



AUSA BACKGROUND BRIEF

SUMMARY OF VARIOUS ETHICS INITIATIVES



No. 7

September 1989

This paper provides a summary and brief analysis of various executive and legislative initiatives of this past year. It was prepared by MG (Ret.) Hugh R. Overholt, a senior advisor (legal) for AUSA. General Overholt was a former Army Judge Advocate General. This is designed for information only and should not be construed as official policy or legal advice.

FEDERAL PROCUREMENT POLICY ACT AMENDMENTS

The most controversial piece of legislation was enacted in November 1988, to be effective 16 May, 1989. This law was The Office of Federal Procurement Policy Act Amendments of 1988. The OFPP Act is an outgrowth of the "ill winds" acquisition scandal. It was passed with little notice and surprised those affected. The law creates added restrictions on government officials on negotiating for employment and post-employment activities. Its major provisions are as follows:

- Negotiating for Employment. The act creates a new ban on seeking employment with competing contractors applicable to any procurement official who has participated "personally and substantially" in the conduct of procurement. There are corollary provisions applicable to competing contractors.
- Post-Employment. The act creates post-employment prohibitions for certain procurement personnel who participate "personally and substantially" in the conduct of an agency procurement or who review and approve the award, modification or extension of any contract. Such an official may not, for two years after his or her participation as a procurement official:
 - participate on behalf of a competing contractor in any negotiations leading to award, modification or extension of the contract, or
 - participate personally and substantially on behalf of a competing contractor in the performance of the contract.

Violations of the new provisions can result in civil penalties of up to \$100,000.

This law created confusion, particularly in the form of definitional questions as to what is "personal and substantial" and who is a "procurement official". This confusion caused Congress to extend the effective date from 16 May, 1989 to 16 July, 1989. Ostensibly the extension was intended to give agencies more time to train or inform their personnel as to the law's impact. In the interim, several senior personnel resigned rather than be subjected to what they considered vague and unreasonable limitations on negotiating for employment and post-employment activities.

SENATE AMENDMENT

Sensitivity to criticism that the law was poorly written and good people were being driven out of government resulted in recent legislation being proposed in the Senate to lighten the impact of the OFPP Act. This occurred 1 August in an amendment to the DoD Authorization Bill. The amendment attempts to provide government-wide clarification of the original bill. It provides, in part, for:

- A mechanism allowing a procurement official to be rescued from an ongoing procurement negotiation and still discuss employment with a competing contractor.

- Establishing a "knowing" standard for violating the revolving door prohibition act.
- The issuance of better rules to define what is personal and substantial participation by a government official.
- Authority for an employee or former employee to request advice from agency ethics officials as to whether he or she is precluded from working for a particular or on a particular contract. Reasonable reliance on the advice will avoid any penalty.

Though similar legislation has not been passed by the House, these provisions will probably survive in conference. Assuming passage, we will then wait for another set of regulations implementing the law.

PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM

On another and much broader front are President Bush's ethics initiatives. Upon taking office the President declared ethics in government as one of his highest priorities. One of his first official actions was to appoint a commission to report on ethics law reform. The President's Commission on Federal Ethics Law Reform report, dated 9 March, 1989, contains 27 separate ethics-related recommendations. Significant aspects of the report included recommendations to:

- Enact legislation that would authorize deferral of taxes when individuals are required to divest themselves of assets to comply with conflict of interest requirements.
- Ban honoraria for all federal officials and employees in all three branches of government.
- Create a uniform cap on the earned income that senior officials in all three branches could receive.
- Bar senior officials in all three branches from serving on the board of directors of a for-profit enterprise and require case-by-case review of requests to serve on boards of non-profit organizations.
- Extend the existing one-year post-employment cooling off period for senior executive branch employees to include senior personnel in the legislative and judicial branches.
- Enact a new two-year bar, applicable to executive and legislative personnel, against the disclosure, in connection with a representation to the government or in connection with aiding or advising a party in a representation to the government, of defined non-public government information. This includes procurement-related proprietary or source selection information and, if specifically definable, information about U.S. strategy in international trade, disarmament, and finance negotiations.
- Establish uniform requirements for financial reporting and review, applicable across all three branches.

This 145 page report is well done and comprehensive. Unfortunately, it did not receive the publicity or public comment that it deserved. Its recommendations, if followed, would help eliminate confusing and duplicate laws. It would clarify and update other laws, and encourage uniform ethics standards for all branches of government. It specifically repeals the previously discussed OFPP Act.

GOVERNMENT-WIDE ETHICS ACT OF 1989

To implement the commission's report, the administration, on 12 April, 1989, forwarded to Congress, The Government-Wide Ethics Act of 1989. (S.765; H.R. 2337) Many of the commission's recommendations are incorporated in the act. Key provisions that affect DoD include:

- Revision of the financial disclosure reporting system to require individuals to disclose actual value of assets (rounded to the nearest thousand dollars):

- Amendment of the Internal Revenue Code to allow deferral of tax liability when an individual is required by his agency to divest assets in order to avoid conflicts of interest.
- Sets the cap on outside earned income for senior officials (GS 16s and above, or equivalent), at 15 percent of an Executive Level I salary (current cap would be \$14,925).
- Would bar senior officials from serving on board of directors of a for-profit enterprise. Service on boards of non-profit organizations will be subject to review and approval by the Designated Agency Ethics Official on a case-by-case basis.
- Creates a new two-year post-employment restriction prohibiting the disclosure of specified non-public government information. In the procurement area, source selection and proprietary information are specifically included.
- Repeals section 6 of the Office of Federal Procurement Policy Act Amendments of 1988. As previously discussed, this law created a number of post-employment activities that overlapped or conflicted with existing statutes.
- Repeals 10 U.S.C. 2397a and 2397b. These sections apply only to DoD personnel and impose restrictions on negotiating for employment and post-employment activities.
- Repeals 37 U.S.C. 801a, a provision that restricts the post employment sales activities of Naval and Marine Corps officers.
- Revises 37 U.S.C. 801(b), reducing the current three-year restriction to a two-year prohibition on payment of retired pay to former officers who are engaged in selling supplies or materials to DoD entities.
- Repeals 18 U.S.C. 281, the statute that prohibits an officer for two years after leaving the service from:
 - selling anything (including services) to his former service; or
 - representing anyone before the Government in any claim involving his former agency.

This legislation is currently tied up in various Congressional Committees.

PRESIDENT'S EXECUTIVE ORDER

In addition to the Commission and the Government-Wide Ethics Act, President Bush, on 12 April 1989, issued Executive Order 12674 (Principles of Ethical Conduct for Government Officers and Employees). E.O. 12674 in an effort to establish standards of ethical conduct that apply consistently throughout the executive branch. Significant aspects of the order include:

- The order establishes fourteen fundamental principles of ethical conduct for the executive branch.
- Full-time non-career Presidential appointees in the executive branch are prohibited from receiving any earned income for outside employment during their Presidential appointments.
- The Office of Government Ethics is responsible for consolidating all executive branch standards of conduct regulations into a single set of regulations, and developing and periodically updating comprehensive executive branch ethics manual.
- Agency heads must ensure that sufficient support is provided to ethics programs; such support should include the provision of a separate budget line item for ethics activities, where practicable.

OTHER ETHICS BILLS IN CONGRESS

Several other ethics bills are pending before Congress. These for the most part address post-employment activities. S.1 introduced by Senator Thurmond is entitled "Integrity in Post-Employment Act of 1989" A companion bill to S.1 was introduced as H.R. 2143. These bills are similar to legislation passed last Congress and vetoed by President Reagan. H.R. 9 is Congressman Frank's Bill, entitled "Post-Employment Restriction Act of 1988." Most recently, Congressman Bennett introduced H.R. 2462.

Congressman Bennett's Bill (H.R. 2462) is the most restrictive of all the bills in the area of DoD contractor employment. It prohibits senior civilian officials of DoD and general and flag officers from working for defense contractors for a period of two years.

Other than H.R. 2462 (Bennett's Bill), all of the bills are intended to strengthen post-employment restrictions, make them more understandable, and expand restrictions beyond the executive branch. For DoD, many restrictions would generally remain the same. The bills retain the lifetime bar on a former employee "switching sides" and representing another party in a matter in which he "personally and substantially" participated while a Federal employee, and the one year "cooling off" period during which high level officials may not contact their former agency in a representational capacity. The bills would continue to prohibit a former employee within two years after leaving Federal service from representing another person by making an appearance before or communication to agency in a matter that was "pending under the (former) employee's official responsibility" within one year prior to termination of employment.

One significant revision in S.1 (Thurmond's Bill), and H.R. 9 (Frank's Bill) would prohibit a former employee within two years after employment from aiding or advising a person concerning a formal or informal appearance before any agency or court that involves a matter in which the U.S. has a direct and substantial interest and in which the employee participated "personally and substantially." Under current law, only senior former employees are prohibited from aiding or advising and only when a former senior employee does so by "personal presence" at a formal or informal appearance before an agency or court.

S.1 and H.R. 9 would also change the one year "cooling off" period restrictions for "very senior" officials. As under current law, all senior executive branch officials (general compensation of at least \$68,700 or designated by OGE) would be prohibited for one year from representing another person before the agency in which they served. Under H.R.9, former "very senior" personnel (including military officers in grade O-9 and O-10) would be prohibited from making representational contacts with "very senior" officials throughout the executive branch. Under S.1 "top level" officials (levels I and Ia of the executive schedule or comparable pay) would be similarly barred.

All of the bills except Congressman Frank's would extend the one year "cooling off" provisions to members and senior employees of Congress.

These bills also make changes in the penalties for post-employment restrictions. This includes distinction between "knowing" and "willful" violations. They also provide for civil monetary penalties and authorize the Attorney General to seek injunctive relief.

SUMMARY

There are presently in effect over 50 laws, regulations, executive orders and directives addressing conflicts-of-interest and standards of conduct. For the past ten years this has been one of the most visible and discussed governmental issues. With every new major fraud investigation or media expose, the Congress moves to impose new laws. The result is overlapping and often confusing requirements for DoD officials and defense contractors. These requirements are causing good people to leave government and making it difficult to attract qualified people into government. Certainly no one condones corruption, fraud, waste or abuse. The problem is we pass new laws and don't repeal old or obsolete laws. Thus, an already complex area becomes further confused.

Assuming you can legislate ethics at all, one positive step would be the enactment of The Government-Wide Ethics Act of 1989. This is the only bill that covers the entire range of ethics topics. It would do more to "level the playing field" among the three branches of government than any other alternative. From a DoD perspective, the President's bill is particularly desirable, because it contains specific provisions repealing a number of overlapping and confusing DoD specific statutory restrictions. Given the alternatives, strong support should be given to the enactment of the Government-Wide Ethics Act of 1989.