

Office of Government Ethics

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Letter to an Agency Ethics Official dated February 12, 1988

This letter is in response to your letter of November 27, 1987, in which you sought guidance from this Office with regard to the application of the restrictions of 18 U.S.C. 207(c) to [an individual serving in a particular position] in [a division] of the Department. The [specific] position has been designated by this Office as a Senior Employee position pursuant to section 207(d)(1)(C) and the [specific division] of the [Department] designated by this Office as a separate non-statutory agency within the Department pursuant to that same authority. While you believe the statute is clear that this individual may not for a period of one year make any representations to the [Division], you are less sure of the extent of the application of the restrictions to other offices within the [Department]. This uncertainty is exacerbated by the fact, acknowledged by this Office, that the regulation at 5 C.F.R. § 737.13(d)(3) uses the term "parent" and refers to a definition in another section that does not exist.

While you have stated that you believe that the restrictions of section 207(c) will run to agencies and bureaus in the Department that have supervisory chain-of-command over [the Division], you believe it is less clear whether the restrictions will run to "offices within the Department that are outside of the clear chain-of-command but which have not been designated by this Office as either separate non-statutory agencies pursuant to section 207(d)(1)(C) or separate statutory agencies pursuant to section 207(e). While you listed some of these offices, our analysis will apply to any office or bureau that has not been so designated.

Under the basic restriction of section 207(c), a former Senior Employee of the Department may not represent anyone before the Department for one year following termination of employment with that Department. This restriction can be narrowed in one or two ways. Each way entails a designation by this Office and each designation has a different effect for different "Senior" Employees. The particular kind of position about which you are asking, a designated Senior Employee in a designated separate

non-statutory agency, is fortunately not the most involved analysis, assuming, of course, the "parent" is clear.

First, if this Office determines under section 207(e) that a separate statutory agency or bureau within a Department exercises functions which are distinct and separate from the remaining functions of the Department, this Office can designate that agency or bureau "as a separate department or agency" for purposes of the application of section 207(c). Except for the head of that designated statutory Department or agency and certain individuals within the parent Department or agency, the effect of this designation for all practical purposes is to pull that entity out of the "parent." Without more, the "parent" Department then includes all offices, bureaus and agencies within that Department that have not been designated by this Office as separate statutory entities. If one stopped at this point to analyze your question with regard to the [position occupied by the individual], she would be restricted from making any representations to anyone within the [Department], except for the separate statutory agencies. Representations to those separate statutory agencies would be treated the same as, for example, representations to [another executive branch agency].

However, these restrictions can be and have been narrowed for certain employees within the [Department], including this [individual], by a second designation made by this Office. Pursuant to section 207(d)(1)(C), this Office determined that while the [Division] did not have separate statutory functions that were distinct and separate from the rest of the Department, it did have "separate and distinct subject matter jurisdiction" within the Department. And, past service with the Division would not create a "potential for use of undue influence or unfair advantage" in representations by a former employee of that Division to other Divisions within the Department which also have separate and distinct subject matter jurisdictions. Therefore, [this Division] along with some other Divisions within the Department were designated as separate non-statutory entities. The effect of that designation for any individual who is also designated by this Office as a Senior Employee (as opposed to an individual who holds a position that is automatically a Senior Employee position without designation) would be to narrow the restrictions of section 207(c) further to allow "appearances before or communications to persons in an unrelated agency or bureau, within the same Department or agency, having separate and distinct subject matter jurisdiction." In other words, a

"designated" Senior Employee who served in a separate non-statutory agency could make representations to all separate statutory agencies within the Department as well as every separate non-statutory agency except the one in which he or she served, without fear of violating section 207(c). The restrictions would attach to representations to his or her own separate non-statutory agency and to every other entity within the parent Department that had not been designated separate statutory or non-statutory agencies.

As you can see by our analysis, we do not believe that the statute requires an analysis of chain-of-command when you are presented with a "designated" Senior Employee in a separate non-statutory agency. The benefit of a separate non-statutory designation is only lateral to other separate non-statutory agencies and it is only available to individuals holding Senior Employee positions designated by this Office. Further, your attention is invited to the letter this Office sent to [the Department] on September 9, 1980. In it you will note that we determined at that time that many of the offices within the Department about which you specifically asked were reviewed for separate non-statutory agency designation by this Office. They were denied such designation because of the interaction of these offices with the entire Department, albeit not necessarily in a supervisory chain-of-command role. Because of these offices' broad roles in the Department, we believe representations to these offices are not only technically prohibited under the statute but are appropriately so, give the reason for such a one-year cooling-off restriction.

If you believe that the roles of these offices have changed during the intervening years such that you would like to have this issue revisited, we would be happy to review a submission by the Department. If not, we believe that the language of section 207(d)(1)(C) assists designated employees of one separate non-statutory agency only with the restrictions that would otherwise apply to representations to all other separate non-statutory agencies.

Therefore, with regard to this [individual], she may not for a period of one year following termination of employment as a designated Senior Employee of the [Division] of the Department represent anyone to [that Division] or to any entity within the Department that is not a separate statutory agency, or a separate non-statutory agency other than [that Division].

As you are acutely aware, if the individual involved had been an executive level Senior Employee, or the [Division] had been a separate statutory agency, or the individual had been the head of a separate statutory agency, regardless of how she became a Senior Employee, the restrictions of section 207(c) would have applied differently. Those, however, are not the facts here.

We appreciate your desire to provide proper advice to this individual and your sensitivity to the complexities of the statute. If we can be of further assistance, please do not hesitate to ask.

Sincerely,

Frank Q. Nebeker
Director