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ALERT

Strict New DOD Revolving Door Prohibitions Effective Now

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Section 1045 of the National Defense Authorization Act for Fiscal Year 2018 – signed into law as Public Law 115-91 on December 12, 2017 – imposes a so far little-known broad new set of post-government employment prohibitions on "lobbying activities" with respect to the U.S. Department of Defense (DOD) by certain former senior civilian officials of the DOD and officers of the U.S. Armed Forces. The scope of the post-employment restrictions imposed by Section 1045 on senior DOD and military personnel is broader – as to activities prohibited and the range of officials (both within and outside DOD) who may not be contacted – than the scope of restrictions already imposed by, for example, Title 18 U.S.C. Section 207(c), the criminal statute prohibiting certain former senior Executive branch officials, for one year after leaving office, from contacting their former employing office with the intent to influence. Significantly, Section 1045 does not contain any provisions for enforcement or sanctions. Nonetheless, whether violations of Section 1045 by covered former senior DOD civilian or military personnel could have suspension, debarment, or other consequences for an employing government contractor remains a significant open question.

Section 1045 imposes two tiers of post-employment restrictions, depending on the rank or seniority of the covered former DOD military or civilian personnel. For military officers in grade O-9 (Lieutenant General or Vice Admiral) or higher who retire or separate from service on or after the effective date of the statute (December 12, 2017), and for their DOD "civilian grade equivalents" who retire or separate on or after this date, Section 1045 imposes a **two-year prohibition** on "lobbying activities with respect to the Department of Defense." Citing and relying on the meaning of the term set forth in

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the Lobbying Disclosure Act (LDA), Section 1045 defines "lobbying activities" to include both "lobbying contacts" – that, is direct communications – and "lobbying activities" – that is, any activities, including behind-the-scenes research, advising of others, or strategizing with others, intended at the time engaged in to support any direct lobbying contact, even if by another. By prohibiting such behind-the-scenes activity, Section 1045 goes beyond the scope of Section 207(c) of Title 18, under which activities taking place entirely behind the scenes are permitted.

Under Section 1045, lobbying contacts and lobbying activities "with respect to the Department of Defense" also appears to have a two-part meaning. First, it clearly includes *s*uch contacts and activities on DOD-related matters with respect to "covered executive branch officials" (again, as defined by the LDA) *in* DOD itself *and* such contacts and activities on DOD-related matters with "covered executive branch officials" federal government-wide. Second, the phrase "with respect to the Department of Defense" may also be intended to cover lobbying contacts (but not lobbying activities) with covered officials within DOD on any *other* (i.e., non-DOD-related) matters. The language of Section 1045 simply is not clear on this second point and there is no relevant legislative history.

That Section 1045 prohibits covered former military and DOD officials from engaging in lobbying contacts and activities *across* DOD exposes another way in which the restrictions imposed by Section 1045 go beyond the scope of Section 207(c). Under the criminal law provision, a former DOD employee is prohibited only from contacting with intent to influence his or her former employing office, or component, at DOD – not, typically, *all* of DOD. Section 1045, however, restricts contacts with "covered executive branch officials" throughout DOD, regardless of DOD office, Military Department, or Defense Agency. And, in capturing contacts and activities with respect to *any* DOD matter, Section 1045 also goes beyond the scope of Title 18 U.S.C. Section 207(a)(2), which is limited to contacts with respect to particular matters involving particular parties if such matters were pending under the former employee's official responsibility during his or her last year before leaving government service.

The second tier of restrictions set forth by Section 1045 covers military officers at grades O-7 (Brigadier General or Rear Admiral (lower half)) and O-8 (Major General or Rear Admiral (upper half)) at the time of their retirement or separation, and their "civilian grade equivalents." The restrictions imposed on these less-senior officers and civilian DOD officials apply only for **one year** after government service, but are otherwise identical in scope to the two-year restrictions described above.

What are the "civilian grade equivalents" of the specific military ranks covered by the provisions of Section 1045? Section 1045 itself does not define or describe this category, nor does there appear to be any other existing source explaining what this category is intended to include. The DOD Standards of Conduct Office, however, is expected to release shortly a summary of Section 1045 and a set of Q&As which, among other essential guidance, should clarify some of the apparent inconsistencies in the language of the new statute and detail the categories of senior civilian DOD employees subject to this new – and complicating – layer of post-government employment prohibitions.