

Office of Government Ethics

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**Memorandum Issued October 26, 1990,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials,
General Counsels, and Inspectors General
Regarding Revised Post-Employment Restrictions
of 18 U.S.C. § 207**

The Office of Government Ethics is currently revising Part 2637 of title 5, Code of Federal Regulations, to reflect the amendments made to 18 U.S.C. § 207 by the Ethics Reform Act of 1989, Public Law 101-194, Nov. 30, 1989, 103 Stat. 1716 and by the technical amendments enacted by Public Law 101-280, May 4, 1990, 104 Stat. 149. Recognizing that the effective date of the revised section 207 is fast approaching, we have attached a summary of its post-Government service employment restrictions as they will be in effect for executive branch employees who terminate Government service on or after January 1, 1991. The summary is designed to provide initial guidance until a revised Part 2637 is issued. Although the content of the summary was coordinated with the Department of Justice, it reflects only a preliminary interpretation of the new or revised portions of the statute.

Summary of Post-Employment Restrictions of 18 U.S.C. § 207

I. Recent Amendments to 18 U.S.C. § 207

Since its enactment in 1962, 18 U.S.C. § 207 has remained the primary source of post-employment restrictions applicable to officers and employees of the executive branch. Unlike certain other post-employment laws, the provisions of section 207 apply to individuals regardless of the executive department or agency in which they served while employed by the Government and regardless of the particular duties they performed. Although certain of the restrictions of section 207 will apply to Members and elected officials of Congress and to legislative staff beginning in January 1991, this summary is not intended to provide guidance to these individuals.

Section 207 has been amended several times over the years. Most recently, section 207 was amended by the Ethics Reform Act of 1989, with technical amendments enacted on May 4, 1990. Individuals who terminate

Government service on or after January 1, 1991, are subject to the post-employment restrictions of section 207 as amended by these recent enactments. Employees terminating Government service before January 1, 1991, are subject to section 207 as it is now in effect.

Individuals who have terminated or will terminate Government service prior to January 1, 1991, should continue to consult the regulations published at Part 2637 of title 5, Code of Federal Regulations, for guidance concerning applicable provisions of section 207. While the Office of Government Ethics (OGE) is drafting revisions to Part 2637 to reflect the recent amendments, the summary below is provided by OGE in the interim to ensure that current employees have a general understanding of the revised post-employment restrictions with which they must comply should they leave Government on or after January 1, 1991.

While this summary has been coordinated with the Department of Justice, employees are cautioned that it reflects only a preliminary interpretation of the new or revised portions of 18 U.S.C. § 207.

II. Summary of Revised Restrictions

Effective January 1, 1991, section 207 of title 18 will set forth six substantive prohibitions restricting the activities of individuals who leave Government service or who leave certain high-level positions in the executive branch. Each of these restrictions is discussed separately below, followed by a discussion of several statutory exceptions.

None of the provisions will bar any individual, regardless of rank or position, from accepting employment with any private or public employer after Government service. As before, section 207 will only prohibit individuals from engaging in certain activities on behalf of persons or entities other than the United States, whether or not done for compensation. While section 207 will continue to prohibit certain representational activities before the United States, the revised statute will also prohibit certain "behind-the-scenes" assistance rendered to others. None of the revised provisions will bar self-representation.

A. Applicability

The first three restrictions [sections 207(a)(1), (a)(2), and (b)] are applicable to former officers or employees of the executive branch. They also apply to former senior or very senior employees as those terms are described below, and to former special Government employees. According to

18 U.S.C. § 202, a "special Government employee" includes an individual who is "retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis" (Enlisted personnel of the uniformed services are not "officers" or "employees" for purposes of section 207.)

The fourth restriction [section 207(c)] is applicable only to former "senior personnel" (hereinafter referred to as senior employees"). A senior employee is any employee (other than an individual covered by the fifth restriction) who was employed in a position for which the rate of pay is specified in or fixed according to the Executive Schedule, in a position for which the rate of basic pay is equal to or greater than the rate of basic pay payable for GS-17 of the General Schedule, or in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade is 0-7 or above. The term includes those individuals appointed by the President to a position under 3 U.S.C. § 105(a)(2)(B) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(B). The term senior employee encompasses a former special Government employee only if he served in a senior position for 60 or more days during his last year of Government service.

The fifth restriction [section 207(d)] applies only to former "very senior personnel" (hereinafter referred to as "very senior employees"). A very senior employee is any employee who was employed in a position at the rate of pay payable for level I of the Executive Schedule, or in a position in the Executive Office of the President at a rate of pay equal to or greater than the rate of pay payable for level II of the Executive Schedule. The term includes the Vice President and those individuals appointed by the President to a position under 3 U.S.C. § 105(a)(2)(A) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(A).

The sixth restriction [section 207(f)] applies to individuals who formerly served in either a senior or very senior position.

B. Substantive Restrictions

1. Basic Prohibition of 18 U.S.C. § 207(a)(1). No former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which he participated personally

and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.

Discussion. This is a lifetime restriction that commences upon an employee's termination from Government service. It is very similar to the present lifetime restriction. The target of this provision is the former employee who participates in a matter while employed by the Government and who later "switches sides" by representing another person on the same matter before the United States. The restriction is measured by the duration of the matter in which the former employee participated.

The restriction does not apply unless a former employee communicates to or makes an appearance before the United States on behalf of some other person. For these purposes, the "United States" refers to any employee of any department, agency, court, or court-martial of the United States (but not of the District of Columbia). The term does not include the Congress, and therefore communications to or appearances before Members of Congress and legislative staff are not prohibited by this provision.

A former employee is not prohibited by this restriction from providing "behind-the-scenes" assistance in connection with the representation of another person. Moreover, the restriction prohibits only those communications and appearances that are made "with the intent to influence." A "communication" can be made orally, in writing, or through electronic transmission. An "appearance" extends to a former employee's mere physical presence at a proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An "intent to influence" the United States may be found if the communication or appearance is made for the purpose of seeking a discretionary Government ruling, benefit, approval, or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular Government action to be taken. Accordingly, the prohibition does not apply to an appearance or communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.

A communication to or appearance before the United States is not prohibited unless it concerns the same particular matter involving a specific party or parties in which the former employee participated personally and substantially while employed by the Government. An

employee can participate "personally" in a matter even though he merely directs a subordinate's participation. He participates "substantially" if his involvement is of significance to the matter. Thus, while a series of peripheral involvements may be insubstantial, participation in a single critical step may be substantial. The term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. In determining whether two situations are part of the same particular matter, one should consider all relevant factors, including the amount of time elapsed and the extent to which the matters involve the same basic facts or issues and the same or related parties. Even if a post-employment communication or appearance would concern the same particular matter, however, the representational bar will not apply unless the United States is a party or has a direct and substantial interest in that matter at the time of the post-employment representation.

The provision requires that an employee's official participation in a particular matter have taken place at a time when the matter involved a specific party (or parties). It also requires that the matter involve some specific party or parties at the time of the post-employment communication or appearance (although these can be different parties from those involved with the matter at the time of the employee's participation). General rulemakings do not usually involve specific parties. Consequently, it is quite possible that an employee who participated in a rulemaking while employed by the Government will, after leaving Government service, be able to appear before his former agency concerning the application of that rule to his new private sector employer without violating the lifetime restriction. Contracts, on the other hand, are always particular matters involving specific parties. A Government procurement has specific parties identified to it when a bid or proposal is received in response to a solicitation, if not before.

The provision does not prohibit a former employee from representing himself before the United States (as distinguished from a corporation or consulting firm). Moreover, a former employee is not prohibited from acting on behalf of the United States (or the Congress). Thus, even though an individual may once have worked on a matter while employed by the Government, he will not, while subsequently reemployed by the Government, be barred from communicating with any employee of the United States concerning that matter if he does so as part of his official duties. A former employee does not act on behalf of the United States, however, merely because the United States may share the same objective as the person whom the former employee is representing.

2. Basic Prohibition of 18 U.S.C. § 207(a)(2). For two years after his Government service terminates, no former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of his employment with the United States.

Discussion. This is a two-year restriction that commences upon an employee's termination from Government service. It is very similar to a present two-year restriction.

This provision is identical to the lifetime restriction discussed above except that it is of shorter duration and requires only that an individual have had official responsibility for a matter while employed by the Government, not that he have participated personally and substantially in that matter. Like the lifetime restriction, it prohibits certain communications and appearances made on behalf of any other person or entity except the United States (or the Congress). The communications and appearances prohibited are those made, with the intent to influence, to or before any employee of a department, agency, court, or court-martial of the United States. The representational bar applies with respect to any particular matter involving a specific party or parties that was actually pending under the former employee's official responsibility at some time during his last year of Government service. "Official responsibility" is defined in 18 U.S.C. § 202[(b)] as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." The scope of an employee's official responsibility is usually determined by those areas assigned by statute, regulation, executive order, or job description. All particular matters under consideration in an agency are under the official responsibility of the agency head, and each is under that of any intermediate supervisor having responsibility for the activities of a subordinate employee who actually participates in the matter. An employee's recusal from or other non-participation in a matter does not remove it from his official responsibility.

A matter was "actually pending" under a former employee's official responsibility if the matter was in fact referred to or under consideration by persons within the employee's area of responsibility. A

former employee is not subject to the restriction, however, unless at the time of the proposed representation of another he knows or reasonably should know that the matter had been under his responsibility during his last year of Government service.

3. Basic Prohibition of 18 U.S.C. § 207(b). For one year after his Government service terminates, no former employee may knowingly represent, aid, or advise on the basis of covered information, any other person (except the United States) concerning any ongoing trade or treaty negotiation in which, during his last year of Government service, he participated personally and substantially as an employee.

Discussion. This is a new one-year restriction that commences upon an employee's termination from Government service. Extending to certain "behind-the-scenes" assistance, this provision can serve to augment the representational bar provided for in the lifetime restriction discussed above. As with the other new substantive provisions of section 207, it is emphasized that this guidance concerning section 207(b) is preliminary only and is subject to future clarification.

The restriction set forth in section 207(b) does not apply unless, during the one-year period before he left Government, an employee participated personally and substantially in an "ongoing" trade or treaty negotiation that is covered by the statute. It is not necessary that a former employee have had actual contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation. An employee is covered by this restriction even though his participation in an ongoing negotiation may have occurred prior to January 1, 1991, the effective date of section 207(b).

Trade negotiations covered by the statute are those that the President determines to undertake pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988. Unless there is an earlier public announcement of a determination by the President, a trade negotiation commences to be "ongoing" when, at least 90 days before entering into a trade agreement, the President notifies both the House of Representatives and the Senate of his intention to enter into an agreement. See section 1103(a)(1)(A). Whether an employee participated personally and substantially in an "ongoing" trade negotiation is determined by reviewing an employee's participation after trade negotiations commenced. A treaty is an international agreement made by the President that requires the advice and consent of the Senate. A negotiation on a treaty commences to be "ongoing" at the point when both (1) the determination has been made by a competent authority that the outcome of a negotiation will be a treaty

and (2) discussions with a foreign government have begun on a text. Trade and treaty negotiations both cease to be ongoing when an agreement or treaty enters into force or when all parties to the negotiation cease discussion based on a mutual understanding that the agreement or treaty will not be consummated.

Section 207(b) prohibits a former employee, once he has participated in an ongoing negotiation, from representing, aiding, or advising any other person concerning a trade or treaty negotiation (that is still ongoing) on the basis of certain "covered" information. "Covered" information refers to agency records which were accessible to the employee, which he knew or should have known were designated as exempt from disclosure under the Freedom of Information Act (e.g., documents that were marked as subject to a national security classification or those otherwise designated in a manner that made it clear they were exempt from release under FOIA), and which concern a negotiation in which the employee participated personally and substantially during his last year of Government service. A former employee is not prohibited from utilizing information from an agency record which, at the time of his post-employment activity, is no longer exempt from disclosure under the Freedom of Information Act.

Only activities that are undertaken on behalf of "any other person" are prohibited by this restriction. Action taken on behalf of the United States (or the Congress) or on behalf of the former employee himself are not prohibited. A former employee "represents" another person when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that person to or before any third party. For this purpose, a third party includes any employee of the executive, legislative, or judicial branch of the Federal Government, including a Member of Congress. A former employee "aids or advises" another person when he assists that person other than by communicating to or appearing before a third party. A former employee represents, aids, or advises another person "on the basis of" covered information if the former employee's representation, aid, or advice either involves a disclosure of covered information to any person or could not have been made or rendered had the former employee not had actual knowledge of covered information. It is important to note that, although a post-employment activity may not be prohibited by section 207(b), a former employee must still be careful to comply with other statutory restrictions. For example, even though a trade or treaty negotiation may not yet have become "ongoing" at the time of an employee's official participation, the negotiation may nevertheless have had specific parties identified to it, thus triggering the lifetime restriction set forth in section 207(a)(1). Also, former employees remain covered by statutory restrictions prohibiting the release of classified

information.

4. Basic Prohibition of 18 U.S.C. § 207(c). For one year after service in a "senior" position terminates, no former "senior" employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of a department or agency in which he served in any capacity during the one-year period prior to termination from "senior" service, if that communication or appearance is made on behalf of any other person (except the United States), in connection with any matter concerning which he seeks official action by that employee.

Discussion. This is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously. The purpose of this one-year "cooling off" period is to allow for a period of adjustment to new roles for the former senior employee and the agency he served, and to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former senior position. As already noted, this provision is applicable to "senior" employees, but not to "very senior" employees.

Like the lifetime restriction discussed above, this provision prohibits communications to and appearances before the Government and does not prohibit "behind-the-scenes" assistance. Unlike the lifetime restriction, however, this one-year restriction applies only to a "senior" employee, does not require that the former employee have ever been in any way involved in the matter that is the subject of the communication or appearance, and only prohibits communications to or appearances before employees of any department or agency in which he formerly served in any capacity during the one-year period prior to his termination from senior service. The representational bar applies with respect to any matter, whether or not involving a specific party, concerning which the former senior employee is seeking official action by a current employee of such department or agency on behalf of any other person except the United States (or the Congress).

As described below, section 207 provides for two methods by which the restrictions of section 207(c) can be narrowed or eliminated. The first is through the designation of separate departmental or agency components and the second is through the exemption of a position or category of positions from coverage. Not all senior employees are eligible to benefit from either or both of these procedures. A former senior employee is ineligible to benefit from these procedures if he is subject to section

207(c) by virtue of having served in a position for which the rate of pay is specified in or fixed according to the Executive Schedule or by virtue of having been appointed by the President to a position under 3 U.S.C. § 105(a)(2)(B) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(B).

As has been noted, the representational bar usually extends to any department or agency in which the former senior employee served in any capacity during the year prior to his termination from senior service. However, certain senior employees may be permitted to communicate to or appear before components of their former department or agency if those components have been designated as separate agencies or bureaus by OGE. For example, although it may not by statute be a separate component, OGE could designate the Defense Logistics Agency as an agency that exercises functions which are separate and distinct from its "parent" department, the Department of Defense. An individual formerly serving in a parent department or agency would be barred by section 207(c) from making communications to or appearances before any employee of that parent, but would not be barred as to employees of any designated component of that parent. An individual formerly serving in a designated component of a parent department or agency would be barred from communicating to or making an appearance before any employee of that component, but would not be barred as to any employee of the parent or of any other designated component. The statute now provides that no agency within the Executive Office of the President may be designated as a separate component.

The restrictions of section 207(c) can be waived altogether as to certain senior employee positions or categories of positions. As a consequence of such exemption, the one-year restriction of section 207(c) will not begin to run upon an employee's termination from such a position. In order to grant an exemption, OGE must receive a request to do so from a department or agency. After review of the request, OGE can grant an exemption or exemptions based upon its determination that as to a particular position or category of positions, the imposition of section 207(c) would create an undue hardship on the department or agency in obtaining qualified personnel and that the granting of the exemption would not create the potential for use of undue influence or advantage.

5. Basic Prohibition of 18 U.S.C. § 207(d). For one year after service in a "very senior" position terminates, no former "very senior" employee may knowingly make, with the intent to influence, any communication to or appearance before any individual appointed to an Executive Schedule position or before any employee of a department or agency in which he served as a "very senior" employee during the one-year

period prior to termination from Government service, if that communication or appearance is made on behalf of any other person (except the United States), in connection with any matter concerning which he seeks individual action by that individual or employee.

Discussion. This is a new one-year restriction. The one-year period is measured from the date when an employee ceases to be a very senior employee, not from the termination of Government service, unless the two occur simultaneously.

This provision, applicable only to "very" senior employees, is very similar to the one-year restriction of section 207(c) discussed above. It too prohibits communications to or appearances before employees of certain Governmental departments and agencies, unless on behalf of the United States (or the Congress). A former very senior employee is prohibited by section 207(d) from representing another before any current employee of any department or agency in which he served as a very senior employee during the one-year period prior to his termination from Government service. (Compare section 207(c) which prohibits communications and appearances to current employees of any department or agency in which a former "senior" employee served in any capacity during the one-year period prior to termination from senior service.) A former very senior employee is also prohibited by section 207(d), however, from representing another person before any individual currently appointed to an Executive Schedule position listed in 5 U.S.C. §§ 5312-5216, whether or not that individual is serving in the very senior employee's former department or agency. The representational bar applies to any matter, whether or not involving a specific party, concerning which the former very senior employee is seeking official action by any current officer or employee of the executive branch.

Section 207 does not authorize OGE to designate separate and distinct components within a department or agency as a means of narrowing the scope of section 207(d). Moreover, no very senior employee is eligible for exemption from the application of section 207(d).

6. Basic Prohibition of 18 U.S.C. § 207(f). For one year after his service in a "senior" or "very senior" position terminates, no former "senior" employee or former "very senior" employee may knowingly, with the intent to influence a decision of an employee of a department or agency of the United States in carrying out his official duties, represent a foreign entity before any department or agency of the United States or aid or advise a foreign entity.

Discussion. This is a new one-year restriction. The one-year period is measured from the date when an employee ceases to be a senior employee or a very senior employee, not from the termination of Government service, unless the two occur simultaneously.

The restriction prohibits a former senior or very senior employee from representing, aiding, or advising a foreign entity with the intent to influence certain governmental officials. A "foreign entity" means the "government of a foreign country" as defined in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611), as amended, or a "foreign political party" as defined in section 1(f) of that Act. The government of a foreign country includes --

any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.

A foreign political party includes --

any organization or any other combination of individuals in a country other than the United States, or any unit or branch thereof, having for an aim or purpose, or which is engaged in any activity devoted in whole or in part to, the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country or a subdivision thereof, or the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country or a subdivision thereof.

A foreign commercial corporation will not generally be considered a "foreign entity" for purposes of section 207(f) unless it exercises the functions of a sovereign.

A former senior or very senior employee "represents" a foreign entity

when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that entity to or before any employee of a department or agency. He "aids or advises" a foreign entity when he assists the entity other than by making such a communication or appearance. Such "behind-the-scenes" assistance to a foreign entity could, for example, include drafting a proposed communication to an agency, advising on an appearance before a department, or consulting on other strategies designed to persuade departmental or agency decisionmakers to take certain action. A former senior or very senior employee's representation, aid, or advice is only prohibited if made or rendered with the intent to influence an official discretionary decision of a current departmental or agency employee.

C. Exceptions

Revised section 207(j) sets forth several exceptions to the statute's substantive prohibitions. As noted below, some exceptions do not avoid application of all of the six substantive restrictions of 18 U.S.C. § 207.

Performing Official Government Duties. A former employee is not restricted by any of the substantive provisions of section 207 from engaging in post-employment activities performed in carrying out official duties on behalf of the United States. This exception also extends to activities undertaken in carrying out official duties as an elected official of a state or local government.

Representing Certain Entities. A former senior or very senior employee will not violate section 207(c) or (d) if his communication or appearance is made in carrying out official duties as an employee of and is made on behalf of (1) an agency or instrumentality of a state or local government, (2) an accredited degree-granting institution of higher education as defined in section 1201(a) of the Higher Education Act of 1965, or (3) a hospital or medical research organization exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986.

Representing or Assisting International Organizations. A former employee is not restricted by any of the substantive provisions of section 207 from representing, aiding, or advising an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interest of the United States.

Imparting Special Knowledge. A former senior or very senior employee will not violate section 207(c) or (d) if he makes a statement that is

based on his own special knowledge in the particular area that is the subject of the statement, provided that he receives no compensation for making the statement.

Scientific or Technological Information or Expertise. A former employee will not violate section 207(a)(1), (a)(2), (c), or (d) if he makes a communication solely for the purpose of furnishing scientific or technological information in accordance with procedures acceptable to the agency involved. Alternatively, a former employee may make a communication if the head of the agency concerned publishes a certification in the Federal Register stating that the former employee has outstanding qualifications in a scientific, technological, or other technical discipline, that he is acting with respect to a particular matter which requires such qualifications, and that national interest would be served by the former employee's participation.

Testimony. A former employee is not restricted by any of the substantive restrictions of section 207 from giving testimony under oath or from making statements required to be made under penalty of perjury, subject to a special rule with respect to expert opinion testimony. Unless expert opinion testimony is given pursuant to court order, a former employee may not provide such testimony on a matter on behalf of any other person except the United States (or the Congress) if he is subject to the lifetime prohibition contained in section 207(a)(1) relating to that matter.