

Memorandum dated March 26, 2008,
from Robert I. Cusick, Director,
to Designated Agency Ethics Officials
Regarding Description of and Scope of the
Exception for Representation of Candidates
and Specified Political Entities by
Former Senior and Very Senior Employees
Under 18 U.S.C. § 207(j)(7)

During this election year, former senior and very senior officials from the executive branch may go to work for candidates for office and political entities. In anticipation of this, the Office of Government Ethics (OGE) wants to bring to your attention an exception to post-employment restrictions under 18 U.S.C. § 207 that applies to senior and very senior former employees.

THE EXCEPTION AT 18 U.S.C. § 207(j)(7)

Section 207(j)(7) provides an exception to the one-year no-contact ban for former senior employees and the two-year no-contact ban for very senior employees.¹ Specifically, the exception allows, under certain circumstances, a former senior or very senior employee to make a communication or appearance that is "solely on behalf of a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or

¹ Under 18 U.S.C. § 207(c), a former senior official, for one year after terminating his position at an agency, may not represent another before an officer or employee of his former agency. For very senior employees subject to the two-year ban under 18 U.S.C. § 207(d), the scope of the restriction applies not only to representations before officials of his former agency, but also to representations made on behalf of another to Government officials appointed to positions listed in 5 U.S.C. §§ 5312-5316.

a political party.”² Therefore, a former senior or very senior employee will not violate sections 207(c) or 207(d) of Title 18 if his communication or appearance is on behalf of a candidate or one of the specified political entities.

LIMITATIONS TO THE EXCEPTION

There are several limitations on the application of 18 U.S.C. § 207(j)(7).³ A former senior or very senior employee must satisfy *all* of the following criteria to take advantage of this exception.

First, the exception does not apply unless the communication or appearance is made “solely on behalf of” the candidate or specified political entity. 18 U.S.C. § 207(j)(7)(A).⁴

Second, if the communication or appearance would be made on behalf of a candidate, the exception does not apply unless it is made on behalf of a candidate “in his or her capacity as a candidate.” 18 U.S.C. § 207(j)(7)(A). For example, the exception would not apply to a former Attorney General who contacts the Federal Trade Commission on behalf of a candidate for Governor of Alaska seeking dismissal of a pending enforcement action involving the candidate’s family business. Such a communication is not made on behalf of the candidate in his capacity as a candidate.

² The definitions of “candidate” as well as the specified political entities are located at 18 U.S.C. § 207(j)(7)(C)(i)-(vii).

³ In addition to the limitations described in this memorandum, the section 207(j)(7) exception does not apply to any former officer or employee of the Federal Election Commission who makes a communication or appearance on behalf of another before the Commission. 18 U.S.C. § 207(j)(7)(B)(i).

⁴ OGE interprets the exception at 18 U.S.C. § 207(j)(7)(A) to apply to a former senior or very senior employee who simultaneously acts on behalf of more than one of the specified candidates or political entities. However, the exception does not apply if the former employee’s communication is also on behalf of any non-specified entity.

However, the former Attorney General may contact OGE concerning the filing of an SF 278 by a candidate for President.

Third, the exception does not apply if the former Government employee is employed by anyone other than (1) "a candidate [or specified political entity]," or by (2) "a person or entity who represents, aids, or advises only persons or entities [specified]." 18 U.S.C. §§ 207(j)(7)(B)(ii)(I) and (II) (emphasis added). Therefore, the exception is not available to a former senior or very senior employee who is employed by a candidate and is also employed as the president of a professional sports franchise. Nor is the exception available to a former senior or very senior employee who is employed by a lobbying firm that represents both political candidates and executives in private industry.

INTERPRETING THE SCOPE OF THE EXCEPTION

A. When a Candidate Ceases to be a Candidate

Although the term "candidate" is defined at 18 U.S.C. § 207(j)(7)(C)(i), section 207(j)(7) does not explain when a candidate for office ceases to be a candidate. The Office of Legal Counsel (OLC) in an opinion issued November 6, 2000, concluded that, for the purpose of this exception, an *unsuccessful* candidate for office ceases to be a candidate when the outcome of the election is finalized.⁵ In the case of the President of the United States, that date is January 6, the day the President of the Senate counts the vote of the electors and announces the outcome. See 3 U.S.C. § 15.

In contrast, a *successful* candidate for office ceases to be a candidate when he assumes office. For example, the President-elect assumes office on January 20, the day of his inauguration. Therefore, a member of the President-elect's Transition Team who otherwise meets the conditions of the section 207(j)(7) exception may continue to communicate on behalf of the President-elect until he

⁵ See Memorandum of Randolph D. Moss, Assistant Attorney General, for the Director, Office of Government Ethics, "Definition of Candidate Under 18 U.S.C. § 207(j)(7)," November 6, 2000.

assumes office on January 20.⁶ After that point, any communications by the former employee on behalf of the office holder will be on behalf of the "United States," and therefore are exempt from the prohibitions of the Act. See 18 U.S.C. § 207(c)(1).

B. When a Former Senior or Very Senior Employee Is "Employed By" a Person or Entity

The exception under section 207(j)(7)(B)(ii) is inapplicable if the former senior or very senior employee "is employed by a person or entity" other than a candidate or specified political entity. This limitation does not apply to every arrangement in which the former employee receives compensation for services. The phrase "employed by a person or entity" should be read in light of the common-law distinction between an employee and an independent contractor.⁷ Those who meet the common-law definition of employee should be deemed "employed by a person or entity" under this exception. We have been advised by the Office of Legal Counsel, Department of Justice, that those who are clearly more analogous to an employee rather than an independent contractor may well be "employed by a person or entity" under this exception.

Under this interpretation of "employed by," for example, the principals of a consulting firm or the

⁶ According to the November 6, 2000, OLC opinion it is logical that the principles of the ethics statute are less at risk when the communication is made exclusively on behalf of the President-elect, rather than on the behalf of a mere candidate for that office. To construe the statute to create a two-week gap from January 6 to January 20 where certain members of the President's Transition Team may not communicate on his behalf would create an absurdity.

⁷ Courts have considered many different factors when determining whether a person receiving compensation for services is a common-law employee or an independent contractor. See, e.g., *Hospital Resource Personnel, Inc., v. United States*, 68 F.3d 421 (11th Cir. 1995)(Employing a 20-factor test established by the Internal Revenue Service and stating that, although no one factor is definitive on its own, collectively the factors define the extent of an employer's control over the time and manner in which the worker performs).

partners in a law firm, even if not employees of the firm in the narrow common-law meaning, would nonetheless be "employed by" the firm because they have a relationship with the firm that is more clearly analogous to that of an employee than to that of an independent contractor. In contrast, former employees who receive payments for speaking engagements are not "employed by" the organization that pays them or by the speaking bureau that arranged the engagement because they have a relationship more analogous to that of an independent contractor. Therefore, a former employee who receives fees for speaking may still use the exception if he represents a candidate, committee, or party as long as all other requirements under section 207(j)(7) are met.

If you have any questions, please feel free to contact my Office.