

Note: Executive Order 12834, referenced in this DAEOgram, has been revoked.



December 19, 1995
DO-95-045

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts, Director

SUBJECT: Effect of Pay Raise on "Senior" Post-Employment Restrictions

Under 18 U.S.C. § 207(c), a former "Senior Employee" of the executive branch is prohibited from making certain communications or appearances, on behalf of another, before an employee of a department or agency in which the former Senior Employee served in any capacity during the one-year period prior to his termination from a "senior" position. In addition, for one year after service in a "senior" position terminates, no 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 or the United States or aid or advise a foreign entity. (A foreign entity is a government of a foreign country or a foreign political party.)

In accordance with 18 U.S.C. § 207(c)(2)(A)(ii), the term "Senior Employee" includes, inter alia, any employee who is employed in a position not under the Executive Schedule for which the basic rate of pay, exclusive of any locality-based pay adjustment under 5 U.S.C. § 5302 (or any comparable adjustment pursuant to interim authority of the President) is equal to or greater than the rate of basic pay payable for level V of the Executive Schedule (EL-V). Currently, the rate of basic pay for EL-V is \$108,200.

Based upon a provision in the recently enacted Treasury Postal appropriations bill, the rate of basic pay for EL-V and other Executive Level positions will not increase in 1996 over 1995. However, except for the top rate which is capped by level IV of the Executive Schedule, the rate of basic pay for Senior Executive Service (SES)-type positions may increase by Executive order. If the pay rate of these positions increases, and the increases are not due to locality-based or comparable pay adjustments, many employees in SES and similar positions (e.g., Senior Foreign Service positions) whose rate of basic pay now is below the rate of basic pay payable for EL-V could have a rate of basic pay that is equal to or greater than the rate of basic pay payable for EL-V.(1) As a consequence, effective the first day of the first applicable pay period cited in the Executive order, those employees will be "Senior Employees" for purposes of the one-year post-employment bar in 18 U.S.C. § 207(c). See OGE Informal Advisory Letter 92x20. Since the President may make such a determination by the end of this year, the effective date could very well be January 7, 1996.

Under Executive Order 12834, every "senior appointee" in every executive agency appointed on or after January 20, 1993, must sign a pledge which establishes a contractual commitment regarding their activities after they have been employed as "senior appointees." The Executive order defines "senior appointee" as "every full-time, noncareer Presidential, Vice-Presidential or agency head appointee in an executive agency whose rate of basic pay is not less than the rate for level V of the Executive Schedule (5 U.S.C. 5316) but does not include any person appointed as a member of the senior foreign service or solely as a uniformed service commissioned officer." Guidance on the effect of any pay raise to non-career appointees potentially covered by this Executive order will be provided in the near future.

It is important for employees to know about the additional post-employment restrictions that could apply to them. We strongly suggest that because there may be very little time between the decision to implement a raise in basic pay and the effective date of that raise, you seek to apprise those potentially affected as soon as possible. The imposition of those restrictions may be a significant factor in an employee's planning for the future. We are providing this notice so that employees and their agencies can be better prepared for the impact of this change, should it occur.

(1) There are six rates of basic pay for the SES (ES rates), ranging from \$92,900 for ES-1 to \$115,700 for ES-6. Currently, the rate for ES-4 is \$107,300. An increase of that rate by 0.84% or more will result in the rate exceeding the rate for EL-V.