
Office of Government Ethics

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Letter to a Designated Agency Ethics Official dated September 12, 1997

This is in reply to your letter of August 19, 1997, concerning a proposed waiver of the post-employment restriction at 18 U.S.C. § 207(c) pursuant to 18 U.S.C. § 207(j)(5). The waiver would be granted by [your agency] to a former "senior" employee at [the agency] who currently serves as the Executive Vice President of [a branch of a corporation]. You indicate in your letter that [the former employee] has been identified as the individual who will soon become president of [the branch of the corporation].

Section 207(c) is a one-year restriction that prohibits a former senior employee from communicating to or appearing before his former department or agency, on behalf of another person or entity, with the intent to influence official action. The bar applies to representational activity concerning virtually any matter, regardless of the nature of the former employee's involvement with the matter while employed by the Government. Since [the former employee] retired in March 1997, his one-year "cooling-off" period will expire in March 1998. Absent a waiver, section 207(c) would, until its expiration, significantly restrict the nature of [the former employee's] interactions with [the agency] concerning the agency's programs.

If granted a waiver of section 207(c) under section 207(j)(5), [the former employee] would not be prohibited by section 207(c) from communicating with [agency] officials on behalf of [the branch of the corporation] concerning the matter or matters specified in the waiver, even if for the purpose of influencing Government action. Section 207(j)(5) provides that --

The restrictions contained in subsections (a), (c), and (d) shall not apply . . . if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

Notably, [the agency] is proposing to waive the application of section 207(c) only. Thus, your letter specifically indicates that [the agency] is not contemplating "a waiver of 18 U.S.C. § 207(a) for any matters in which he was personally and substantially involved." While section 207(j)(5) clearly authorizes a waiver for a former senior employee that would extend to section 207(a) as well, we see nothing to preclude the grant of a waiver more limited in scope.⁽¹⁾

Regulatory guidance published at 5 C.F.R. § 2637.207(b) provides that an exemption should be granted pursuant to this statutory provision only where the former employee's involvement is needed on a "continuous and comprehensive" basis. Under that regulation, an exemption takes effect "upon the execution of the certification, provided that it is transmitted to the Federal Register." 5 C.F.R. § 2637.207(c).⁽²⁾

According to your letter, [the former employee] has been involved with the [agency's mission] for 35 years. After serving as a key member of [a] team during [a] program, he served for eight years in [a] Program Office. You also indicate that [the former employee] was primarily responsible for [the agency's] response to the investigative efforts and recommendations for corrective action that were prompted by [an incident]. [The former employee] was serving as Director of [an agency] Center when he retired from Government on March 3, 1997.

You indicate that "[t]he principal role of [the branch of the corporation] is supporting [the agency's project] effort." You point out that, consistent with recommendations made by a team of outside experts in 1995, "development and upgrade contracts like those held by [the branch of the corporation] have been restructured to place more responsibility on the contractor to determine how to accomplish the work." Since [the agency] plans to use [an agency product] through at least 2012, the [agency product] will require upgrades and modifications to ensure safe and productive use of the [product]. You note that [the branch of the corporation] "is one of the leading contractors in [the product] research and development and upgrade work" For example, [the branch of the corporation] has recently completed the redesign of [a] center, has just been awarded a contract to upgrade [aspects of the product], and is currently participating in the design of the upgraded processing system at [the agency] Center.

According to the list of qualifications provided to [the agency] by [the Corporation], the president of [the branch of the corporation] must possess "knowledge and understanding" of a variety of technical matters, including software, hardware development, integration of software and hardware, center design and development, communications, and "the functions, facilities, and systems necessary to support [the agency's missions]." You observe that, with one exception, all of the qualifications articulated by [the corporation] focus on technical or technological skills. You believe that as president, [the former employee] "will be required to utilize those technological skills on a daily basis." If unable to communicate freely with [the former employee] in the months prior to the expiration of the section 207(c) bar, you conclude that "there will be a seriously negative effect on the transition to private operation of the [agency product], the implementation of the upgrade program, and the concomitant impact on safety margins."

After reviewing your letter of August 19, we are persuaded that the Administrator of [the agency] may grant the proposed waiver.⁽³⁾ We have not reviewed a draft of the proposed Federal Register certification. However, we suggest that the certification should include, at a minimum, the name of the former employee; the Government position he last held; a summary of his outstanding qualifications in a scientific, technological, or other technical discipline; the identity of the employer on whose behalf he would be utilizing those qualifications; a description of the matter concerning which he would be communicating with his former agency; and a statement that the national interest would be served by his participation in that matter.

As discussed earlier, [the agency] is proposing to waive 18 U.S.C. § 207(c) only. Since we are satisfied that our analysis would apply equally to a waiver of section 207(a)(1) or (a)(2), you need not coordinate further with this Office in the event [the agency] determines to also waive one or both of those restrictions.

Sincerely,

Stephen D. Potts
Director

1. Section 207(a) also contains a two-year restriction, section 207(a)(2), which applies with respect to any particular matter, involving a specific party or parties, which was under a former employee's official responsibility during his last year of Government service. Any waiver should clearly indicate whether it extends to this provision. (The limitations imposed by 18 U.S.C. § 207(d) are not at issue in [the former employee's] case since he apparently did not serve in a "very senior" employee position while employed by [the agency].)
2. Although 5 C.F.R. part 2637 relates to 18 U.S.C. § 207 as in effect prior to its substantial revision by the Ethics Reform Act of 1989, we are continuing to rely on section 2637.207 in relation to the interpretation of section 207(j)(5), pending the promulgation of a new regulation.
3. See 5 C.F.R. § 2637.207(c) concerning the delegation of the Administrator's certification authority.