

PART 2641 -- POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS

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Subpart A -- General Provisions

2641.101 Definitions.

The following terms are defined for purposes of this part:

Agency includes any department, independent establishment, commission, administration, authority, board, or bureau of the United States, and includes a Government corporation. 18 U.S.C. 202(e)(1); 5 U.S.C. 105.

Department means one of the executive departments enumerated in 5 U.S.C. 101.

Designated agency ethics official means an officer or employee who is designated by the head of an agency to coordinate and manage an agency's ethics program in accordance with 2638.203 of this subchapter. 5 CFR 2638.202.

Employee means any officer or employee of the executive branch as that term is defined in this section. Unless otherwise indicated, the term does not include the President or the Vice President. 18 U.S.C. 202(c). It does not include an individual performing services for the United States as an independent contractor under a personal services contract or an enlisted member of the armed forces as defined in 5 U.S.C. 2101(2). 18 U.S.C. 202(a). Unless otherwise indicated, the term encompasses senior employees, very senior employees, and special Government employees as

defined in this section.

Executive branch includes each executive agency as defined in 5 U.S.C. 105, other than the General Accounting Office, and also includes any other entity or administrative unit in the executive branch. 18 U.S.C. 202(e)(1).

Former employee, former senior employee, or former very senior employee means one who was, and is no longer, an employee, senior employee, or very senior employee.

Senior employee means an employee, other than a very senior employee, who is:

(1) Employed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311 - 5318 (the Executive Schedule);

(2) Employed in a position 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 (including any such position in the Senior Executive Service or other SES-type systems, e.g., the Senior Foreign Service);

(3) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(B);

(4) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(B);

(5) Employed 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 (as specified in 37 U.S.C. 201) is pay grade O - 7 or above; or

(6) Detailed to any such position.

Special Government employee includes an officer or employee of an agency who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed 130 days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis. See 18 U.S.C. 202(a).

Very senior employee means an employee who is:

(1) Serving in the position of Vice President of the United States;

(2) Employed in a position at a rate of pay payable for Level I of the Executive Schedule;

(3) Employed in a position in the Executive Office of the President at a rate of pay payable for Level II of the Executive Schedule;

(4) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(A);

(5) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(A); or

(6) Detailed to any such position.

Subpart B -- Substantive Provisions

2641.201 One-year restriction on a former senior employee's representations to employees of former agency concerning matter, regardless of prior involvement.

(a) 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 on which he seeks official action by any employee.

(b) Applicability. 18 U.S.C. 207(c) applies to all former "senior employees" as defined in 2641.101 of this part. Certain individuals who served in "very senior" positions are subject to the one-year bar set forth in section 207(d) in lieu of that set forth in section 207(c). See definition of "very senior employee" in 2641.101.

(1) Special Government Employees. 18 U.S.C. 207(c) does not apply to an individual as a result of service as a special Government employee unless the individual:

(i) Served in a senior employee position while serving as a special Government employee; and

(ii) Served 60 or more days as a special Government employee during the one-year period before terminating service as a senior employee.

(2) Exemption from 18 U.S.C. 207(c). 18 U.S.C. 207(c) does not apply to an individual as a result of service in a senior position if that position has been exempted from section 207(c) pursuant to the waiver procedures set forth in 2641.201(d) of this part.

(c) Measurement of Restriction. 18 U.S.C. 207(c) is a one-year restriction. The one-year period is measured from the date when the employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously.

(d) Waiver of 18 U.S.C. 207(c). Certain positions or categories of positions can be exempted from 18 U.S.C. 207(c) through the grant of a waiver by the Director of the Office of Government Ethics. 18 U.S.C. 207(c)(2)(C).

(1) Effect of Exemption. When an eligible position is exempted from 18 U.S.C. 207(c) by the Director of the Office of Government Ethics, the one-year restriction of section 207(c) will not be triggered upon any employee's termination from the position.

(2) Eligible Senior Employee Positions. Any senior employee position is eligible for exemption except the following:

(i) Positions for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311 - 5318

(the Executive Schedule);

(ii) Positions whose occupants are appointed by the President pursuant to 3 U.S.C. 105(a)(2)(B);
or

(iii) Positions whose occupants are appointed by the Vice President pursuant to 3 U.S.C. 106(a)
(1)(B).

(3) Procedure. An exemption shall be granted in accordance with the following procedure:

(i) Initial Exemption. An agency's designated agency ethics official shall forward to the Director of the Office of Government Ethics a written request that a certain senior employee position or category of positions be exempted from 18 U.S.C. 207(c). Any such request shall address the criteria set forth in paragraph (d)(5) of this section. A designated agency ethics official may also request that a current exemption be revoked.

(ii) Agency Update. Designated agency ethics officials shall by November 30 of each year forward to the Office of Government Ethics a letter stating whether positions or categories of positions currently exempted should remain exempt from the application of 18 U.S.C. 207(c) in light of the criteria set forth in paragraph (d)(5) of this section.

(iii) Action by Office of Government Ethics. The Director of the Office of Government Ethics shall promptly provide to the designated agency ethics official a written response to each initial request for exemption or revocation. The Director shall annually publish in appendix A to this part an updated compilation of all exempted positions or categories of positions. The Director shall publish notice in the Federal Register when he determines to revoke an exemption based on his finding that the position or positions no longer qualify for exemption.

(4) Effective Date of Exemption. Exemptions issued under paragraph (d) of this section shall be effective as of the date of the Director's written response to the designated agency ethics official indicating that the request for exemption has been granted. An exemption shall inure to the benefit of the individual who holds the position when the exemption takes effect, as well as to his successors, but shall not benefit individuals who terminated senior service prior to the effective date of the exemption. Revocation of an exemption shall be effective 90 days after the date that the Director publishes notice of the revocation in the Federal Register. Individuals who formerly served in an exempted position will not become subject to 18 U.S.C. 207(c) in the event the position's exempted status is revoked subsequent to the individual's termination from the position.

(5) Criteria for Exemption. Before exempting a position or positions from 18 U.S.C. 207(c), the Director of the Office of Government Ethics must find that with respect to the position or category of positions:

(i) The granting of the exemption would not create the potential for use by former senior employees of undue influence or unfair advantage based on past Government service; and

(ii) The imposition of the restrictions would create an undue hardship on the department or

agency in obtaining qualified personnel to fill such position or positions as shown by relevant factors which may include, but are not limited to:

(A) The payment of a special rate of pay to the incumbent of the position pursuant to specific statutory authority; or

(B) The requirement that the incumbent of the position have outstanding qualifications in a scientific, technological, or other technical discipline.

(e) Separate Departmental or Agency Components. For purposes of 18 U.S.C. 207(c) only, the Director of the Office of Government Ethics is authorized by 18 U.S.C. 207(h) to designate departmental and agency ``components" that are distinct and separate from the ``parent" department or agency and from each other. Absent such designation, the representational bar of section 207(c) extends to the whole of the department or agency in which the former senior employee served.

(1) Effect of Designation. An eligible former senior employee who served in a ``parent" department or agency is not barred by 18 U.S.C. 207(c) from making communications to or appearances before any employee of any designated component of that parent, but is barred as to employees of that parent or of other components that have not been designated. An eligible former senior employee who served in an designated component of a parent department or agency is barred from communicating to or making an appearance before any employee of that component, but is not barred as to any employee of the parent or of any other component.

(2) Eligible Senior Employees. All former senior employees are eligible to benefit from this procedure except those who were senior employees by virtue of having been:

(i) Employed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311 - 5318 (the Executive Schedule);

(ii) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(B); or

(iii) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(B).

(3) Procedure. Distinct and separate components shall be designated in accordance with the following procedure:

(i) Initial Designation. Initial designations of departmental and agency components are set forth in appendix B to this part and are effective as of January 1, 1991.

(ii) Agency Update. A designated agency ethics official may at any time recommend the designation of an additional component or the revocation of a current designation by forwarding a written request to the Director addressing the criteria set forth in paragraph (e)(6) of this section. Designated agency ethics officials shall by November 30 of each year forward to the Office of Government Ethics a letter stating whether components currently designated should remain designated in light of the criteria set forth in paragraph (e)(6).

(iii) Action of Office of Government Ethics. The Director of the Office of Government Ethics shall by rule make or revoke a component designation after considering the recommendation of the designated agency ethics official. The Director shall annually publish in appendix B to this part an updated compilation of all designated departmental or agency components.

(4) Effective Date of Designation. Initial component designations shall be effective as of January 1, 1991. Any subsequent designation shall be effective as of the effective date of the rule that creates the designation, but shall not be effective as to employees who terminated senior service prior to that date. Revocation of a component designation shall be effective 90 days after the effective date of the rule that revokes the designation, but shall not be effective as to individuals who terminated senior service prior to the expiration of such 90-days period.

(5) Unauthorized Designations. No. agency or bureau within the Executive Office of the President may be designated as a separate departmental or agency component.

(6) Criteria for Designation. Before designating an agency component as distinct and separate for purposes of 18 U.S.C. 207(c), the Director of the Office of Government Ethics must find that:

(i) There exists no potential for use by former senior employees of undue influence or unfair advantage based on past Government service; and

(ii) The component is an agency or bureau, within a department or agency, that exercises functions which are distinct and separate from the functions of the parent department or agency and from the functions of other components of that parent as shown by relevant factors which may include, but are not limited to:

(A) The component's creation by statute or a statutory reference indicating that it exercises functions which are distinct and separate; or

(B) The component's exercise of separate and distinct subject matter or geographical jurisdiction.

(7) Supervisory Relationship. Provided that a component has a separate statutory basis or exercises distinct and separate subject matter or geographical jurisdiction, the parent will generally be deemed by the Director of the Office of Government Ethics to be distinct and separate from that component notwithstanding that the parent may exercise general supervisory authority over the component. However, the degree of a parent's supervision over a component will be a factor in determining whether subject matter or geographical jurisdiction is in fact distinct and separate. The Director will not ordinarily consider two components as distinct and separate from one another where one component exercises supervisory authority over another.

Appendix A to 5 CFR Part 2641 -- Positions Exempted from 18 U.S.C. 207(c)

Pursuant to the provisions of 18 U.S.C. 207(c)(2)(C), each of the following positions is exempt from the provisions of 18 U.S.C. 207(c). All exemptions are effective as of the date indicated.

Agency: Securities and Exchange Commission.

Positions: Solicitor, Office of General Counsel (effective October 29, 1991); Chief Litigation Counsel, Division of Enforcement (effective October 29, 1991).

[57 FR 3116, Jan. 28, 1992]

Pt. 2641, App. B

Appendix B to 5 CFR Part 2641 -- Agency Components for Purposes of 18 U.S.C. 207(c)

Pursuant to the provisions of 18 U.S.C. 207(h), each of the following departments or agencies is determined, for purposes of 18 U.S.C. 207(c), to have within it distinct and separate components as set forth below. Except as otherwise indicated, all designations are effective as of January 1, 1991.

Parent: Department of Commerce

Components:

Bureau of the Census

Bureau of Export Administration (effective January 28, 1992)

Economic Development Administration

International Trade Administration

Minority Business Development Administration

National Oceanic and Atmospheric Administration

National Telecommunications and Information Administration

Patent and Trademark Office

Technology Administration (effective January 28, 1992)

United States Travel and Tourism Administration (effective January 28, 1992) Parent:
Department of Defense

Components:

Department of the Air Force

Department of the Army

Department of the Navy

Defense Information Systems Agency

Defense Intelligence Agency

Defense Logistics Agency

Defense Mapping Agency

Defense Nuclear Agency

National Security Agency

Parent: Department of Energy

Component:

Federal Energy Regulatory Commission

Parent: Department of Health and Human Services

Components:

Administration for Children and Families (effective January 28, 1992)

Health Care Financing Administration

Food and Drug Administration

Public Health Service

Social Security Administration

Parent: Department of the Interior

Components:\1\ (FOOTNOTE)

(FOOTNOTE) \1\ All designated components under the jurisdiction of a particular Assistant Secretary shall be considered a single component for purposes of determining the scope of 18 U.S.C. 207(c) as applied to senior employees serving on the immediate staff of that Assistant Secretary.

Bureau of Indian Affairs (effective January 28, 1992)

Bureau of Land Management (effective January 28, 1992)

Bureau of Mines (effective January 28, 1992)

Bureau of Reclamation (effective January 28, 1992)

Minerals Management Service (effective January 28, 1992)

National Park Service (effective January 28, 1992)

Office of Surface Mining (effective January 28, 1992)

Office of Territorial and International Affairs (effective January 28, 1992)

U.S. Fish and Wildlife Service (effective January 28, 1992)

U.S. Geological Survey (effective January 28, 1992)

Parent: Department of Justice

Components:

Antitrust Division

Bureau of Prisons (including Federal Prison Industries, Inc.)

Civil Division

Civil Rights Division

Community Relations Service

Criminal Division

Drug Enforcement Administration

Environment and Natural Resources Division

Executive Office for United States Attorneys² (FOOTNOTE) (effective January 28, 1992)

(FOOTNOTE) ²The Executive Office for United States Attorneys shall not be considered separate from any Office of the United States Attorney for a judicial district, but only from other designated components of the Department of Justice.

Executive Office for United States Trustees³ (FOOTNOTE) (effective January 28, 1992)

(FOOTNOTE) ³The Executive Office for United States Trustees shall not be considered separate from any Office of the United States Trustee for a region, but only from other designated components of the Department of Justice.

Federal Bureau of Investigation

Foreign Claims Settlement Commission

Immigration and Naturalization Service

Independent Counsel

Office of Justice Programs

Office of the Pardons Attorney (effective January 28, 1992)

Offices of the United States Attorney (94)\4\ (FOOTNOTE)

(FOOTNOTE) \4\ Each Office of the United States Attorney for a judicial district shall be considered a separate component from each other such office. However, the Office of the United States Attorney for a judicial district shall not be considered separate from the Office of United States Marshal for the same judicial district.

Offices of the United States Marshal (94)\5\ (FOOTNOTE)

(FOOTNOTE) \5\ Each Office of the United States Marshal for a judicial district shall be considered a separate component from each other such office. However, the Office of the United States Marshal for a judicial district shall not be considered separate from the Office of United States Attorney for the same judicial district.

Offices of the United States Trustee (21)\6\ (FOOTNOTE)

(FOOTNOTE) \6\ Each Office of the United States Trustee for a region shall be considered a separate component from each other such office.

Tax Division

United States Parole Commission

Parent: Department of Labor

Components:

Bureau of Labor Statistics

Employment and Training Administration

Employment Standards Administration

Mine Safety and Health Administration

Occupational Safety and Health Administration

Parent: Department of State

Components:

Foreign Service Grievance Board

International Joint Commission, United States and Canada (American Section)

Parent: Department of Transportation

Components:

Federal Aviation Administration

Federal Highway Administration

Federal Railroad Administration

Maritime Administration

National Highway Traffic Safety Administration

Saint Lawrence Seaway Development Corporation

United States Coast Guard

Urban Mass Transportation Administration

Parent: Department of the Treasury

Components:

Bureau of Alcohol, Tobacco and Firearms

Bureau of Engraving and Printing

Bureau of the Mint

Bureau of the Public Debt

Comptroller of the Currency

Federal Law Enforcement Training Center

Financial Management Center

Internal Revenue Service

Office of Thrift Supervision

United States Customs Service

United States Savings Bonds Division

(effective April 7, 1992)

United States Secret Service

Parent: Federal Emergency Management Agency

Component:

United States Fire Administration

Parent: National Credit Union Administration

Component:

Central Liquidity Facility

[56 FR 3963, Feb. 1, 1991, as amended at 57 FR 3116, Jan. 28, 1992; 57 FR 11673, Apr. 7, 1992]