Summary of Post-Employment Restrictions May 2013

U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Current employees who have begun seeking or negotiating for subsequent non-federal employment must immediately recuse from participation in any official matter that involves the prospective employer as an identified party, such as a grant, contract, application, audit, investigation, or lawsuit. The recusal also must extend to any particular matter of general applicability that affects the discrete industry, economic sector, or other defined class of organizations in which the prospective employer operates, such as a legislative initiative, regulatory proposal, or policy determination that affects the prospective employer as a member of such class. See 5 CFR Part 2635, Subpart F.

Former employees are subject to the provisions described below. Former government attorneys and public officials with a law license are subject to additional post-employment restrictions under State Rules of Professional Conduct. Political appointees are subject to additional pledge requirements under E.0. 13490. OGE 278 filers are required to submit a termination Public Financial Disclosure Report within 30 days after departure. Certain exceptions, not discussed in this document, may apply in limited circumstances. **Contact Reclamation Deputy Ethics Counselor, Erika Armani at 202-513-0599, earmani@usbr.gov or Department of the Interior Ethics Office at (202) 208-7960, DOI_Ethics@ios.doi.gov for further information.**

Restrictions Applicable to All Employees

18 US Code 207(a)(1) Permanent Ban on "Switching Sides." Former employees are subject to a lifetime ban on communicating to or appearing before the Government on behalf of their new employer or anyone else regarding specific party matters in which they participated personally and substantially during their entire government service.

18 US Code 207(a)(2) Two-Year Official Responsibility Provision. For two years after leaving federal employment, former employees cannot make representational communications to or appearances before the Government regarding specific party matters that were pending under their official responsibility during their last year of government service.

18 US Code 207(b) One-Year Ban on Trade or Treaty Negotiation Activities. Former employees who participated in ongoing trade or treaty negotiations on behalf of the United States within the year preceding their departure cannot, for one year, represent, aid, or advise anyone based on information exempt from disclosure to which the employees had access.

18 US Code 203 Compensation Limitation. Former employees who join a law, accounting, or government relations firm cannot share in any bonus, profit sharing, or similar compensation derived from fees earned by the employee's new firm or partnership for representational services before the Government that were rendered during the former employee's period of government service.

41 US Code 2102 Disclosure of Procurement Information. Former employees cannot knowingly disclose contractor bid or proposal information or source selection information to anyone not authorized to receive such information.

41 US Code 2104 One-Year Ban on Contractor Compensation. Employees who worked on a contract in excess of $10 million cannot accept compensation from that contractor within one year after the employee: (1) served as the procuring contracting officer, source selection authority or evaluation board member, or chief of a financial or technical evaluation team; (2) served as a program manager, deputy program manager, or administrative contracting officer; or (3) personally made certain decisions such as awarding a contract, subcontract, modification, task or delivery order, establishing overhead, issuing payment, or settling a claim.

45 CFR Part 2 Testimony and Production of Documents in Proceedings where the United States is Not a Party. Former employees cannot provide testimony or produce documents in a federal, state, local, or tribal judicial or administrative proceeding (or a state, local, or tribal legislative hearing) concerning information acquired during the course of their official duties or because of their former government position, unless authorized by the head of their respective OPDIV or, if a former employee of OS, the ASA. This requirement applies to requested or subpoenaed oral statements before a court or an adjudicative or investigatory body, as well as statements made in depositions, interrogatories, declarations, affidavits, or other formal participation.

Restrictions Applicable Only to "Senior Employees"*

Executive Levels II through V; Uniformed Service Pay Grades O-7 or above; SES and employees in other Pay Systems with an Annual Rate of Basic Pay (Excluding Locality-Based Adjustments) at or above $155,441.

18 US Code 207(c) One-Year "Cooling-Off" Period. Former employees cannot, for one year after completing service in a "senior" position, knowingly make, with the intent to influence, any communication to or appearance before any officer or employee of their former agency on behalf of anyone seeking official action. Except for Senate confirmed Presidential appointees, who are prohibited from contacting the entire Department, "former agency" means the OPDIV where the employee worked (or OS, if employed in a STAFFDIV).

The restrictions in 18 US Code 207(c) do not apply to acts done in carrying out official duties as an employee of and on behalf of: (1) a state or local government; (2) a college or university; or (3) a non-profit hospital or medical research organization. Other exceptions may apply for certain types of testimony, uncompensated statements based on special knowledge, and scientific or technological information, and for certain contacts made on behalf of international organizations or political campaign organizations.

18 US Code 207(f) One-Year Foreign Entity Provision. Former employees cannot, for one year after completing service in a "senior" position, knowingly represent, aid, or advise a foreign government or foreign political party with the intent to influence any officer or employee of the United States.

***NOTE: Cabinet officers paid at Executive Level I, known as "very senior employees," are subject to an additional two-year restriction that precludes representational contact to the appointee's former department, as well as to any Presidential appointee in the entire Executive Branch and any employee paid at Executive Levels I-V.**

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RULES FOR THE ROAD (October 2007)

RULES FOR THE ROAD

U.S. Office of Government Ethics
www.usoge.gov

Introduction - As an executive branch employee, you have learned much about Government policies, programs, and personnel that could be of use to future employers. Even after you leave your Federal job, some of you may still be able to influence Government decisions.

This pamphlet briefly describes Federal laws that restrict what you can do after you leave Government service or when you leave certain Government positions. The laws address the types of activities that are most likely to cause the public to be concerned about the way the Government does its work.

Depending upon the nature of your Government job and what you plan to do in the future, some of these laws may not affect you. Or you may be affected by more than one restriction. Most of the laws do not apply to former military enlisted personnel. However, some of these laws apply even to individuals who worked for the Government only part-time.

In addition to the laws described in this pamphlet, you might also have to comply with rules that apply just to former employees of your agency. Also, if you have participated in a procurement or in the administration of a contract or had access to certain sensitive procurement information, some special restrictions or obligations may affect you. Finally, when you leave, you might agree to other limitations in exchange for a separation payment, or "buyout."

This pamphlet only summarizes the laws. It is not a substitute for counseling. If you have any questions, you should contact your agency ethics official.

Note: Seeking Future Employment - Although this pamphlet focuses on the laws that apply to post-Government activities, there are also laws that may affect you while you are looking for a job. For example, you may have to avoid working on certain official assignments while you are seeking or negotiating for a job. Ask an agency ethics official for advice before you take any steps toward getting a job with someone affected by matters that you are working on for the Government. Also, if you are participating in a procurement, you may have to file a written report if you contact or are contacted by a bidder or offeror about a possible job — even if you immediately reject any offer.

If You Want to Represent Others Before the Government - After you leave your Federal job, you generally may work for any employer. You also may contact any part of the Government solely on your own behalf — by phone, by letter, or in person.

You may not, however, try to influence any Federal agency or court on behalf of anyone else (including a new employer) concerning certain kinds of matters — like contracts, grants, or lawsuits — if you worked on those same matters during your Government service. A new employer includes any separate business entity, such as a corporation, that you have formed. You do not have to be a "lobbyist" to be affected by the law, and you may be affected even if you are working for a good cause or are not being paid for your work.

Unless you served in a "senior" or "very senior" employee position, you may try to persuade current Government employees to take action concerning matters in which neither you nor any of your subordinates were involved. You may even be able to try to influence current employees about some of your old assignments that did not involve a "party" or "parties," such as a regulation or legislation that you drafted.

The length of the restriction depends upon how you were involved in the matter while you still worked for the Government. If you were personally and substantially involved in the matter, then the restriction is permanent. If you merely supervised others who did the actual work, then the restriction lasts for two years from the date you leave Government service. The two-year restriction does not apply unless you supervised the matter during your last year of Federal service.

"Senior" and "very senior" employees are subject to some additional post-employment rules that are described at the end of this pamphlet.

If You Want to Accept Compensation From an Employer That Represents Others Before the Government - After you leave your Federal job, you generally may work for any employer — even one that represents clients before the Government. You may not, however, share in profits that your new employer earned as a result of representing clients — in connection with certain kinds of matters — before any Federal department, agency, or court at a time when you were still a Government employee. The restriction may affect you even though you were never involved in the matter during your Federal service.

This restriction is most likely to affect former employees who join law, accounting, or public relations firms as partners. As time passes,

the restriction is less likely to be an issue since firms will eventually collect past due accounts and distribute the related profits to those firm employees who may accept them.

If Your Government Work Has Related to Procurement - Even if you have participated in a procurement or in the administration of a contract, you may be able to work for a contractor that does business or seeks to do business with your former agency.

However, for one year you may not accept compensation from a contractor to serve as an employee, officer, director, or consultant if — while working for the Government — you had certain responsibilities or took certain actions relating to a large procurement involving that contractor. The bar against accepting compensation may apply to you whether you participated in the pre-award or post-award phase of the procurement.

For example, you may not accept compensation from a particular contractor if — in connection with a contract awarded to the contractor for more than $10,000,000 — you served as the procuring contracting officer at the time of award, or as the program manager or administrative contracting officer for the contract. You also may not accept compensation from the contractor for one year if, for example, you approved a contract payment or payment of a claim to that contractor for more than $10,000,000.

You may accept compensation from a division or affiliate of the contractor that does not produce the same or similar products or services as the entity responsible for the contract.

Note: Disclosure of Procurement Information - If you have had access to certain sensitive procurement information, you may not disclose that information before the award of the contract to which the information relates (unless permitted by some other law).

If Your Government Work Has Related to International Negotiations - If you worked on certain trade or treaty negotiations during your last year of Government service and had access to certain restricted information, you should contact your agency ethics official because you may be barred for one year from aiding or advising anyone (other than the United States) concerning those negotiations.

If You Have Been a High-Level Government Official - Even if you have served in a high-level Government position, you generally may work for any employer –- including a foreign government -- after you leave Federal service. You are also free to contact any part of the Government solely on your own behalf — by phone, by letter, or in person. However, if you have served in a "senior" employee position, your future activities may be affected by restrictions in addition to the other restrictions discussed in this pamphlet. These additional restrictions last for one year from the date you leave your senior employee position and apply even if you aren't paid for your work.

Specifically:

- You may not try to influence any department or agency in which you served during your last year of Government service, on behalf of anyone else (including a new employer), concerning any official matter — even if you were never involved with the matter as a Government employee. (Some former senior employees, however, are allowed to contact certain components of their former department or agency.) If you work for a large department, you should ask your ethics official whether your department is divided into these components.
- You may not assist a foreign government or foreign political party in its attempt to influence a decision of any department or agency. You may also be prohibited from representing a foreign entity before Congress.

Your ethics official can determine whether you are a senior employee. In general, "senior" employees include most Presidential appointees, General and Flag Officers, most members of the Senior Executive Service (and some high-level employees in similar pay systems), and private sector participants in the Information Technology Exchange Program.

Former "very senior" employees, such as cabinet officers, are also prohibited from contacting their former department or agency to seek official action on any matter. In addition, they are prohibited for two years from trying to influence current high-level officials at any other department or agency. As described above, very senior employees are also prohibited from assisting a foreign government or foreign political party in its attempt to influence any department or agency. Very senior employees also may be prohibited from representing a foreign entity before Congress.

If You Participated in the Information Technology Exchange Program - If you are an employee of a private sector organization and have been assigned to an agency under the Information Technology Exchange Program, you may not aid, counsel, or assist in representing anyone (other than the United States) concerning any contract with that agency. This restriction only lasts for one year after the end of your assignment.

Conclusion - This pamphlet is only a brief summary of the post-employment rules. For more guidance about your particular situation, contact your agency ethics official.

United States Office of Government Ethics

Understanding the Revolving Door:

How Ethics Rules Apply to Your Job Seeking and Post-Government Employment Activities

If you are planning to leave the executive branch and return to private employment, you need to know how the Federal ethics laws may affect you, both while you are looking for a job and after you leave the Government. This pamphlet provides an overview of the relevant restrictions that apply in these situations. You should consult your agency ethics official for detailed guidance about how these complex rules and criminal prohibitions apply to you.

Looking for a Job

Several issues can arise when you seek employment outside the Government while you are still working in the executive branch.

Generally, you may not work in your Government job on a matter that would affect the financial interests of someone with whom you are discussing possible employment. To do so would be a conflict of interest subject to criminal penalties. You must disqualify yourself from working on such a matter during your job search. In addition, if you participate in certain procurement matters, you may be subject to additional rules, including the duty to report employment contacts made by you or a bidder or offeror.

Some additional ethics rules may affect your job search. Generally, you may not work on a Government matter that would affect the financial interests of someone with whom you are "seeking employment." The rules define "seeking employment" broadly. In most cases, you will be considered to be seeking employment before you are engaged in actual job negotiations. For example, sending a resume or having preliminary contacts about possible employment, whether initiated by you or a prospective employer, may be considered seeking employment.

During your job search, you must be careful not to misuse Government resources such as your official time, the services of other employees, equipment, supplies, and non-public information to which you have access. You also will want to bear in mind the post-employment restrictions, discussed below, to which you will be subject once you leave your Government post.

After you accept a job outside the Government, you must continue to refrain from working on matters in your Government job that would affect the financial interests of your prospective employer.

Restrictions on Employment After Government Service

This section highlights the restrictions that will apply to you even after you leave executive branch service. You should seek advice from your agency's ethics official on how these post-employment restrictions apply to you, both before and after you terminate Government employment.

Criminal Post-Employment Restrictions

Restrictions on post-Government employment do not bar you from working for any particular employer. The restrictions are designed to address certain activities that involve, or may appear to involve, the unfair use of your prior Government employment. How these restrictions apply to you depends upon your position and your duties during your Government service.

- As an executive branch employee, you are barred permanently from trying to influence any Federal agency or court, by communications or appearances on behalf of someone other than yourself or the United States (i.e., "representational contacts"), on a matter that has parties (such as a contract, grant, or lawsuit) if you worked on that matter as a Government employee. If the matter was under your official responsibility during your last year of Government service, even if you did not personally participate in it, you are barred from making representational contacts about that matter for two years.
- If you served as a "senior employee" during your last year of Government service, you are subject to a one-year prohibition on making any representational contacts to your former agency on any matter, regardless of whether the matter involves

parties or whether you previously worked on the matter. Senior employees include certain Presidential appointees, General and Flag Officers, most members of the Senior Executive Service (and some high-level employees in similar pay systems), and private-sector participants in the Information Technology Exchange Program.

  - If you work for a large department, you should contact your ethics official and inquire about whether your department is divided into smaller components for post-employment purposes. If so, the restriction on your representational contacts, which otherwise would extend to your entire department, may be limited to a smaller subset of offices within your department.

- If you served as a "very senior employee," you are covered by a two-year cooling-off period with respect to representational contacts made to your former agency and to any Executive Schedule employee serving in any agency in the executive branch. Very senior employees include cabinet officers, the Vice-President, and certain very high-level White House staff.
- If you are a former senior or very senior employee, you are subject to a one-year prohibition on representing, aiding, or advising a foreign government or foreign political party, with an intent to influence any officer or employee of a department or agency. You also may be prohibited from representing a foreign entity before Congress.
- If you worked on certain trade or treaty negotiations during your final year of Government service and have had access to certain restricted information, you are barred for one year from aiding or advising anyone other than the United States concerning those negotiations.
- If you were a private-sector participant in the Information Technology Exchange Program, you may not aid, counsel, or assist in representing anyone other than the United States on any contract with the agency in which you served for one year after the end of your assignment.

Exceptions to Post-Employment Restrictions

There are exceptions to some of these restrictions. For example, one exception permits former employees to engage in post-employment activities performed in carrying out official duties on behalf of the United States. Another exception, in some cases, allows former senior and very senior employees to make representational contacts on behalf of a candidate for Federal or State office, or on behalf of national and campaign committees or a political party. You should contact your designated agency ethics official for assistance in determining whether any exceptions apply to your situation.

Additional Restrictions

Depending on your current Government duties and your future employment, other post-employment restrictions may apply to you. Here are some common situations in which other post-employment restrictions may apply:

- If you will be working for a firm that represented clients before either the executive branch or any court where the United States had an interest, you are prohibited from sharing in the profits earned by the firm for those matters. The restriction applies if the firm's work before the Government occurred while you were employed by the Government.
- If you were involved in certain large procurements or in the administration of contracts, you may not be able to accept compensation from certain contractors for one year.
- If you are an attorney or other licensed professional, you should consult your local bar rules or similar professional code for any special restrictions on employment following Government service.
- If your agency has special post-employment laws and regulations, you may be subject to additional requirements and restrictions not mentioned here.

Summary for Avoiding Trouble

Understanding the Federal ethics laws that govern your conduct while you are looking for a job and after you terminate Government service can be challenging. This pamphlet is only a starting point, but remembering these key issues and seeking the assistance of your agency ethics official will help you successfully pass through the revolving door.

Prepared by
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SUMMARY OF POST-EMPLOYMENT RESTRICTIONS OF 18 U.S.C. § 207

I. INTRODUCTION

Since its enactment in 1962, 18 U.S.C. § 207 has remained the primary source of post-employment restrictions applicable to officers and employees of the executive branch. Unlike certain other post-employment laws, most of the provisions of section 207 apply to individuals regardless of the executive department or agency in which they served while employed by the Government and regardless of the particular duties they performed.

Section 207 has been amended several times over the years. For example, section 207 was substantially revised by the Ethics Reform Act of 1989. As a consequence of these amendments, former employees are subject to varying post-employment restrictions depending upon the date of their termination from Government service or from certain high-level positions.

Individuals who terminated service prior to January 1, 1991, should continue to consult the regulations published at Part 2637 of title 5, Code of Federal Regulations, for guidance concerning applicable provisions of section 207. Individuals terminating service on or after January 1, 1991, should consult this summary pending completion of revised regulatory guidance at 5 C.F.R. Part 2641. As of this date, Part 2641 contains guidance concerning 18 U.S.C. § 207(c) only. (Except where the underlying statutory provision has changed, Part 2637 remains persuasive concerning the interpretation of the newer version of 18 U.S.C. § 207.)

This summary was prepared by the U.S. Office of Government Ethics (OGE) in 1990, was redistributed in November 1992, was updated and reissued in February 2000, and is again being updated and reissued today. While it has been coordinated with the Department of Justice, employees are cautioned that it reflects only a preliminary interpretation of the amendments to 18 U.S.C. § 207 enacted by the Ethics Reform Act of 1989 and thereafter.

II. SUMMARY OF RESTRICTIONS

Section 207 of title 18 sets forth seven substantive prohibitions restricting the activities of individuals who leave Government service or who leave certain high-level positions in the executive branch. Each of these restrictions is discussed separately below, followed by a discussion of several statutory exceptions.

None of the provisions bar any individual, regardless of rank or position, from accepting employment with any private or public

employer after Government service. Section 207 only prohibits individuals from engaging in certain activities on behalf of persons or entities other than the United States, whether or not done for compensation. None of the restrictions bar self-representation.

A. APPLICABILITY

The first three restrictions [§§ 207(a)(1), (a)(2), and (b)] are applicable to former officers or employees of the executive branch. They also apply to former senior or very senior employees as those terms are described below, and to former special Government employees. According to 18 U.S.C. § 202, a "special Government employee" includes an individual who is "retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis...." [Enlisted personnel of the uniformed services are not "officers" or "employees" for purposes of section 207.]

The fourth restriction [§ 207(c)] is applicable only to former "senior personnel" (hereinafter referred to as "senior employees"). A senior employee is any employee (other than an individual covered by the fifth restriction) who was employed in a position for which the rate of pay is specified in or fixed according to the Executive Schedule, in a position for which the rate of basic pay is equal to or greater than 86.5 percent of the rate of basic pay payable for level II of the Executive Schedule (or, for a period of two years following November 24, 2003, any person who was employed on November 23, 2003 in a position for which the rate of basic pay was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service), or 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 is O-7 or above. The term includes those individuals appointed by the President to a position under 3 U.S.C. § 105(a)(2)(B) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(B). The term also includes any person who was assigned from a private sector organization to an agency under the Information Technology Exchange Program, 5 U.S.C., chapter 37. An individual is subject to section 207(c) as a result of service as a special Government employee only if the individual served 60 or more days as a special Government employee during the one-year period before terminating service as a senior employee.

The fifth restriction [§ 207(d)] applies only to former "very senior personnel" (hereinafter referred to as "very senior employees"). A very senior employee is any employee who was employed in a position at a rate of pay payable for level I of the Executive Schedule, or in a position in the Executive Office of the

President at a rate of pay payable for level II of the Executive Schedule. The term includes the Vice President and those appointed by the President to a position under 3 U.S.C. § 105(a)(2)(A) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(A).

The sixth restriction [§ 207(f)] applies to individuals who formerly served in either a senior or very senior position.

The seventh restriction [§ 207(l)] applies to any person who was assigned from a private sector organization to an agency under the Information Technology Exchange Program, 5 U.S.C., chapter 37.

B. SUBSTANTIVE RESTRICTIONS

1. Basic Prohibition of 18 U.S.C. § 207(a)(1). No former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.

Discussion. This is a lifetime restriction that commences upon an employee's termination from Government service. The target of this provision is the former employee who participates in a matter while employed by the Government and who later "switches sides" by representing another person on the same matter before the United States. The restriction is measured by the duration of the matter in which the former employee participated.

The restriction does not apply unless a former employee communicates to or makes an appearance before the United States on behalf of some other person. For these purposes, the "United States" refers to any employee of any department, agency, court, or court-martial of the United States (but not of the District of Columbia). The term does not include the Congress, and therefore communications to or appearances before Members of Congress and legislative staff are not prohibited by this provision.

A former employee is not prohibited by this restriction from providing "behind-the-scenes" assistance in connection with the representation of another person. Moreover, the restriction prohibits only those communications and appearances that are made "with the intent to influence." A "communication" can be made orally, in writing, or through electronic transmission. An "appearance" extends to a former employee's mere physical presence at a proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An "intent to influence" the United States may be found if the communication or appearance is made for the purpose of seeking a discretionary

Government ruling, benefit, approval, or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular Government action to be taken. Accordingly, the prohibition does not apply to an appearance or communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.

A communication to or appearance before the United States is not prohibited unless it concerns the same particular matter involving a specific party or parties in which the former employee participated personally and substantially while employed by the Government. An employee can participate "personally" in a matter even though he merely directs a subordinate's participation. He participates "substantially" if his involvement is of significance to the matter. Thus, while a series of peripheral involvements may be insubstantial, participation in a single critical step may be substantial. The term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. In determining whether two situations are part of the same particular matter, one should consider all relevant factors, including the amount of time elapsed and the extent to which the matters involve the same basic facts or issues and the same or related parties. Even if a post-employment communication or appearance would concern the same particular matter, however, the representational bar will not apply unless the United States is a party or has a direct and substantial interest in that matter at the time of the post-employment representation.

The provision requires that an employee's official participation in a particular matter have taken place at a time when the matter involved a specific party (or parties). It also requires that the matter involve some specific party or parties at the time of the post-employment communication or appearance (although these can be different parties than were involved with the matter at the time of the employee's participation). General rulemakings do not usually involve specific parties. Consequently, it is quite possible that an employee who participated in a rulemaking while employed by the Government will, after leaving Government service, be able to appear before his former agency concerning the application of that rule to his new private sector employer without violating the lifetime restriction. Contracts, on the other hand, are always particular matters involving specific parties. A Government procurement has specific parties identified to it when a bid or proposal is received in response to a solicitation, if not before.

The provision does not prohibit a former employee from representing himself before the United States (as distinguished

from a corporation or consulting firm). Moreover, a former employee is not prohibited from acting on behalf of the United States (or the Congress). Thus, even though an individual may once have worked on a matter while employed by the Government, he will not, while subsequently reemployed by the Government, be barred from communicating with any employee of the United States concerning that matter if he does so as part of his official duties. A former employee does not act on behalf of the United States, however, merely because the United States may share the same objective as the person whom the former employee is representing.

2. Basic Prohibition of 18 U.S.C. § 207(a)(2). For two years after his Government service terminates, no former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of his employment with the United States.

Discussion. This is a two-year restriction that commences upon an employee's termination from Government service.

This provision is identical to the lifetime restriction discussed above except that it is of shorter duration and requires only that an individual have had official responsibility for a matter while employed by the Government, not that he have participated personally and substantially in that matter. Like the lifetime restriction, it prohibits certain communications and appearances made on behalf of any other person or entity except the United States (or the Congress). The communications and appearances prohibited are those made, with the intent to influence, to or before any employee of a department, agency, court, or court-martial of the United States. The representational bar applies with respect to any particular matter involving a specific party or parties that was actually pending under the former employee's official responsibility at some time during his last year of Government service.

"Official responsibility" is defined in 18 U.S.C. § 202 as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." The scope of an employee's official responsibility is usually determined by those areas assigned by statute, regulation, executive order, or job description. All particular matters under consideration in an

agency are under the official responsibility of the agency head, and each is under that of any intermediate supervisor having responsibility for the activities of a subordinate employee who actually participates in the matter. An employee's recusal from or other non-participation in a matter does not remove it from his official responsibility.

A matter was "actually pending" under a former employee's official responsibility if the matter was in fact referred to or under consideration by persons within the employee's area of responsibility. A former employee is not subject to the restriction, however, unless at the time of the proposed representation of another he knows or reasonably should know that the matter had been under his official responsibility during his last year of Government service.

3. <u>Basic Prohibition of 18 U.S.C. § 207(b)</u>. For one year after his Government service terminates, no former employee may knowingly represent, aid, or advise on the basis of covered information, any other person (except the United States) concerning any ongoing trade or treaty negotiation in which, during his last year of Government service, he participated personally and substantially as an employee.

<u>Discussion</u>. This is a one-year restriction that commences upon an employee's termination from Government service. Extending to certain "behind-the-scenes" assistance, this provision can serve to augment the representational bar provided for in the lifetime restriction discussed above.

The restriction set forth in section 207(b) does not apply unless, during the one-year period before he left Government, an employee participated personally and substantially in an "ongoing" trade or treaty negotiation that is covered by the statute. It is not necessary that a former employee have had actual contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation.

Trade negotiations covered by the statute are those that the President determines to undertake pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 2902). [Note: The specific statutory trade agreement authority referenced in section 207(b) has expired.] Unless there is an earlier public announcement of a determination by the President, a trade negotiation commences to be "ongoing" when, at least 90 days before entering into a trade agreement, the President notifies both the House of Representatives and the Senate of his intention to enter into an agreement (19 U.S.C. § 2903(a)(1)(A)). Whether an employee participated personally and substantially in an "ongoing" trade negotiation is determined by reviewing an employee's participation after trade negotiations commenced. A treaty is an international

agreement made by the President that requires the advice and consent of the Senate. A negotiation on a treaty commences to be "ongoing" at the point when both (1) the determination has been made by a competent authority that the outcome of a negotiation will be a treaty, and (2) discussions with a foreign government have begun on a text. Trade and treaty negotiations both cease to be ongoing when an agreement or treaty enters into force or when all parties to the negotiation cease discussion based on a mutual understanding that the agreement or treaty will not be consummated.

Once he has participated in an ongoing negotiation, section 207(b) prohibits a former employee from representing, aiding, or advising any other person concerning a trade or treaty negotiation (that is still ongoing) on the basis of certain "covered" information. "Covered" information refers to agency records which were accessible to the employee, which he knew or should have known were designated as exempt from disclosure under the Freedom of Information Act (e.g., documents that were marked as subject to a national security classification or those otherwise designated in a manner that made it clear they were exempt from release under FOIA), and which concern a negotiation in which the employee participated personally and substantially during his last year of Government service. A former employee is not prohibited from utilizing information from an agency record which, at the time of his post-employment activity, is no longer exempt from disclosure under the Freedom of Information Act.

Only activities that are undertaken on behalf of "any other person" are prohibited by this restriction. Action taken on behalf of the United States (or the Congress) or on behalf of the former employee himself are not prohibited. A former employee "represents" another person when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that person to or before any third party. For this purpose, a third party includes any employee of the executive, legislative, or judicial branch of the Federal Government, including a Member of Congress. A former employee "aids and advises" another person when he assists that person other than by communicating to or appearing before a third party. A former employee represents, aids, or advises another person "on the basis of" covered information if the former employee's representation, aid, or advice either involves a disclosure of covered information to any person, or could not have been made or rendered had the former employee not had actual knowledge of covered information.

It is important to note that although a post-employment activity may not be prohibited by section 207(b), a former employee must still be careful to comply with other statutory restrictions. For example, even though a trade or treaty negotiation may not yet have become "ongoing" at the time of an employee's official participation, the negotiation may nevertheless have had specific

parties identified to it, thus triggering the lifetime restriction set forth in section 207(a)(1).

4. 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 concerning which he seeks official action by that employee.

Discussion. This is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously. The purpose of this one-year "cooling off" period is to allow for a period of adjustment to new roles for the former senior employee and the agency he served, and to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former senior position. As already noted, this provision is applicable to "senior" employees, but not to "very senior" employees.

Like the lifetime restriction discussed above, this provision prohibits communications to and appearances before the Government and does not prohibit "behind-the-scenes" assistance. Unlike the lifetime restriction, however, this one-year restriction applies only to a "senior" employee, does not require that the former employee have ever been in any way involved in the matter that is the subject of the communication or appearance, and only prohibits communications to or appearances before employees of any department or agency in which he formerly served in any capacity during the one-year period prior to his termination from senior service. The representational bar applies with respect to any matter, whether or not involving a specific party, concerning which the former senior employee is seeking official action by a current employee of such department or agency on behalf of any other person except the United States (or the Congress).

As described below, section 207 provides for two methods by which the restrictions of section 207(c) can be narrowed or eliminated. The first is through the designation of separate departmental or agency components and the second is through the exemption of a position or category of positions from coverage. Not all senior employees are eligible to benefit from either or both of these procedures. A former senior employee is ineligible to benefit from these procedures if he is subject to section 207(c) by virtue of having served in a position for which the rate of pay is specified in or fixed according to the Executive Schedule or by virtue of having been appointed by the President to a position

under 3 U.S.C. § 105(a)(2)(B) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(B). A former senior employee who is subject to section 207(c) by virtue of having been assigned by a private sector organization to an agency under the Information Technology Exchange Program, 5 U.S.C., chapter 37, is eligible to benefit from the component designation procedure but not from the position exemption procedure.

As has been noted, the representational bar usually extends to any department or agency in which the former senior employee served in any capacity during the year prior to his termination from senior service. However, certain senior employees may be permitted to communicate to or appear before components of their former department or agency if those components have been designated as separate agencies or bureaus by OGE. For example, although it may not by statute be a separate component, OGE has designated the Defense Logistics Agency as an agency that exercises functions which are separate and distinct from its "parent" department, the Department of Defense. For a list of other designations of separate agencies, see appendix B to 5 C.F.R. part 2641. An individual formerly serving in a parent department or agency would be barred by section 207(c) from making communications to or appearances before any employee of that parent, but would not be barred as to employees of any designated component of that parent. An individual formerly serving in a designated component of a parent department or agency would be barred from communicating to or appearing before any employee of that component, but would not be barred as to any employee of the parent or of any other component. The statute now provides that no agency within the Executive Office of the President may be designated as a separate component.

The restrictions of section 207(c) can be waived altogether as to certain senior employee positions or categories of positions. As a consequence of such exemption, the one-year restriction of section 207(c) will not begin to run upon an employee's termination from such a position. In order to grant an exemption, OGE must receive a request to do so from a department or agency. After review of the request, OGE can grant an exemption or exemptions based upon its determination that as to a particular position or category of positions, the imposition of section 207(c) would create an undue hardship on the department or agency in obtaining qualified personnel and that the granting of the exemption would not create the potential for use of undue influence or advantage.

5. <u>Basic Prohibition of 18 U.S.C. § 207(d)</u>. For one year after service in a "very senior" position terminates, no former "very senior" employee may knowingly make, with the intent to influence, any communication to or appearance before any individual appointed to an Executive Schedule position or before any employee of a department or agency in which he served as a "very senior"

employee during the one-year period prior to termination from Government service, if that communication or appearance is made on behalf of any other person (except the United States), in connection with any matter concerning which he seeks official action by that individual or employee.

Discussion. This is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a very senior employee, not from the termination of Government service, unless the two occur simultaneously.

This provision, applicable only to "very" senior employees, is very similar to the one-year restriction of section 207(c) discussed above. It too prohibits communications to or appearances before employees of certain governmental departments and agencies, unless on behalf of the United States (or the Congress). A former very senior employee is prohibited by section 207(d) from representing another before any current employee of any department or agency in which he served as a very senior employee during the one-year period prior to his termination from Government service. (Compare section 207(c) which prohibits communications and appearances to current employees of any department or agency in which a former "senior" employee served in any capacity during the one-year period prior to termination from senior service.) A former very senior employee is also prohibited by section 207(d), however, from representing another person before any individual currently appointed to an Executive Schedule position listed in 5 U.S.C. §§ 5312-5316, whether or not that individual is serving in the very senior employee's former department or agency. The representational bar applies to any matter, whether or not involving a specific party, concerning which the former very senior employee is seeking official action by any current officer or employee of the executive branch.

Section 207 does not authorize OGE to designate separate and distinct components within a department or agency as a means of narrowing the scope of section 207(d). Moreover, no very senior employee's position is eligible for exemption from the application of section 207(d).

6. Basic Prohibition of 18 U.S.C. § 207(f). For one year after his service in a "senior" or "very senior" position terminates, no former "senior" employee or former "very 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 of the United States or aid or advise a foreign entity.

Discussion. This is a one-year restriction, except that it is permanent as applied to any individual who serves as the United

States Trade Representative or Deputy United States Trade Representative. The restriction is measured from the date when an employee ceases to be a senior employee or a very senior employee, not from the termination of Government service, unless the two occur simultaneously.

This restriction prohibits a former senior or very senior employee from representing, aiding, or advising a foreign entity with the intent to influence certain governmental officials. A "foreign entity" means the "government of a foreign country" as defined in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611), as amended, or a "foreign political party" as defined in section 1(f) of that Act. The government of a foreign country includes--

> any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.

A foreign political party includes--

> any organization or any other combination of individuals in a country other than the United States, or any unit or branch thereof, having for an aim or purpose, or which is engaged in any activity devoted in whole or in part to, the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country or a subdivision thereof, or the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country or a subdivision thereof.

A foreign commercial corporation will not generally be considered a "foreign entity" for purposes of section 207(f) unless it exercises the functions of a sovereign.

A former senior or very senior employee "represents" a foreign entity when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that entity to or before any employee of a department or agency. He "aids or advises" a foreign entity when he assists the entity other than by making such a communication or appearance. Such "behind the scenes" assistance to a foreign entity could, for example, include

drafting a proposed communication to an agency, advising on an appearance before a department, or consulting on other strategies designed to persuade departmental or agency decisionmakers to take certain action. A former senior or very senior employee's representation, aid, or advice is only prohibited if made or rendered with the intent to influence an official discretionary decision of a current departmental or agency employee.

7. Basic Prohibition of 18 U.S.C. § 207(l). For one year after the termination of his assignment from a private sector organization to an agency, under the Information Technology Exchange Program, 5 U.S.C., chapter 37, no former assignee may knowingly represent, or aid, counsel, or assist in representing any other person (except the United States) in connection with any contract with that agency.

Discussion. This prohibition, which was added as part of the E-Government Act of 2002, Pub. L. 107-347, § 209(d)(3), applies only to former private sector assignees under the Information Technology Exchange Program created by that Act. The one-year restriction is measured from the date when the former employee's assignment under the Program terminates.

This provision prohibits a former assignee from representing another person in connection with a contract with the agency to which the former assignee was assigned. A former assignee represents someone when he acts as agent or attorney or otherwise communicates or appears on behalf of another person in connection with a contract with the former agency. In addition to representational conduct, the prohibition also covers certain "behind-the-scenes" activity, i.e., aiding, counseling, or assisting in representing another person in connection with a contract with the former agency.

C. EXCEPTIONS

Sections 207(j) and (k) set forth several exceptions to the statute's substantive prohibitions. As noted below, some exceptions do not avoid application of all of the seven substantive restrictions of 18 U.S.C. § 207.

Performing Official Government Duties. A former employee is not restricted by any of the substantive provisions of section 207 from engaging in post-employment activities performed in carrying out official duties on behalf of the United States. This exception also extends to activities undertaken in carrying out official duties as an elected official of a state or local Government.

Representing Certain Entities A former senior or very senior employee will not violate section 207(c) or (d) if his communication or appearance is made in carrying out official duties

as an employee of and is made on behalf of (1) an agency or instrumentality of a State or local Government, (2) an accredited degree-granting institution of higher education as defined in section 101 of the Higher Education Act of 1965, as amended (20 U.S.C. § 1001), or (3) a hospital or medical research organization exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. § 501(c)(3)).

Representing or Assisting International Organizations. A former employee is not restricted by any of the substantive provisions of section 207 from representing, aiding, or advising an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interest of the United States.

Imparting Special Knowledge. A former senior or very senior employee will not violate section 207(c) or (d) if he makes a statement that is based on his own special knowledge in the particular area that is the subject of the statement, provided that he receives no compensation for making the statement.

Scientific or Technological Information or Expertise. A former employee will not violate section 207(a)(1), (a)(2), (c), or (d), if he makes a communication solely for the purpose of furnishing scientific or technological information in accordance with procedures acceptable to the agency involved. Alternatively, a former employee may make a communication if the head of the agency concerned publishes a certification in the Federal Register stating that the former employee has outstanding qualifications in a scientific, technological, or other technical discipline, that he is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the former employee's participation.

Testimony. A former employee is not restricted by any of the substantive restrictions of section 207 from giving testimony under oath or from making statements required to be made under penalty of perjury, subject to a special rule with respect to expert opinion testimony. Unless expert opinion testimony is given pursuant to court order, a former employee may not provide such testimony on a matter on behalf of any other person except the United States (or the Congress) if he is subject to the lifetime prohibition contained in section 207(a)(1) relating to that matter.

Representing Candidates or Certain Political Organizations. A former senior or very senior employee will not violate section 207(c) or (d) if his communication or appearance is on behalf of a candidate for Federal or State office or an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party.

Employment with Certain Prior Employers. A former employee is not restricted by any of the substantive restrictions of section 207 if granted one of 25 Presidential waivers in connection with his reemployment at a Government-owned, contractor operated entity.