions, and at the end of the analysis period, 15 requests awaited action by an ethics official. Regarding the 78 requests which AGEAR indicated took ethics counselors more than 30 days to process, the Executive Agent quantified reasons as follows:

Table 2. Requests Exceeding 30 Days

Number	Reason
25	The requests should have been rejected because they did not meet section 847 criteria for processing and retention in AGEAR.
20	The requests were forwarded to multiple ethics officials, which potentially contributed to the delay.
13	The requests did not contain sufficient information for the ethics official to provide a meaningful post government employment analysis and opinion.
9	The reason for the delay was not apparent.
7	The ethics official actually rejected the request or issued the opinion within 30 days, but did properly close the action within AGEAR.
3	The requests were historical opinions completed prior to 2012 and uploaded into AGEAR later for retention.
1	The record was a duplicate request.
78	**Total requests indicated as exceeding 30 days**

Source: DoD Executive Agent AGEAR data for the period January 1, 2012—May 3, 2013

The Executive Agent noted that, with regard to timeliness, system limitations, and accountability for compliance:

- "Cyber-security restrictions contribute to delays in issuance of opinions and audit trail difficulty. As AGEAR is a web-based system available to the public, cyber-security restrictions prevent requesters from uploading supporting documents with their request. Ethics officials are required to obtain additional information outside of AGEAR, such as resumes and position descriptions, which cuts into the 30-day clock. Additionally, requesting and obtaining information outside of AGEAR often means ethics officials forget or fail to properly create an audit trail in AGEAR to show that they requested additional information and/or to show when they received sufficient information to prepare an opinion. Of course, the lack of an audit trail in AGEAR makes it difficult to discern whether an opinion was issued within 30 days of receipt of a complete request."
- "AGEAR mandatory use in DoD became effective January 1, 2012. Many ethics officials are still relatively inexperienced in using the system. To ensure better accountability with respect to Section 847 compliance, DoD anticipates issuing guidance to ethics officials concerning proper AGEAR usage, particularly with regard to rejecting requests that do not meet Section 847 criteria, and to creating a clear audit trail within AGEAR establishing when requests for additional information are made and when ethics officials receive sufficient information to prepare a Section 847 opinion."

Following through on the anticipated guidance noted above, on September 6, 2013—and citing the ongoing DoD OIG assessment—the Executive Agent issued "*Business Rules for Use of the After Government Employment Advice Repository (AGEAR) System.*" The *Business Rules* in their entirety are attached at Appendix F of this report.

Regarding the Executive Agent's data analysis, the GAO guide, *Assessing the Reliability of Computer-Processed Data*, July 2009, explains that whether management provides information to evaluators, or evaluators extract information independently, evaluators should perform a data reliability assessment to determine whether the data was sufficiently reliable for the purpose of the review. The guide defines data reliability as information that is complete, accurate, and consistent. To further analyze whether information in the AGEAR database was complete, we organized the 379 records

analyzed by the AGEAR Executive Agent to determine the extent of separate Component activity. The results are reflected in Table 3 below.

Table 3. Analysis of Section 847 Activity by the Seventeen Separate DoD Components

DoD Component	Records	Percent
Department of the Army	140	36.9
Department of the Navy	124	32.7
Office of the Secretary of Defense	50	13.2
Defense Threat Reduction Agency	27	7.1
Department of the Air Force	24	6.3
National Geospatial-Intelligence Agency	4	1.1
Defense Logistics Agency	4	1.1
Defense Intelligence Agency	3	0.8
Uniformed Services University of Health Science	2	0.5
Defense Information Systems Agency	1	0.3
Defense Commissary Agency	0	0.0
Defense Contract Audit Agency	0	0.0
Defense Finance and Accounting Service	0	0.0
Defense Security Service	0	0.0
National Security Agency	0	0.0
Department of Defense Inspector General	0	0.0
Armed Services Board of Contract Appeals	0	0.0
Total	**379**	**100.0**

Source: DoD Executive Agent AGEAR data for the period January 1, 2012 – May 3, 2013

Our analysis indicated that more than 80 percent of all section 847 activity was accounted for by only three Components—the Army, Navy, and the Office of the Secretary of Defense. Our analysis also indicated significantly less activity by the Air Force, when compared to the Army and Navy, and limited or no activity by the Defense Logistics Agency (DLA) or the National Security Agency (NSA), organizations with substantial contracting activity. Consequently, we concluded that the AGEAR database did not contain all required section 847 records, and as a result, that AGEAR was of marginal value as a central management control system to determine whether opinions were being provided and retained in accordance with the law.

Central Supervision and Oversight of Section 847 Compliance

In the SOCO Director's September 10, 2013, memorandum discussed earlier (see Appendix E), the SOCO Director agreed that the apparent lack of section 847 opinions posted in AGEAR by two large agencies was troubling. However, the SOCO Director:

- "Fundamentally" disagreed that the Secretary of Defense, SOCO, or some other centralized entity reporting to the Secretary "should be responsible for ensuring compliance with Section 847 across the entirety of DoD."
- Explained that the Federal regulatory scheme formalized decentralization of the DoD ethics program; that accordingly, the OGE designated 17 "independent" DoD Components responsible to OGE for performance, and that each independent DoD Component was subject to OGE oversight and audit.
- Noted that in the "ethics realm," for personnel assigned outside of the Office of the Secretary of Defense, the Secretary of Defense's role was generally one of "policy setting" rather than exercising "central supervisory authority," and that the only centralized activities specified by section 847 were "recordkeeping," and the related IG review function superimposed on the existing decentralized ethics program.
- Recommended that if the DoD OIG wanted to find out why two large agencies with acquisition responsibilities seemed to have unrealistically low numbers, the OIG confer directly with those entities.

While asserting SOCO lacked central supervisory authority, the SOCO Director accepted responsibility within SOCO's policy setting role to help resolve inconsistency in compliance among DoD Components. Accordingly, the SOCO Director suggested that SOCO ask OGE to perform section 847 compliance reviews during routine OGE audits of individual DoD Component post-government advice programs.

U.S. Office of Government Ethics

On October 25, 2013, we met with the OGE Deputy Director for Compliance and other senior OGE officials to discuss the SOCO assertions and suggestions. OGE disagreed with the SOCO assertions that, in the "ethics realm," the Secretary of Defense had no responsibility for supervising "independent" DoD Components or that OGE had designated 17 independent DoD Components responsible to OGE for ethics performance.

The OGE explained that, with regard to the individual DoD Components, they had concurred with a DoD request to establish a Designated Agency Ethics Official (DAEO) in each. Nonetheless, OGE emphasized that, despite the separate DAEO structure:

- OGE "viewed DoD as one agency,"
- OGE considered the Secretary of Defense as the "head of the agency," and
- the separate DAEO structure did not relieve the Secretary of Defense of responsibility for supervising DoD ethics programs.

Regarding the SOCO Director's suggestion to the DoD OIG assessment team that OGE perform section 847 compliance reviews during routine OGE audits of DoD Components, OGE explained that they were a relatively small organization with approximately 63 people currently "on-board" to oversee the activities of more than 5,600 ethics officials across the entire executive branch. As a result, OGE did not have the resources to oversee section 847 compliance in 17 separate DoD Components. Further, OGE questioned whether they had the authority to assess DoD section 847 compliance, since the law pertained exclusively to DoD. However, OGE pointed out that the DoD Inspector General did have such authority.

In a follow-up letter to confirm its position, the OGE OGC provided the following observations regarding Department compliance with section 847:

- Neither the National Defense Authorization Act for FY 2008 nor the Ethics in Government Act of 1972 vested the OGE with responsibility for overseeing the Department's compliance with section 847, "including retaining a database of Department opinions."
- "Section 847 (b) (1) of the National Defense Authorization Act expressly provided that the centralized database of the Department's opinions would be retained "by the Department of Defense."

The letter, in its entirety, is included at Appendix G of this report.

National Security Agency

In communication with the NSA DAEO to determine why they were not retaining section 847 records in AGEAR, the DAEO explained that, although the NSA provided "written ethics advice to all…seniors who expect to work for contractors" and kept "internal folders," for those records, the NSA did not use AGEAR because of the following separate provision of law:

> 50 USC § 3605. *Disclosure of Agency's organization, function, activities, or personnel*—"…nothing in this act or any other law... shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency."

Defense Logistics Agency

The DLA is a large defense combat logistics support organization with $44 billion in annual sales and revenue, has 27,000 employees worldwide, supports 2,250 weapons systems, manages 9 supply chains with more than 5 million items, and processes more than 9,000 contract actions every day.

We met with the DLA Deputy DAEO in the OGC to determine how DLA was managing its ethics opinion program and to determine why DLA was not retaining required section 847 records in AGEAR. The Deputy DAEO explained that a "covered official" applied to all employees "involved with 10 million dollar programs or contracts," and that he was not aware of how many $10 million DLA contracts were issued. He also noted that while there were many $10 million contracts at DLA and many DLA employees at the GS-12, GS-13, and GS-14 level involved with them, DLA did not issue many section 847 opinions to employees other than general officers or department managers. The Deputy DAEO acknowledged that DLA was not using AGEAR and explained:

- They were not using AGEAR because they were under the impression SOCO had placed AGEAR "on hold."
- Even though most opinions were written in the field, they were all sent to Headquarters for retention in the DLA repository.
- The DLA would immediately begin using AGEAR.

Conclusion

The OGE OGC and DoD OGC SOCO position on the meaning of "central supervision" and the section 847 requirement for a "central database" differed. The OGE OGC viewed DoD as a single agency with the Secretary of Defense responsible for supervising all DoD ethics programs, and interpreted section 847 as requiring the DoD to maintain a "single" central database for all required section 847 opinions.

Conversely, the DoD OGC SOCO took the position that:

- The Secretary of Defense did not have central supervisory authority over DoD ethics programs and compliance with section 847.
- The Secretary of Defense's role in the area of ethics was only one of policy setting.
- DoD could have section 847 records located in multiple locations.

Notwithstanding this difference, the AGEAR database was incomplete, contained inconsistent data, and consequently we could not:

- be certain that the data provided by the AGEAR Executive Agent in Tables 1 and 2, addressing the quantitative data requested by the HASC, was complete; nor
- conclude that AGEAR provided a centralized repository/database of written ethics opinions, in accordance with the requirements of section 847.

As a result, we concluded that AGEAR was of marginal value for management of DoD section 847 ethics opinions, and therefore, that DoD may not have fully complied with the intent of this law.

Recommendation, Management Comments, and Our Response

Recommendation a.

The Deputy Secretary of Defense seek clarification regarding the intent of Public Law 110-181 section 847 with respect to the requirement to retain ethics opinions in a "centralized database or repository," specifically whether the law intended a single central database or "multiple 'central' databases."

General Counsel of the Department of Defense on Behalf of the Deputy Secretary of Defense

Management nonconcurred with our recommendation. They explained that there was no need to seek clarification of the law because section 847 was clear. Despite their nonconcurrence, management acknowledged that "the Department does not

take the position that multiple databases or repositories maintained by the various individual components…constitutes compliance with Section 847." In a March 12, 2014 memorandum, the DoD General Counsel stated that SOCO had recently issued a memorandum to the Department DAEOs requesting that they upload historical records into AGEAR from the date of section 847 enactment on January 28, 2008 until AGEAR deployment on January 1, 2012. Management comments from the DoD General Counsel, on behalf of the Deputy Secretary of Defense, are included in their entirety in the Management Comments Section of this report. The DoD General Counsel follow-up response is included at Appendix H.

Our Response

We note management's nonconcurrence with our recommendation, but consider as responsive management's acknowledgement that multiple databases or repositories do not constitute compliance with section 847. We also acknowledge that, on February 26, 2014, prior to the publication of this report, the SOCO Director, in a memorandum to Department DAEOs, asked the DAEOs to upload into AGEAR "historical Section 847 documents, meaning those requests and opinions collected from the date of enactment of Section 847 (January 28, 2008) until deployment of AGEAR on January 1, 2012." (The DoD General Counsel's memorandum, in its entirety, is included at Appendix H of this report.)

We agree that maintaining separate databases does not constitute compliance with section 847, and that all section 847 requests and opinions, both predating and postdating the effective date of AGEAR on January 1, 2012, should be entered into AGEAR. We will request an update on this effort in 6 months.

> ***Recommendation b.***
>
> Deputy Secretary of Defense delegate to an appropriate DoD official/ office the responsibility and authority to centrally supervise Departmental section 847 compliance sufficient to meet the intent of the law, and determine and assign the needed resources.

General Counsel of the Department of Defense on Behalf of the Deputy Secretary of Defense

Management partially concurred with our recommendation and explained that the DoD SOCO had been providing leadership, education, training, legal interpretation, and

guidance regarding Section 847 compliance since the law was enacted. Management also explained that SOCO would continue to exercise this leadership role in the future, and asserted that delegating supervisory responsibility to another DoD official/office was unnecessary. However, management qualified SOCO's leadership role and explained that SOCO was "not equipped, nor should it be tasked with, discharging the ethics programs responsibilities of the separate DAEO components."

Our Response

We note management's partial concurrence and consider it partially responsive. In particular, we take note of management's clarifying comments with respect to the SOCO role in providing leadership, education, training, and legal interpretations and guidance regarding Section 847 compliance. With respect to what management characterizes in their comments as "taking over line supervision" or "delegating supervisor responsibility," we agree with management that SOCO does not now have, nor should be delegated this authority and we did not recommend this. We also agree that "taking over line supervision" of the DAEOs or "delegating supervisor responsibility [of the DAEOs to] another DoD official/office" would be unnecessary and we did not recommend this, either.

Lines of supervision already exist. Pursuant to DoD Directive 5145.01, "General Counsel of the Department of Defense," and DoD Directive 5145.04, "Defense Legal Services Agency," many lines of supervision run through Defense Legal Services Agency to the DoD General Counsel. However, others, such as the DoD OIG DAEO, do not. (None the less, as previously mentioned, DoD General Counsel stated that SOCO had recently issued a memorandum to the Department DAEOs requesting that they upload historical records into AGEAR from the date of section 847 enactment on January 28, 2008 until AGEAR deployment on January 1, 2012. See Appendix H.) Therefore, to assist us in identifying and, if need be, assessing the effectiveness of these lines of supervision, we request that, as a follow-up to this review, the Department submit to the OIG, by organization, the position names (positions) of all Department DAEOs and the Department positions to whom those DAEOs directly report, with the exception of the DAEO for the DoD OIG.

Appendix A

Prior Coverage

During the last 6 years the Government Accountability Office (GAO) and DoD Inspector General (IG) have issued four reports discussing DoD's post-government employment of former DoD officials, ethics programs, and compliance with Section 847. Unrestricted GAO reports can be accessed over the Internet at http://www.gao.gov. Unrestricted DoD IG reports can be accessed at http://www.dodig.mil. In addition, during the past 6 years the Congressional Research Service (CRS), the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD [AT&L]), and the National Academy of Public Administration (NAPA) have issued reports discussing post-employment laws and restrictions.

GAO

GAO Report No. GAO-09-591, "Defense Contracting Integrity: Opportunities Exist to Improve DOD's Oversight of Contractor Ethics Programs," September 22, 2009

GAO Report No. GAO-08-485, "Defense Contracting: Post-Government Employment of Former DOD Officials Needs Greater Transparency," May 21, 2008

DoD IG

DoD IG Report No. DODIG-2013-039, "Defense Advanced Research Projects Agency's Ethics Program Met Federal Government Standards," January 24, 2013

DoD IG Report No. SPO-2010-003, "Review of DoD Compliance with Section 847 of the NDAA for FY 2008," June 18, 2010

Congressional Research Service (CRS)

CRS Report No. R42728, "Post-Employment, 'Revolving Door,' Laws for Federal Personnel," September 13, 2012

Under Secretary of Defense for Acquisition, Technology, and Logistics (USD [AT&L])

USD (AT&L) DoD Panel on Contracting Integrity Report, "Review of Post-Employment Restrictions Applicable to the DoD," May 9, 2011

USD (AT&L) Report, "Panel on Contracting Integrity 2010 Report to Congress," January 28, 2011

USD (AT&L) Report, "Panel on Contracting Integrity 2009 Report to Congress," Undated

USD (AT&L) Report, "Panel on Contracting Integrity 2008 Report to Congress," January 5, 2009

National Academy of Public Administration (NAPA)

NAPA Report, "Independent Assessment of the Department of Defense Review of Post-Employment Restrictions," February 2012 (Mandated by the Fiscal Year 2010 National Defense Authorization Act)

Appendix B

Acting DoD General Counsel Dell'Orto Letter to the Government Accountability Office, May 7, 2008

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

MAY 07 2008

[redacted]
General Accountability Office
Director, Acquisition and Sourcing Management
441 G Street, NW
Room 4440A
Washington, DC 20548

Re: Draft report on Defense Contracting Post-Government Employment of Former DoD Officials Needs Greater Transparency GAO -08-485

Dear [redacted]

In connection with the referenced matter, we provide two comments:

First, we recommend a one word change for accuracy on page 2 of the GAO Report, first paragraph, near the end of the paragraph, which states: "Congress repealed these reporting requirements in 1995 when enacting new provisions to impose a 1 year hiring ban." Instead of saying "hiring ban" which is inaccurate, the sentence should read "compensation ban." See 41 U.S.C. 423(d).

Second, in response to several references in the GAO Report to DoD establishing a "central database" for post-employment requests and opinions, we want to apprise GAO that the DoD Standards of Conduct Office is attempting to establish one global database for all DoD post-employment requests and opinion letters. Please note, however, that in DoD, 18 designated agency ethics officials (DAEOs) and at least 25 DoD entity Deputy DAEOs have separate, independent authority to provide and retain ethics advisory opinions. Accordingly, there are, and must be, multiple "central" databases maintained by these individual ethics officials containing thousands of post-employment ethics advisory letters.

Never before has the DoD Standards of Conduct Office undertaken such a significant collection and retention program for ethics advice. We are working closely with our Information Technology experts to fashion a viable mechanism for collecting and retaining this information. If unsuccessful, we will rely on the existing system in which each DAEO and Deputy DAEO is responsible for maintaining these requests and opinions.

Acting DoD General Counsel Dell'Orto Letter to the Government Accountability Office, May 7, 2008 (cont'd)

As contemplated in Section 847 (b)(2) of the National Defense Authorization Act, the DoD Inspector General will be able to retrieve any required information efficiently relying on either collection and retention methodology.

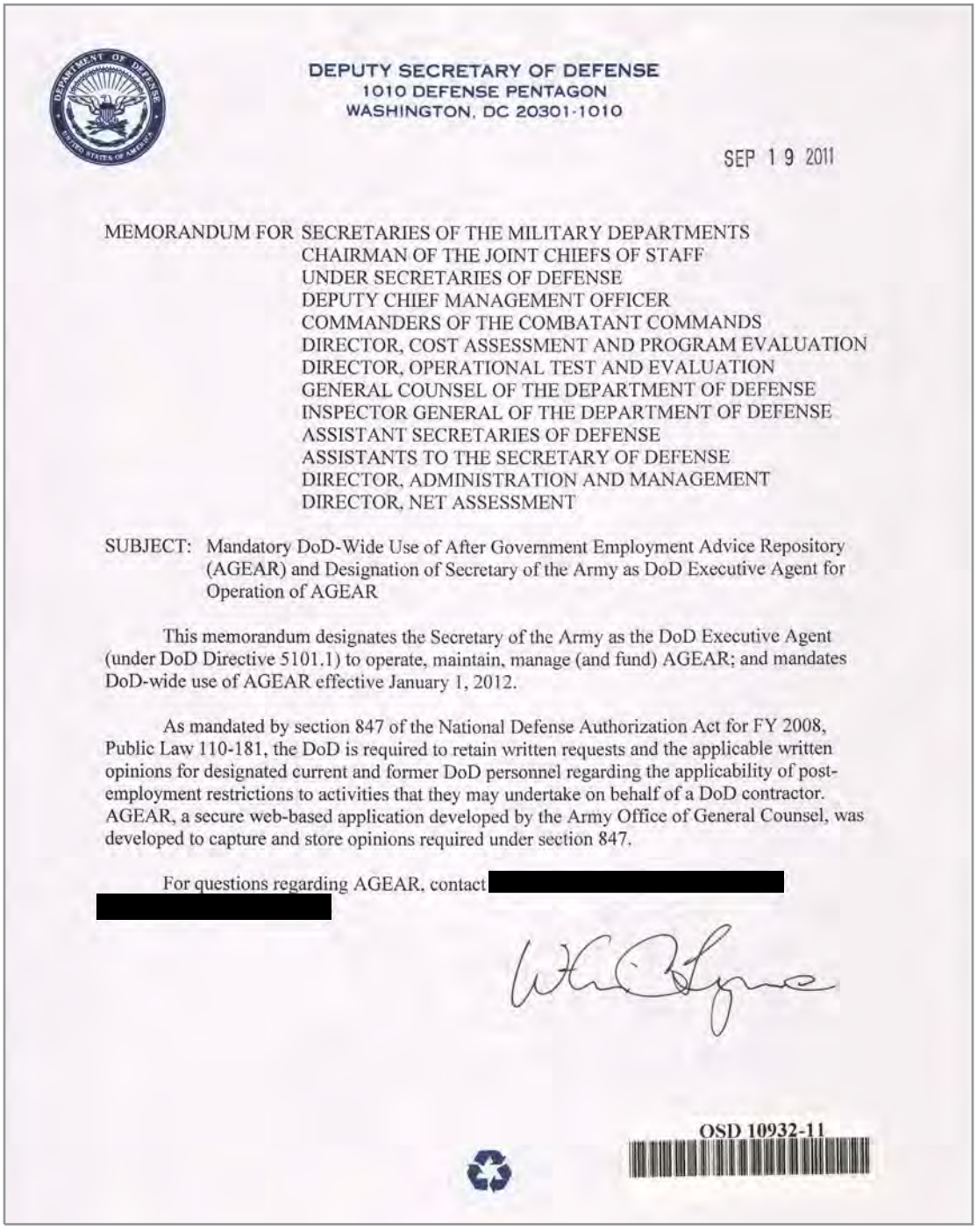
Sincerely,

Daniel J. Dell'Orto

Daniel J. Dell'Orto
Acting

Appendix C

Deputy Secretary of Defense Memorandum, September 19, 2011



DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

SEP 19 2011

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
COMMANDERS OF THE COMBATANT COMMANDS
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
DIRECTOR, OPERATIONAL TEST AND EVALUATION
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT

SUBJECT: Mandatory DoD-Wide Use of After Government Employment Advice Repository (AGEAR) and Designation of Secretary of the Army as DoD Executive Agent for Operation of AGEAR

This memorandum designates the Secretary of the Army as the DoD Executive Agent (under DoD Directive 5101.1) to operate, maintain, manage (and fund) AGEAR; and mandates DoD-wide use of AGEAR effective January 1, 2012.

As mandated by section 847 of the National Defense Authorization Act for FY 2008, Public Law 110-181, the DoD is required to retain written requests and the applicable written opinions for designated current and former DoD personnel regarding the applicability of post-employment restrictions to activities that they may undertake on behalf of a DoD contractor. AGEAR, a secure web-based application developed by the Army Office of General Counsel, was developed to capture and store opinions required under section 847.

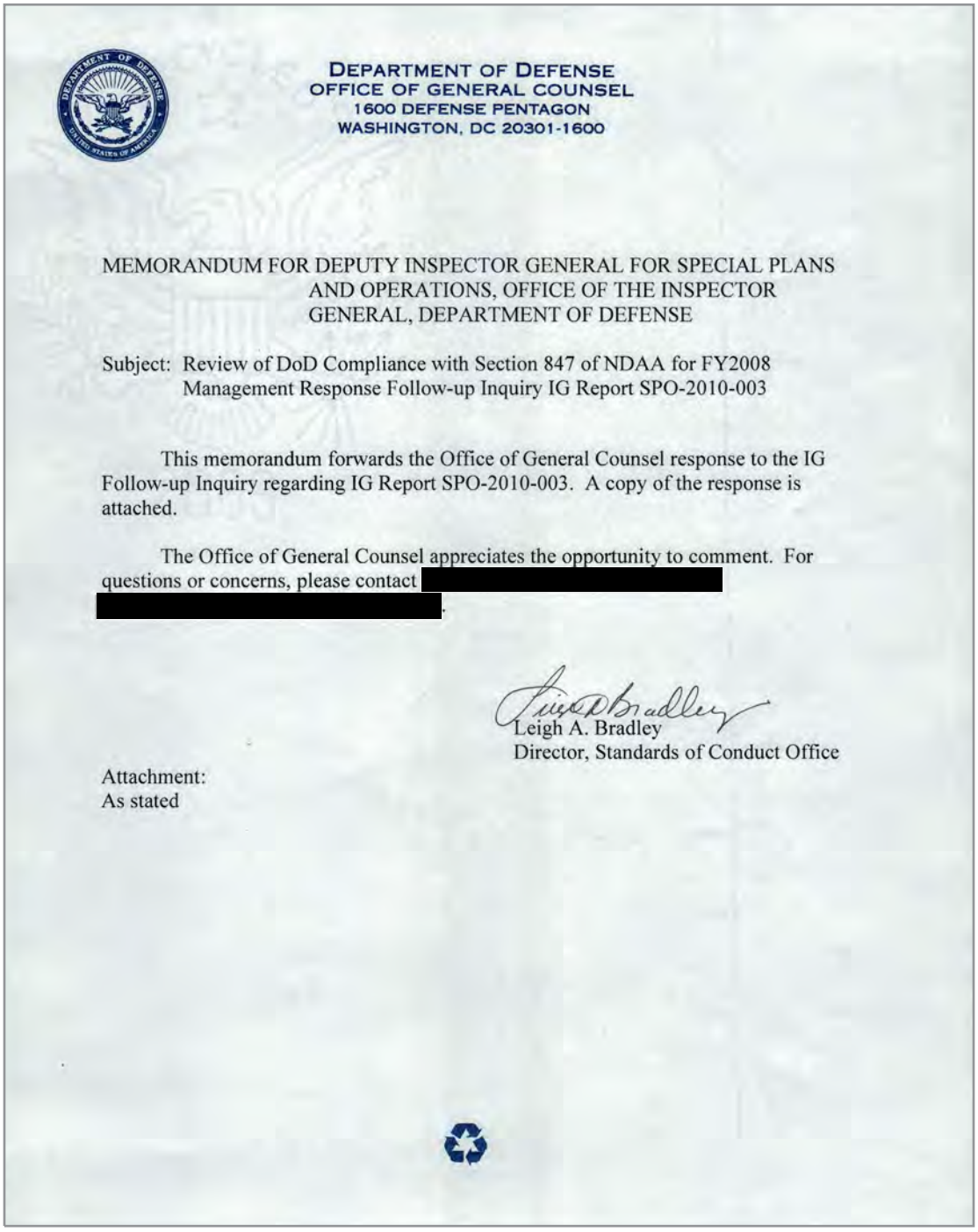
For questions regarding AGEAR, contact [redacted]

OSD 10932-11


INSPECTOR GENERAL
INTEGRITY
EFFICIENCY
DEPARTMENT OF DEFENSE

Appendix D

Response to DoD Office of Inspector General Follow-up Request



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

MEMORANDUM FOR DEPUTY INSPECTOR GENERAL FOR SPECIAL PLANS AND OPERATIONS, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

Subject: Review of DoD Compliance with Section 847 of NDAA for FY2008 Management Response Follow-up Inquiry IG Report SPO-2010-003

This memorandum forwards the Office of General Counsel response to the IG Follow-up Inquiry regarding IG Report SPO-2010-003. A copy of the response is attached.

The Office of General Counsel appreciates the opportunity to comment. For questions or concerns, please contact [redacted].

Leigh A. Bradley
Director, Standards of Conduct Office

Attachment:
As stated

Response to DoD Office of Inspector General Follow-up Request (cont'd)

PROJECT NO. D2010-DIP0E2-0105.000

Review of DoD Compliance with Section 847 of NDAA for FY2008

DOD OFFICE OF THE GENERAL COUNSEL, STANDARD OF CONDUCT OFFICE RESPONSE TO THE DOD OIG RECOMMENDATIONS.

"Recommendation 1
We recommend that the Standards of Conduct Office in the DoD Office of General Counsel:

a. continue the development and implementation of a central DoD repository in an expeditious manner in order to meet the statutory requirement."

RESPONSE TO 1.a.: The Deputy Secretary of Defense directed implementation of an internet-based platform to receive requests for and store ethics advisory opinions throughout the Department of Defense on September 21, 2011. (See enclosure 1.) This memorandum designated the Army executive agent for the program and mandated use of the Army- developed After Government Employment Advisory Repository (AGEAR) application DoD-wide, effective January 1, 2012. The program utilizes the existing Financial Disclosure Management system software suite and similarly allows for electronic submission by requestors, sharing among responsible reviewers, and accessibility of opinions for the IG and other oversight officials. AGEAR has performed successfully in a large group trial for the Department of the Army.

Upon the Deputy Secretary's action, SOCO informed component ethics offices regarding the centralized database application and their roles and responsibilities for meeting the statutory requirement for a DoD-wide central repository via AGEAR. See, e.g., DOD SOCO email of September 28, 2011(enclosure 2).

We updated key regulations applicable throughout the Department to reflect the requirement to request written post-Government employment advice and mandatory use of AGEAR. For example, the Joint Ethics Regulation, DoD 5500.07-R, Change 7, now provides:

"SECTION 4. POST-EMPLOYMENT COUNSELING AND ADVICE.
9-400. Written Advice. Current and former DoD employees may obtain counseling and written advice concerning post-employment restrictions from the Ethics Counselor of the DoD Component command or organization from which they are leaving, or have left, Federal Government service. Certain current and former DoD employees are, by law, required to request written advice from the DoD Component DAEO or designee under section 847 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, implemented at DFAR 203.171-3 (Reference (r))."

1

Response to DoD Office of Inspector General Follow-up Request (cont'd)

In preparation for the January 1, 2012 implementation date, DoD SOCO identified the required AGEAR points of contact to enable proper dissemination of incoming opinion requests. See, e.g., DDAEO Teleconference Agenda of September 28, 2011(enclosure 3). SOCO and the other responsible ethics offices ensured identified ethics official users of the database were trained on the procedures for AGEAR opinion request processing. We used the Army-provided training, "Introduction to the AGEAR Application" (enclosure 4, or online at https://www.fdm.army.mil/PM_Reference_Docs/EOUsingAGEAR.ppt) or live training opportunities. See, e.g., Department of the Navy DAEO Section 847 Repository and Live Online Training announced for December 14, 2011 (enclosure 5). More in-depth training is offered annually at the Ethics Counselor's Course at The Judge Advocate General of the Army Legal Center and School in Charlottesville, Virginia (enclosure 6).

Finally, to ensure that pre-existing requests for written opinions and copies of written opinions issued are transferred into AGEAR, the implementation rollout includes a procedure and instructions on transferring and retaining this historical information within AGEAR (enclosure 7).

Enclosures:

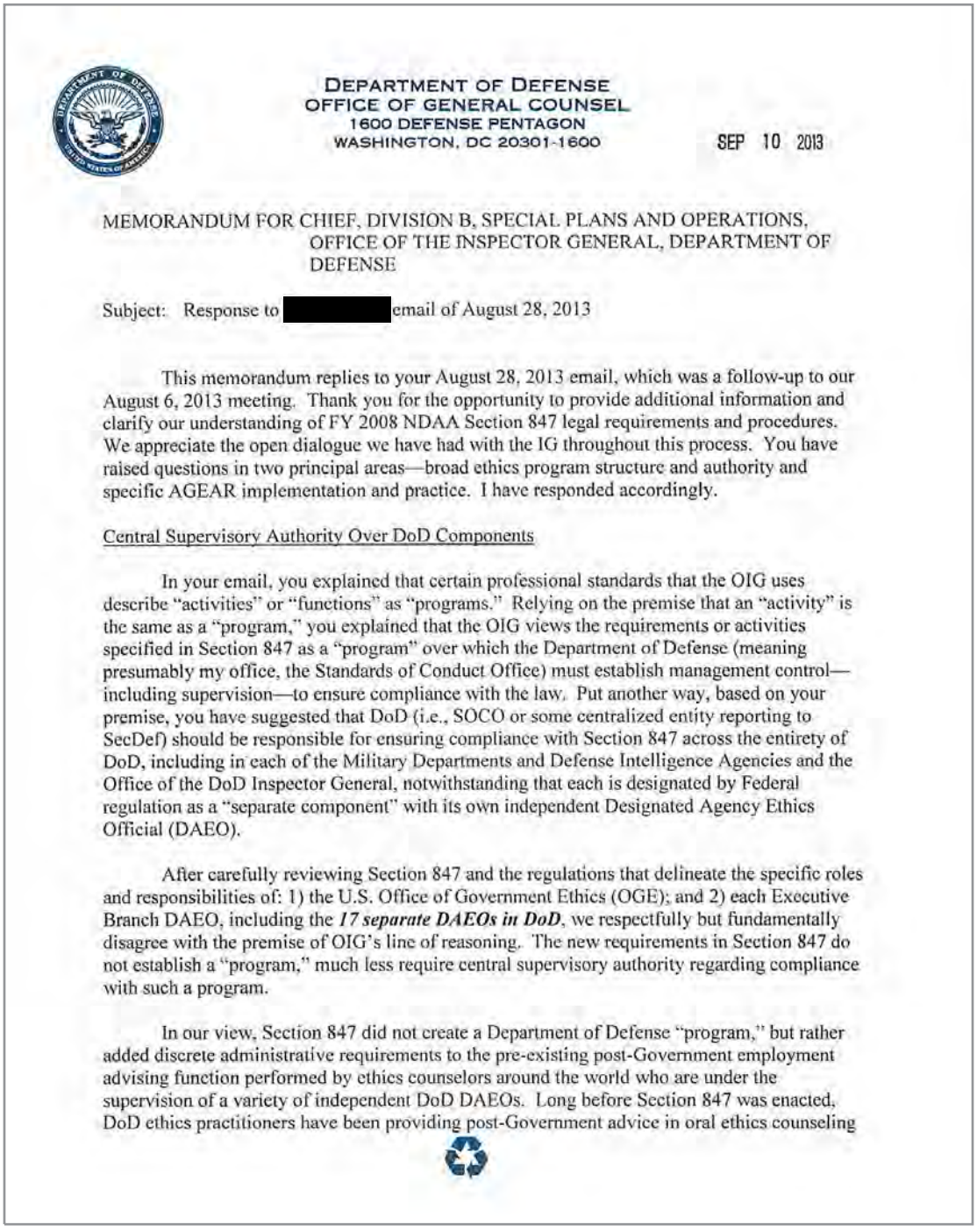
(1) Deputy Secretary of Defense memo of September 21, 2011
(2) DoD SOCO email of September 28, 2011
(3) DDAEO teleconference agenda of September 28, 2011
(4) Ethics Official Using AGEAR presentation
(5) Navy DAEO Section 847 Repository and Live Online Training email of December 13, 2011
(6) Ethics Counselor Course training on AGEAR , April 2012 edition
(7) AGEAR Historical Opinions procedure training

2


INSPECTOR GENERAL
INTEGRITY
EFFICIENCY
DEPARTMENT OF DEFENSE

Appendix E

Standards of Conduct Office Memorandum, September 10, 2013



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

SEP 10 2013

MEMORANDUM FOR CHIEF, DIVISION B, SPECIAL PLANS AND OPERATIONS, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

Subject: Response to [redacted] email of August 28, 2013

This memorandum replies to your August 28, 2013 email, which was a follow-up to our August 6, 2013 meeting. Thank you for the opportunity to provide additional information and clarify our understanding of FY 2008 NDAA Section 847 legal requirements and procedures. We appreciate the open dialogue we have had with the IG throughout this process. You have raised questions in two principal areas—broad ethics program structure and authority and specific AGEAR implementation and practice. I have responded accordingly.

Central Supervisory Authority Over DoD Components

In your email, you explained that certain professional standards that the OIG uses describe "activities" or "functions" as "programs." Relying on the premise that an "activity" is the same as a "program," you explained that the OIG views the requirements or activities specified in Section 847 as a "program" over which the Department of Defense (meaning presumably my office, the Standards of Conduct Office) must establish management control—including supervision—to ensure compliance with the law. Put another way, based on your premise, you have suggested that DoD (i.e., SOCO or some centralized entity reporting to SecDef) should be responsible for ensuring compliance with Section 847 across the entirety of DoD, including in each of the Military Departments and Defense Intelligence Agencies and the Office of the DoD Inspector General, notwithstanding that each is designated by Federal regulation as a "separate component" with its own independent Designated Agency Ethics Official (DAEO).

After carefully reviewing Section 847 and the regulations that delineate the specific roles and responsibilities of: 1) the U.S. Office of Government Ethics (OGE); and 2) each Executive Branch DAEO, including the ***17 separate DAEOs in DoD***, we respectfully but fundamentally disagree with the premise of OIG's line of reasoning. The new requirements in Section 847 do not establish a "program," much less require central supervisory authority regarding compliance with such a program.

In our view, Section 847 did not create a Department of Defense "program," but rather added discrete administrative requirements to the pre-existing post-Government employment advising function performed by ethics counselors around the world who are under the supervision of a variety of independent DoD DAEOs. Long before Section 847 was enacted, DoD ethics practitioners have been providing post-Government advice in oral ethics counseling

Standards of Conduct Office Memorandum, September 10, 2013 (cont'd)

sessions and in literally thousands of tailored written opinions. Indeed, the writing of formal post-Government employment opinions dates at least as far back as the Procurement Integrity Act provision allowing officials departing after January 1, 1997 to request an agency ethics official's advisory opinion. (*See* 41 U.S.C. § 2101-2107 formerly known as Procurement Integrity Act, as implemented in the Federal Acquisition Regulation, 48 C.F.R. 3.104-6.) (For reasons that I discuss later in this response, please note that SOCO does not now, nor has it ever, collected, reviewed, or audited those traditional kinds of post-Government employment opinions issued by separate component DAEOs.) Section 847 did not create a new post-Government employment ethics "program"; it simply levied additional administrative requirements for seeking, drafting, maintaining, and auditing ethics opinions focused on a narrow class of DoD employees who are departing Federal service.

As we discussed at our meeting in early August, DoD ethics counselors derive authority to perform their duties from a Federal regulatory scheme that clearly acknowledges and formalizes decentralization of the overall ethics "program" in DoD. Currently, neither the OSD DAEO, nor SOCO by extension, is charged with supervising or auditing the post-Government employment advice of separate component DAEO agencies in DoD. Importantly, these separate components are not exempt from oversight, however. Each DAEO is responsible to OGE for the performance of the agency or component program and subject to program review by OGE on that basis. Moreover, along with other ethics program elements and activities, OGE routinely audits post-Government employment advice, procedures, and protocols. Notably, since Section 847 was enacted, OGE has conducted 21 formal program reviews of DoD organizations. It is interesting that all of these program reviews were coordinated with the audited organization, ***but not with SOCO (or any centralized authority in DoD)***.

Furthermore, while we acknowledge SecDef's broad inherent authority to oversee the programs and operations of the Department, in the ethics realm, for personnel assigned outside of the Office of the Secretary of Defense, the Secretary's (and hence the OSD DAEO's and SOCO's) role is generally one of ***policy setting*** (e.g., issuing DoD regulations), rather than exercising "central supervisory authority." An example of this kind of policy setting can be seen in the most recent revision of the Joint Ethics Regulation (JER), in which the DepSecDef (acting on behalf of the Secretary), included a reference to the Section 847 requirement. *See* JER 9-400.

Indeed, the central supervisory regime for ethics that you have suggested is at odds with the roles and responsibilities for ethics officials as established throughout the Executive Branch. The Ethics in Government Act gives the OGE Director (a Presidentially-appointed, Senate-confirmed official) principal authority for establishing the rules regarding the provision of ethics advice in the Executive Branch. *See* 5 U.S.C. App. §402 (Ethics in Government Act of 1978) and Executive Order No. 12674, § 201(c). Apr. 12, 1989, set out as a note under 5 U.S.C 7301. Pursuant to that authority, the OGE Director issued implementing regulations reposing responsibility for administering ethics to a Designated Agency Ethics Official (DAEO) in each department or "agency" (an ethics term of art). 5 C.F.R. 2638.203. Each DAEO serves this function for their agency pursuant to the OGE designation. ***Across the Department of Defense, OGE designated 17 general counsels as separate agency DAEOs for: the Military Departments***

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Standards of Conduct Office Memorandum, September 10, 2013 (cont'd)

(Air Force, Army, and Navy) and certain Defense agencies (ASBCA, DeCA, DCAA, DFAS, DIA, DISA, DLA, DSS, DTRA, NGA, NSA, USUHS, and, of course, OIG), with the DoD General Counsel responsible for OSD and any agency or component not so designated. *See* JER 1-201, 1-405, and 2-201; 5 C.F.R.3601.102. See also the attached excepted authorities, as well as, DoD Directive 5145.01, para. 3, which states that the DoD General Counsel serves as the DAEO only "for OSD and all DoD organizations that are not defined as separate Agencies."

Finally, and importantly, Section 847 itself, acknowledges DoD's decentralized ethics program. Specifically, the language in paragraph (a)(2) SUBMISSION OF REQUEST (on seeking and obtaining an opinion), requires that a request for an ethics opinion be submitted "to an ethics official of the Department of Defense *having responsibility for the organization* in which the official or former official served" (emphasis added). Notice that the law does not establish a "central program" for opinion requesting or opinion writing. The only centralized activity in the law is recordkeeping (and related IG review function) which is superimposed on the existing decentralized ethics program.

That said, while we disagree with your rationale in support of a central supervisory ethics authority over the various DoD components for purposes of Section 847 compliance, we do commend and support the OIG's attempts to enhance compliance with Section 847 in every DoD organization and agency. One concrete approach to enhance Section 847 compliance throughout DoD would be to recommend that OGE add to its program review checklist a segment on Section 847 (assuming that, to date, OGE has not been auditing Section 847 compliance). Because Section 847 is a DoD-unique requirement, it is possible that OGE has not been closely monitoring compliance in this area when conducting program reviews of DoD component agencies. My office would be pleased to prepare a letter to OGE that would explain the legal requirements and request that OGE consider auditing Section 847 compliance in DoD agencies, just as it audits other aspects of the provision of post-Government employment ethics advice.

It should also be mentioned that, based on our practical experience working with a variety of large Defense contractor companies, Section 847's key control mechanism—threatened suspension and debarment of the contractor, rescission of contract, etc. —has been extremely effective at prompting compliant behavior. These threats have dramatically incentivized defense contractors to withhold any formal employment offer to a current or former DoD official (regardless of seniority or procurement status) unless the employee is able to demonstrate he or she has received a written ethics opinion. This kind of "market pressure" has driven requests and opinion drafting far more effectively than any audit or internal control mechanism and we are confident will continue to do so.

AGEAR Implementation and Practice

In addition to the overarching concern about central program management you raised, you asked several specific questions about the past and current use of the AGEAR central database system. The thrust of these inquiries seems to gloss-over the near Herculean task SOCO undertook to roll out an electronic system ***as an unfunded mandate*** in a large, decentralized department like DoD. Prior IG audits document the history of Section 847

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Standards of Conduct Office Memorandum, September 10, 2013 (cont'd)

implementation, but several facts are worth repeating. Obviously, SOCO had no way to create instantaneously a repository across the entire Department. Nevertheless, we worked tirelessly to communicate the new requirement throughout the ethics community and relied on existing, individual ethics office recordkeeping to create the "central database" until a better solution could be developed. This admittedly cumbersome system in which Section 847 opinions were available upon call, seemed to be sufficient to meet the needs of the OIG as it conducted two earlier audits While this less than perfect "central" database was in place, SOCO was able to develop software (AGEAR) modifying the pre-existing electronic Financial Disclosure Management system to allow electronic requests and opinion storage as mandated by law. We can all agree that AGEAR is a vast improvement over the system we used in 2009 and 2010. The process to deploy AGEAR was admittedly time-consuming. As you know, the development, pre-beta testing and training on AGEAR, coupled with obtaining OPM approval of the required request form, was not completed until April 2010, when the Army formally established the AGEAR opinion database. Thereafter, the system was implemented on a trial basis in the Department of the Army, before expanding to DoD-wide use effective January 1, 2012. Thus, put into perspective, most agency ethics practitioners have had less than two years to become acquainted and comfortable with regular and proper AGEAR use. This is no excuse for noncompliance, but as with any new software system, it does take time for all users to become conversant and compliant.

That said, it is clear that we must do a better job ensuring that AGEAR is being employed reliably and consistently ***by all agencies and organizations within the Department of Defense***. You noted examples of at least two large agencies with acquisition responsibilities that apparently have posted few, if any, Section 847 opinions in AGEAR. We agree that this is troubling and must be pursued further and rectified if appropriate. We recommend that OIG confer directly with those entities that seem to have unrealistically low numbers of uploaded 847 opinions to find out why.

SOCO, too, can play an important role in this regard and, acting within our policy-setting authority, readily accepts responsibility to help resolve this apparent inconsistency in compliance among DoD agencies and components. We will continue to encourage regular and proper use of AGEAR by ethics officials. In this regard, the Army, as Executive Agent, issued guidance on AGEAR business rules on September 5, 2013 as part of the ongoing efforts to address many of your database entry concerns (attached to this response). This guidance went to every agency and component ethics official in DoD and should go a long way to assist ethics counselors become more conversant with the system. We also will be more vigorous in our treatment of Section 847 requirements in SOCO training and policy reminders, both for ethics practitioners and potentially affected employees. Additionally, we will brief this topic in upcoming meetings of the "DoD Ethics Coordinating Group," which meets monthly and is attended by representatives of the Military Departments and Defense agencies. We will also include a section on AGEAR use at the Ethics Counselor Course (ECC) in November. The ECC is a 3.5 day training course attended by civilian and military ethics counselors from around the world. Finally, we intend to prepare a one-page information paper (an "FYI" on AGEAR) on proper use of AGEAR and will post the FYI to the SOCO website, which is available to every ethics

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Standards of Conduct Office Memorandum, September 10, 2013 (cont'd)

counselor in DoD, along with members of the general public. If you can identify other ways for us to publicize the requirement for and proper use of AGEAR, we would welcome those ideas.

I trust that this commentary and the references will aid you and your team as you draft your formal report. Please do not hesitate to contact me, or [redacted] my point of contact for this effort, with any additional questions or concerns. We appreciate the opportunity to present our views at this stage of the process.

Leigh A. Bradley
Director, Standards of Conduct Office

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INSPECTOR GENERAL
INTEGRITY
EFFICIENCY
DEPARTMENT OF DEFENSE

Appendix F

Business Rules for the After Government Employment Advice Repository System, September 6, 2013

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
104 ARMY PENTAGON
WASHINGTON, DC 20310-0104

SAGC-EF

6 September 2013

MEMORANDUM FOR Ethics Officials in the Department of Defense

SUBJECT: Business Rules for Use of the After Government Employment Advice Repository (AGEAR) System

1. References:

a. National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, Section 847 (Requirements For Senior Department Of Defense Officials Seeking Employment With Defense Contractors.)

b. Memorandum, Deputy Secretary of Defense, 19 September 2011, Subject: Mandatory DoD-Wide Use of After Government Employment Advice Repository (AGEAR) and Designation of Secretary of the Army as DoD Executive Agent for Operation of AGEAR

c. Code of Federal Regulations (CFR), Chapter 48, Part 252, Subparts 203.171-1 and 252.203-7000 (Requirements Relating to Compensation of Former DoD Officials.)

2. Purpose. In our capacity as Department of Defense (DoD) Executive Agent for AGEAR, we have developed the following "business rules" to assist EOs in properly processing requests for Section 847 opinions in AGEAR.

3. Background.

a. Section 847 requires a "covered DoD official"[1] of the Department of Defense, who, within two years after leaving government service in the DoD, expects to receive compensation from a DoD contractor, to, prior to accepting such compensation, request a written opinion regarding the applicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor. Ethics officials are

[1] Section 847 defines a "covered DoD official" as an official or former official of the DoD that:
(1) participated personally and substantially in an acquisition as defined in section 4(16) of the Office of Federal Procurement Policy Act with a value in excess of $10,000,000 and serves or served--
(A) in an Executive Schedule position under subchapter II of chapter 53 of title 5, United States Code;
(B) in a position in the Senior Executive Service under subchapter VIII of chapter 53 of title 5, United States Code; or
(C) in a general or flag officer position, compensated at a rate of pay for grade 0-7 or above under section 201 of title 37, United States Code; or
(2) serves or served as a program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of $10,000,000.

Business Rules for the After Government Employment Advice Repository System, September 6, 2013 (cont'd)

SAGC-EF
SUBJECT: Business Rules for Use of the After Government Employment Advice Repository (AGEAR) System

required to issue a written opinion to the requestor not later than 30 days after receiving the request. The statute and implementing regulation[2] also prohibit DoD contractors from knowingly providing compensation to a former "covered DoD official" within two years after such former official leaves service in the DoD, without first determining that the former official has sought and received (or has not received after 30 days of seeking) a written opinion from the appropriate ethics counselor regarding the applicability of post-employment restrictions to activities that the former official is expected to undertake on behalf of the contractor.

b. Reading Section 847 and DFAR 252.203-7000 together, it seems clear that a request must meet the following criteria to qualify for processing in AGEAR: 1) the requestor must be a "covered DoD official" as defined by References a and c; and 2) the requestor must have an actual offer of employment or compensation from a defense contractor to perform specific duties for that contractor within the two year period after leaving DoD service.

c. In a recent DoD/IG assessment of DoD's compliance with Section 847[3], which included a review of AGEAR, we discovered numerous instances where AGEAR was being used improperly. Generally, they fell into two broad categories.

(i) The first category involved requests that should not have been processed or retained in AGEAR because they clearly did not meet the criteria for a Section 847 opinion. For example, the requestor clearly did not meet the definition of a "covered DoD official," or the requestor did not identify any specific DoD contractor from whom the official expected to receive compensation.

(ii) The second category involved the failure of Ethics Officials (EOs) to use AGEAR functionality properly in processing proper Section 847 requests. For example, EOs frequently failed to record when they requested and/or when they received additional information necessary to prepare a Section 847 opinion. With missing or incomplete audit trails, the DoD/IG could not determine whether PGE opinions were being issued in compliance with the 30-day statutory deadline. Many opinions in AGEAR were issued well beyond 30 days of the initial request, but without an audit trail, it appeared that EOs were responsible for the delay. The DoD/IG also observed that often EOs hit the "Prepare Opinion" button in AGEAR on the same day they issued the opinion. Without a complete audit trail in AGEAR, the perception exists that EOs may be "gaming the system" to avoid responsibility for late opinions.

[2] Defense Supplement to the Federal Acquisition Regulation (DFAR), Subpart 252.203-7000

[3] Section 847 requires the DoD Office of the Inspector General to conduct periodic reviews to ensure that written opinions are being provided and retained in accordance with the law.

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Business Rules for the After Government Employment Advice Repository System, September 6, 2013 (cont'd)

SAGC-EF
SUBJECT: Business Rules for Use of the After Government Employment Advice Repository (AGEAR) System

d. In our capacity as DoD Executive Agent for AGEAR, we have developed the following "business rules" to assist EOs in properly processing requests for Section 847 opinions in AGEAR. Adherence to these rules will help EOs establish appropriate audit trails which will give DoD/IG better insight into whether DoD EOs are complying with Section 847, and should cast DoD in a more favorable light in future DoD/IG assessments.

4. Business Rules. In processing requests for Section 847 opinions in AGEAR, EOs should:

a. Reject requests that do not meet Section 847 criteria. AGEAR should not be used to process requests for routine (non-Section 847) PGE opinions, or retain routine PGE requests and opinions, including letters addressing the inapplicability of Section 847 to the requestor. Only complete requests that establish eligibility for a Section 847 opinion in AGEAR should be accepted and processed in AGEAR. If, on its face, a request form submitted in AGEAR is incomplete or contains information demonstrating the request does not meet Section 847 criteria, then the cognizant AGEAR Manager and/or EO should promptly reject the request. If, once a request is accepted and forwarded to the EO, additional information is obtained indicating that the requestor does not meet the criteria for a Section 847 opinion, the EO should reject the request from AGEAR and process it as a routine request for PGE advice outside of AGEAR. Procedures for rejecting a request follow:

(1) To reject a request, the EO must log into AGEAR and click on the "View" button next to the requestor's name. After the request is opened, click on the "Request Detail" tab at the top of the request. Then, click on the "Reject" button. When rejecting a request, AGEAR requires the EO to provide an explanation for the rejection. It is not necessary to upload supporting documentation. As a best practice, the EO should download and save the completed request questionnaire elsewhere before clicking the "Reject" button so that it can be used in issuing a routine PGE opinion outside of AGEAR.

(2) After clicking the "Reject" button, a dialogue box will appear. Insert a written explanation (e.g., "Requestor is not a covered official" or "Requestor does not have an offer of employment or compensation from a specific DoD contractor"), then click on the "Save" button. Once the "Save" button has been clicked, the status of the request will change to "Rejected." The "Reject" button is always available to the EO regardless of the status of the request. No further action in AGEAR is necessary. The EO should inform the requestor of the rejection, and discuss other available options for routine PGE advice.

b. Use the "Request More Info" button when requesting additional information from the requestor. If, after reviewing a request that initially appears to meet the eligibility criteria for a Section 847 opinion, the EO determines that additional information is required, the EO should promptly contact the requestor and request the missing information, e.g.,

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Business Rules for the After Government Employment Advice Repository System, September 6, 2013 (cont'd)

copy of resume, description of current or anticipated duties, and any other supporting information needed to write the opinion. (Additional information is typically required because AGEAR does not permit requestors to attach documents to their requests, primarily due to information technology system security concerns.) The EO must document the request by clicking the "Request More Info" button in AGEAR, and entering a comment in the dialogue box. This will create an audit trail to document that the EO has not yet received a complete request with sufficient information to permit issuance of the Section 847 opinion to the requestor, thereby demonstrating to any reviewing authority that the EO is not responsible for any delay.

c. Use the "Prepare Opinion" button once sufficient information has been provided for the EO to draft the opinion. Upon receipt of any necessary additional information and clarifications, the EO should *immediately* review them to determine if there is sufficient information to write an opinion. If sufficient information has been received, the EO *must* immediately click the "Prepare Opinion" button to begin the 30-day clock. EOs may *not* delay this action to avoid triggering the statutory 30-day clock. The EO has 30 days from receipt of a completed request with any required additional information to prepare and issue the opinion.

d. Close requests in AGEAR once the opinion has been issued.

(1) To ensure the statutory 30-day clock is stopped in AGEAR and demonstrate to reviewers that the opinion was issued timely, EOs must take action to close the request in AGEAR once the opinion is issued.

(2) Procedures to Close a Request in AGEAR. To close a request, the EO must click on the "Attachments" tab at the top of the request in AGEAR. The EO then clicks on the "Add Attachment" button. Next, the EO must identify the attachment as the written opinion by clicking on "Opinion" from the four types of attachments that are displayed on the screen. Only by selecting the "Opinion" button will AGEAR allow the EO to close the request in AGEAR. The EO clicks on the "Upload" button to attach the opinion to the request in AGEAR. Finally, the EO clicks on the "Send Opinion and Close" button at the top of the request. This allows the EO to send the opinion to the requestor and close the request in AGEAR simultaneously. After the opinion has been sent, the status of the request will change to "Closed" in AGEAR.

(3) As a best practice, the EO may wish to also upload the transmittal document and, where available, evidence of receipt by the requestor (e.g., e-mail exchange, cover letter, etc.) into AGEAR in addition to the opinion. This will provide evidence that the opinion was actually provided to and received by the requestor in the event of a subsequent investigation or legal action for violation of post-Government employment restrictions.

Business Rules for the After Government Employment Advice Repository System, September 6, 2013 (cont'd)

SAGC-EF
SUBJECT: Business Rules for Use of the After Government Employment Advice Repository (AGEAR) System

5. Additional Information.

a. FAQs are available to assist EOs in determining whether a request falls within Section 847 and is required to be processed and retained in AGEAR. Just click the "Help" link at the very bottom of the Login screen.

b. When viewing a request under the "Request Detail" tab in AGEAR, links along the right side of the screen allow you to skip directly to specific sections of the questionnaire. For example, if the EO needs to locate the requestor's responses concerning whether they have participated in acquisitions/contracts in excess of $10 million, the EO can click on the "DoD Procurement Information" link to go directly to that information.

c. Note that the DD 2945 has been revised and the new version will be uploaded into AGEAR shortly. In Section IV, Question 19 explicitly states that the look back period for positions and duties is five years. While not explicitly stated in Question 20, DoD SOCO has indicated that the look back period for participation in acquisitions and contracts is also five years.

d. Section 847 opinions that were issued outside of AGEAR after January 1, 2012 may be uploaded into AGEAR. These are referred to in AGEAR as "Historical Requests." When the EO logs into AGEAR, a button that says "Add Completed Opinion" can be seen. The EO can click this button, complete the required information, upload the opinion and any corresponding DD 2945, questionnaire, and/or other relevant attachments, and then enter an "Opinion Sent and Closed Date.

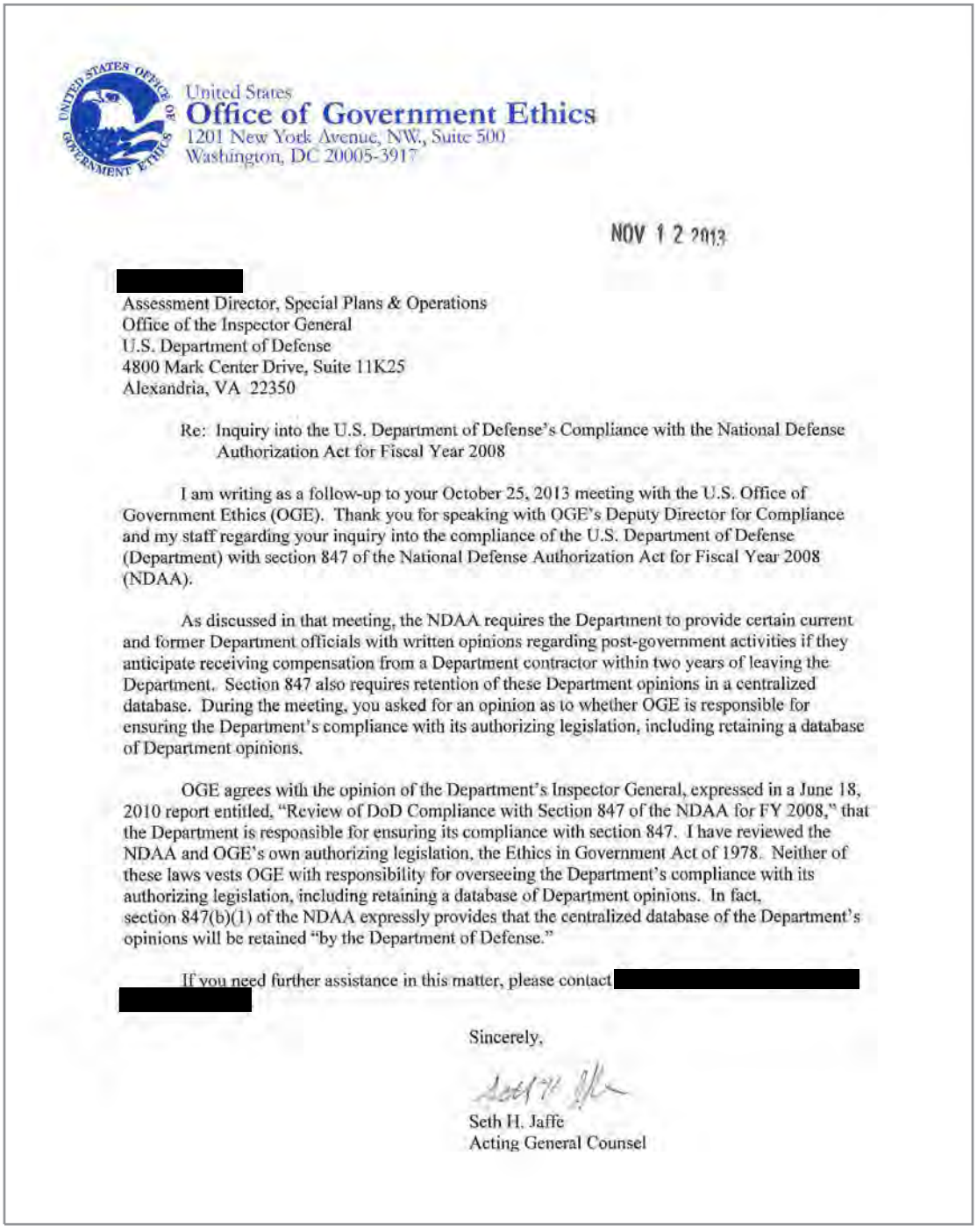
6. Contact. Please contact me at (703) 695-4296 or susan.d.tigner.civ@mail.mil if you have questions regarding the above guidance. For assistance in operating the AGEAR system, please contact the [redacted]

Susan D. Tigner
Deputy General Counsel
(Ethics & Fiscal)


INSPECTOR GENERAL
INTEGRITY
EFFICIENCY
DEPARTMENT OF DEFENSE

Appendix G

Office of Government Ethics Memorandum, November 12, 2013



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

NOV 12 2013

[redacted]
Assessment Director, Special Plans & Operations
Office of the Inspector General
U.S. Department of Defense
4800 Mark Center Drive, Suite 11K25
Alexandria, VA 22350

Re: Inquiry into the U.S. Department of Defense's Compliance with the National Defense Authorization Act for Fiscal Year 2008

I am writing as a follow-up to your October 25, 2013 meeting with the U.S. Office of Government Ethics (OGE). Thank you for speaking with OGE's Deputy Director for Compliance and my staff regarding your inquiry into the compliance of the U.S. Department of Defense (Department) with section 847 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA).

As discussed in that meeting, the NDAA requires the Department to provide certain current and former Department officials with written opinions regarding post-government activities if they anticipate receiving compensation from a Department contractor within two years of leaving the Department. Section 847 also requires retention of these Department opinions in a centralized database. During the meeting, you asked for an opinion as to whether OGE is responsible for ensuring the Department's compliance with its authorizing legislation, including retaining a database of Department opinions.

OGE agrees with the opinion of the Department's Inspector General, expressed in a June 18, 2010 report entitled, "Review of DoD Compliance with Section 847 of the NDAA for FY 2008," that the Department is responsible for ensuring its compliance with section 847. I have reviewed the NDAA and OGE's own authorizing legislation, the Ethics in Government Act of 1978. Neither of these laws vests OGE with responsibility for overseeing the Department's compliance with its authorizing legislation, including retaining a database of Department opinions. In fact, section 847(b)(1) of the NDAA expressly provides that the centralized database of the Department's opinions will be retained "by the Department of Defense."

If you need further assistance in this matter, please contact [redacted]

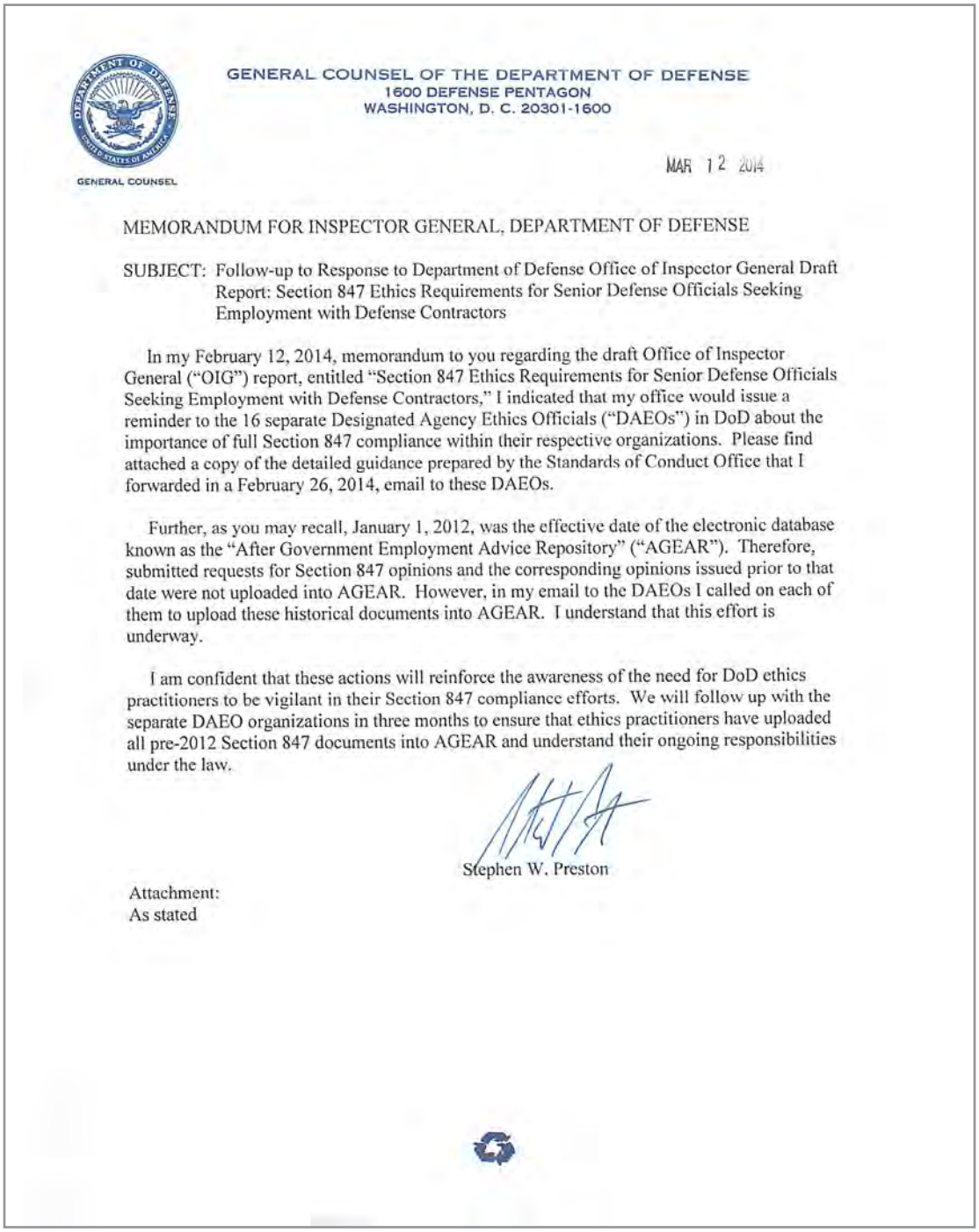
Sincerely,

Seth H. Jaffe
Acting General Counsel


INSPECTOR GENERAL
INTEGRITY
EFFICIENCY
DEPARTMENT OF DEFENSE

Appendix H

General Counsel of DoD Follow-up Response to DoD Office of Inspector General Draft Report, March 12, 2014



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

MAR 12 2014

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

SUBJECT: Follow-up to Response to Department of Defense Office of Inspector General Draft Report: Section 847 Ethics Requirements for Senior Defense Officials Seeking Employment with Defense Contractors

In my February 12, 2014, memorandum to you regarding the draft Office of Inspector General ("OIG") report, entitled "Section 847 Ethics Requirements for Senior Defense Officials Seeking Employment with Defense Contractors," I indicated that my office would issue a reminder to the 16 separate Designated Agency Ethics Officials ("DAEOs") in DoD about the importance of full Section 847 compliance within their respective organizations. Please find attached a copy of the detailed guidance prepared by the Standards of Conduct Office that I forwarded in a February 26, 2014, email to these DAEOs.

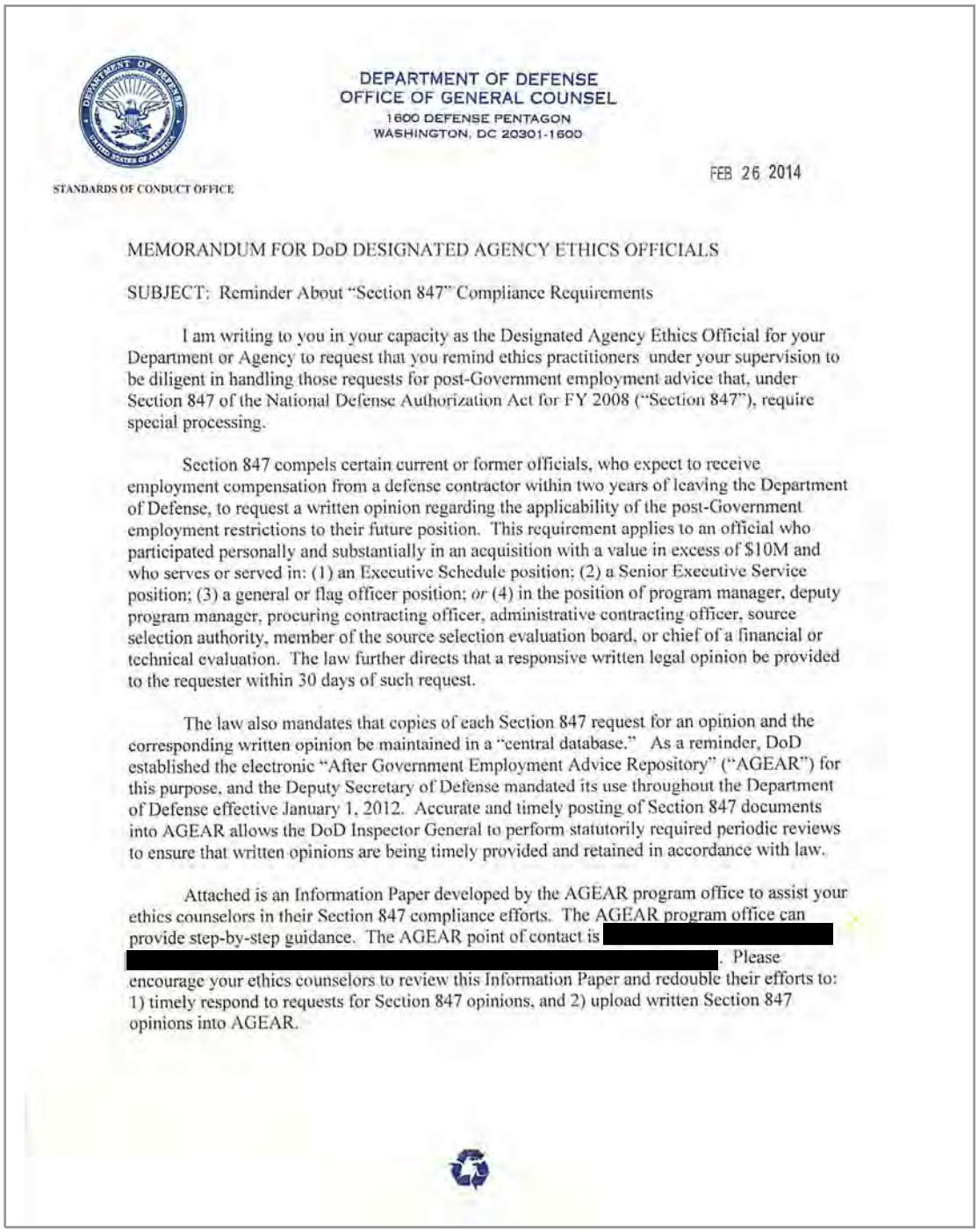
Further, as you may recall, January 1, 2012, was the effective date of the electronic database known as the "After Government Employment Advice Repository" ("AGEAR"). Therefore, submitted requests for Section 847 opinions and the corresponding opinions issued prior to that date were not uploaded into AGEAR. However, in my email to the DAEOs I called on each of them to upload these historical documents into AGEAR. I understand that this effort is underway.

I am confident that these actions will reinforce the awareness of the need for DoD ethics practitioners to be vigilant in their Section 847 compliance efforts. We will follow up with the separate DAEO organizations in three months to ensure that ethics practitioners have uploaded all pre-2012 Section 847 documents into AGEAR and understand their ongoing responsibilities under the law.

Stephen W. Preston

Attachment:
As stated

General Counsel of DoD Follow-up Response to DoD Office of Inspector General Draft Report, March 12, 2014 (cont'd)



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

STANDARDS OF CONDUCT OFFICE

FEB 26 2014

MEMORANDUM FOR DoD DESIGNATED AGENCY ETHICS OFFICIALS

SUBJECT: Reminder About "Section 847" Compliance Requirements

I am writing to you in your capacity as the Designated Agency Ethics Official for your Department or Agency to request that you remind ethics practitioners under your supervision to be diligent in handling those requests for post-Government employment advice that, under Section 847 of the National Defense Authorization Act for FY 2008 ("Section 847"), require special processing.

Section 847 compels certain current or former officials, who expect to receive employment compensation from a defense contractor within two years of leaving the Department of Defense, to request a written opinion regarding the applicability of the post-Government employment restrictions to their future position. This requirement applies to an official who participated personally and substantially in an acquisition with a value in excess of $10M and who serves or served in: (1) an Executive Schedule position; (2) a Senior Executive Service position; (3) a general or flag officer position; *or* (4) in the position of program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation. The law further directs that a responsive written legal opinion be provided to the requester within 30 days of such request.

The law also mandates that copies of each Section 847 request for an opinion and the corresponding written opinion be maintained in a "central database." As a reminder, DoD established the electronic "After Government Employment Advice Repository" ("AGEAR") for this purpose, and the Deputy Secretary of Defense mandated its use throughout the Department of Defense effective January 1, 2012. Accurate and timely posting of Section 847 documents into AGEAR allows the DoD Inspector General to perform statutorily required periodic reviews to ensure that written opinions are being timely provided and retained in accordance with law.

Attached is an Information Paper developed by the AGEAR program office to assist your ethics counselors in their Section 847 compliance efforts. The AGEAR program office can provide step-by-step guidance. The AGEAR point of contact is [redacted]. Please encourage your ethics counselors to review this Information Paper and redouble their efforts to: 1) timely respond to requests for Section 847 opinions, and 2) upload written Section 847 opinions into AGEAR.

General Counsel of DoD Follow-up Response to DoD Office of Inspector General Draft Report, March 12, 2014 (cont'd)

Finally, the DoD Office of the Inspector General has requested that historical Section 847 documents, meaning those requests and opinions collected from the date of enactment of Section 847 until deployment of AGEAR on January 1, 2012, be uploaded into AGEAR. The DoD General Counsel has informed the Deputy Secretary of Defense that every DoD DAEO will accomplish this task. Accordingly, please direct your offices to post these documents to AGEAR as soon as possible.

Leigh A. Bradley
Alternate Designated Agency Ethics Official

Attachment
As stated

General Counsel of DoD Follow-up Response to DoD Office of Inspector General Draft Report, March 12, 2014 (cont'd)

INFORMATION PAPER

1 October 2011

SUBJECT: Post-Government Opinions for Certain Employees Seeking Employment with Defense Contractors ("Section 847" Opinions & Online Process – After Government Employment Advice Repository (AGEAR))

1. Purpose: to provide information to ethics counselors on the new online process for certain current or former Defense Department employees seeking employment with DoD Contractors

2. Facts:

a. The National Defense Authorization Act of 2008, Public Law 110-181, section 847, https://www.fdm.army.mil/PM_Reference_Docs/Section847.pdf:

(1) Requires that certain DoD officials and former DoD officials who, within two years after leaving DoD, expect to receive compensation from a DoD contractor, shall, before accepting such compensation, request a written opinion regarding the applicability of post-employment restrictions to activities that the official or former official may undertake on behalf of a contractor.

(2) Applies to any DoD employee who participated personally and substantially in an acquisition with a value in excess of $10M and who are now (for current employees) or when they left DoD were in:
(a) an Executive Schedule position;
(b) a Senior Executive Service position;
(c) a general or flag officer position; or
(d) in the position of program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation.

(3) Requires a central repository of the requests and the opinions and retention for six years.

(4) Requires the DoD Inspector General (IG) review and annually report to Congress.

b. New process: In coordination with the DoD Standards of Conduct Office and the DoD IG, Army built an online process to receive and process requests for Section 847 opinions. In a decision memo dated 19 Sep 2011, DEPSECDEF mandated use of the on-line process DOD-wide and appointed Army as the Executive Agent.

(1) Effective 1 January 2012 refer all requests for a Section 847 opinion to https://www.fdm.army.mil/AGEAR to submit the request. This application is NOT used for routine Post-Government Employment opinions.

(2) Individuals without Internet access may complete the DD Form 2945 and mail it to their ethics counselor at their last or current duty organization. That ethics counselor will

General Counsel of DoD Follow-up Response to DoD Office of Inspector General Draft Report, March 12, 2014 (cont'd)

manually input the required information into the application as a request and then scan and attach the form to the request.

(3) The (Agency) AGEAR manager will review the online request and forward it to the responsible Ethics Counselor based on the requestor's organization when requesting the opinion (or last organization in the event the requestor is no longer working for DoD at the time of the request). The request can be further reassigned within their office if necessary.

(4) Web sites:

(a) Opinion requests: https://www.fdm.army.mil/AGEAR (public; no login required).

(b) Ethics Official site to act on the request as assigned: https://www.fdm.army.mil/AGEAREO (restricted access; login required – same as FDM).

c. Summary: The departing or former DoD employee requests an opinion at https://www.fdm.army.mil/AGEAR to provide employment-related information. The assigned ethics counselor accesses https://www.fdm.army.mil/AGEAREO to determine whether a Section 847 opinion is, in fact, required. If so the ethics counselor will provide an advisory opinion. A legal opinion template is provided within the application. The edited final opinion prepared by the ethics counselor is attached within the application to the request. The request can be e-mailed from within the application or sent via postal service as optioned by the requestor. All requests for and legal opinions provided are electronically stored for six years. If the ethics counselor determines Section 847 does not apply, reject the request for a Section 847 opinion and notify the requestor that no Section 847 opinion is required. The ethics counselor should consider whether the information provided merits other post-government employment advice. DOD policy is to provide such advice. Prepare any non-Section 847 advisory opinions outside this application.

d. Resources:

(1) A narrated web site tour: https://www.fdm.army.mil/PM_Reference_Docs/Intro847/Intro847.html.

(2) *Using AGEAR* narrated presentation:

a. Slides: https://www.fdm.army.mil/PM_Reference_Docs/EOUsingAGEAR.ppt

b. Narrated: https://www.fdm.army.mil/PM_Reference_Docs/AGEAREO/EOUsingAGEAR.html

(3) An AGEAR Ethics Officials *Quick Start*: https://www.fdm.army.mil/PM_Reference_Docs/EOQuickStart.doc

(4) Site Help: https://www.fdm.army.mil/PM_Reference_Docs/Requestor_Help.pdf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Management Comments

General Counsel of the Department of Defense on Behalf of the Deputy Secretary of Defense

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

FEB 18 2014

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

SUBJECT: Department of Defense Office of the Inspector General (DoDIG) Draft Report, Section 847 Ethics Requirements for Senior Defense Officials Seeking Employment with Defense Contractors

In your memorandum of January 9, 2014, you asked me to respond on behalf of the Department to the comments and recommendations contained on page IV of the draft report referenced above. In preparing my response, I asked the Office of the General Counsel (OGC) to review your report and provide feedback to better inform my comments.

Attached, please find the OGC's memorandum of February 12, 2014 which responds, on my behalf, to your request for comment. I have studied your preliminary findings and recommendations, and have determined that the review and comment provided by the OGC adequately serves as the Department's response to your draft report. It comes to you with both my authorization and approval.

Attachments:
As stated

cc:
General Counsel, Department of Defense

General Counsel of the Department of Defense on Behalf of the Deputy Secretary of Defense (cont'd)

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

GENERAL COUNSEL

FEB 12 2014

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

SUBJECT: Response to Department of Defense Office of the Inspector General Draft Report, Section 847 Ethics Requirements for Senior Defense Officials Seeking Employment with Defense Contractors (Project No. D2013-D00SPO-0137.000)

The Acting Deputy Secretary of Defense asked that I respond to your office's memorandum of January 9, 2014, seeking her review and comment on the subject proposed report. This memorandum responds to the two recommendations in the subject proposed report.

DODIG Draft Report Recommendation a: Seek clarification regarding the intent of Section 847 with respect to the requirement to retain ethics opinions in a centralized database or repository—specifically whether the law intended a single central database or "multiple databases."

DoD Response: Nonconcur. There is no need to seek clarification of the law. Section 847 requires that each request for a written opinion made pursuant to Section 847, and each written opinion provided pursuant to such a request, be retained by DoD in a central database or repository for not less than five years from the date on which the written opinion was provided. It is clear that the law mandates a central database or repository across DoD. DoD established a central electronic database, the After Government Employment Advice Repository ("AGEAR"), which became effective on January 1, 2012, and is mandated for use by every department, agency and organization in the Department. See Deputy Secretary of Defense Memorandum, dated September 19, 2011. Section 847 opinions issued prior to January 1, 2012, the effective date of AGEAR, were collected from the 17 separate DAEO components by the Standards of Conduct Office within the Office of General Counsel, DoD ("SOCO"), retained in SOCO's central repository, and transmitted to the Office of the Inspector General ("OIG"). The Department does not take the position that multiple databases or repositories maintained by the various individual components served by the 17 separate Designated Agency Ethics Officials ("DAEOs") constitutes compliance with Section 847.

DODIG Draft Report Recommendation b: Delegate to an appropriate DoD official/office the responsibility and authority to centrally supervise Departmental Section 847 compliance sufficient to meet the intent of the law, and determine and assign the needed resources.

DoD Response: Partially concur. To the extent that the OIG's reference in the recommendation to "centrally supervise" Departmental Section 847 compliance means to provide leadership, education, training, and legal interpretations and guidance regarding Section 847 compliance within DoD, we concur. The DoD General Counsel Office, through SOCO, has performed these critical functions with respect to Section 847 since its enactment in January 2008. SOCO took the lead in developing and issuing interim Section 847 guidance and implementation procedures. This leadership role continued with the development, testing, and department-wide deployment of AGEAR. Furthermore, SOCO will continue to exercise this leadership role in the future in an effort to ensure Departmental compliance with Section 847. Specifically, this will include

General Counsel of the Department of Defense on Behalf of the Deputy Secretary of Defense (cont'd)

issuance of a memorandum to the separate DoD component DAEOs emphasizing the need for full compliance with Section 847 within their respective organizations and the creation of a Section 847 page on the SOCO website that will contain up-to-date information, procedures, best-practices, and links for use by DoD ethics officials.

To the extent that the OIG's reference in the recommendation to "centrally supervise" Departmental Section 847 compliance means taking over line supervision for the retail application of Section 847 within the separate DAEO components, the Department nonconcurs. SOCO is not equipped to, nor should it be tasked with, discharging the ethics program responsibilities of the separate DAEO components. Each of the 17 separate DAEO components, including SOCO for the Office of the Secretary of Defense, is responsible through their assigned ethics officials for preparing and uploading required Section 847 opinions in AGEAR. Delegating this supervisory responsibility to another DoD official/office is unnecessary and is not a cost-effective use of resources in a time of constrained budgets and a reduced DoD workforce. Furthermore, it is unclear whether the establishment of such central supervision would provide more than marginal enhancements to Section 847 compliance.

Stephen W. Preston

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Acronyms and Abbreviations

AGEAR	After Government Employment Advice Repository
DAEO	Designated Agency Ethics Official
DLA	Defense Logistics Agency
GAO	Government Accountability Office
HASC	House Armed Services Committee
NSA	National Security Agency
OGC	Office of General Counsel
OGE	Office of Government Ethics
SOCO	Standards of Conduct Office


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Whistleblower Protection
U.S. Department of Defense

The Whistleblower Protection Enhancement Act of 2012 requires the Inspector General to designate a Whistleblower Protection Ombudsman to educate agency employees about prohibitions on retaliation, and rights and remedies against retaliation for protected disclosures. The designated ombudsman is the DoD IG Director for Whistleblowing & Transparency. For more information on your rights and remedies against retaliation, go to the Whistleblower webpage at www.dodig.mil/programs/whistleblower.

For more information about DoD IG reports or activities, please contact us:

Congressional Liaison
Congressional@dodig.mil; 703.604.8324

Media Contact
Public.Affairs@dodig.mil; 703.604.8324

Monthly Update
dodigconnect-request@listserve.com

Reports Mailing List
dodig_report@listserve.com

Twitter
twitter.com/DoD_IG

DoD Hotline
dodig.mil/hotline

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4800 Mark Center Drive
Alexandria, VA 22350-1500
www.dodig.mil
Defense Hotline 1.800.424.9098