

# BRIEFING PAPERS<sup>®</sup> WEST<sup>®</sup>

## SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

### POSTEMPLOYMENT CONFLICT-OF-INTEREST RESTRICTIONS ON FORMER EMPLOYEES OF THE EXECUTIVE BRANCH

By Joseph D. West, Diana G. Richard & Christyne K. Brennan

As stated by Congress over 30 years ago, the “fundamental character of the men and women who serve in federal office is, as it should be, a matter of great importance to the American public; and conflict of interest statutes are a reflection of that interest and concern.”<sup>1</sup> In this regard, Congress has established post-Government employment conflict-of-interest restrictions—more commonly referred to as “revolving door” restrictions—that significantly affect both former Government employees and their employers. The details of these restrictions are complex and vary by the relative seniority of the Government employee and “cooling-off” periods. Therefore, before initiating or participating in any employment discussions with former Government employees, it is important to fully understand the relevant restrictions and related regulatory guidance that may apply to such employees.

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Indeed, consideration of these revolving door restrictions is particularly timely due to the recent change in administration. As employees terminate their employment with the Government and enter the private workforce, former Government employees, as well as their new employers, will need to be cognizant of the relevant postemployment restrictions on the new employee’s role within the company. In this regard, employers will need to ensure that their compliance programs

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adequately address the relevant prohibitions and that employers monitor the activities of former Government employees. It should be further noted that such postemployment restrictions attach to the former Government employee and, therefore, may apply whether or not the employee becomes employed by a Government contractor. Thus, postemployment restrictions may apply to former Government employees who are employed by such nontraditional Government contractors as law firms.

Previous BRIEFING PAPERS have discussed the restrictions and limitations that govern the hiring of former Government employees, including postemployment conflict-of-interest restrictions.<sup>2</sup> Much of what they covered regarding such revolving door restrictions remains valid. However, over the past 10 years, there have been a number of developments (e.g., the Darleen Druyun scandal,<sup>3</sup> the Honest Leadership and Open Government Act of 2007,<sup>4</sup> and recent substantive revisions to the Office of Government Ethics' guidance concerning the postemployment conflict-of-interest statute, 18 U.S.C.A. § 207, as applied to former officers and employees of the executive branch<sup>5</sup>) that require a fresh look at this topic.

This BRIEFING PAPER builds on those earlier efforts and provides a current, basic overview of postemployment conflict-of-interest restrictions on former employees of the executive branch as set forth in 18 U.S.C.A. § 207. It includes background on the various iterations of postemployment conflict-of-interest restrictions, as well as a general discussion of the current postemployment restrictions on executive branch employees terminating their employment on or after January 1, 1991. In addition, this PAPER features certain

useful examples contained in the OGE's recent final rule that illustrate the application of the postemployment conflict-of-interest restrictions contained in 18 U.S.C.A. § 207. Finally, the PAPER presents a chart summarizing the postemployment conflict-of-interest restrictions applicable to former employees of the executive branch.

## Background

The Ethics in Government Act was enacted in 1962 to strengthen criminal laws relating to bribery, graft, and conflicts of interest, including conflicts of interest in post-Government employment.<sup>6</sup> Generally, the Act disqualified former officers and employees of the executive branch, of any independent agency of the United States, or of the District of Columbia in matters connected with their former duties or official responsibilities.<sup>7</sup> However, since then, the postemployment restrictions contained in the Act and, more specifically, the restrictions contained in the postemployment conflict-of-interest statute, 18 U.S.C.A. § 207, have been substantively modified and addressed in OGE regulations. Indeed, it appears that most modifications of post-Government employment conflict-of-interest restrictions have been largely in response to recurring Government scandals and a weakened public confidence in Government.<sup>8</sup>

In 1978, for example, the Act was amended largely in response to the Watergate scandal. In this regard, the Ethics in Government Act of 1978 created the OGE within the Office of Personnel Management,<sup>9</sup> and the OGE was later established as a separate agency in the executive branch.<sup>10</sup> The Director of the OGE was assigned certain

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responsibilities related to conflicts of interest and ethics in the executive branch, including:<sup>11</sup>

- (1) Developing and recommending to the Office of Personnel Management rules and regulations to be promulgated by the President, or the Office of Personnel Management pertaining to conflicts of interest and ethics in the executive branch.
- (2) Developing and recommending to the Office of Personnel Management rules and regulations to be promulgated by the President or the Office of Personnel Management pertaining to the identification and resolution of conflicts of interest.
- (3) Interpreting rules and regulations issued by the President or the Office of Personnel Management governing conflict-of-interest and ethical problems.
- (4) Consulting, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflict-of-interest problems in individual cases.
- (5) Assisting the Attorney General in evaluating the effectiveness of the conflict-of-interest laws and in recommending appropriate amendments.
- (6) Evaluating the need for changes in rules and regulations issued by the Office of Personnel Management and the agencies regarding conflict-of-interest and ethical problems with a view toward making such rules and regulations consistent with and an effective supplement to the conflict-of-interest laws.

Additionally, the Ethics in Government Act of 1978 extended the prior Act's one-year prohibition against representing private parties on matters within the official's former responsibility to two years and added other prohibitions on former senior Government employees, including a one-year prohibition on contacting the agency in which the former employee served as an officer or employee.<sup>12</sup> These prohibitions were highly controversial, resulting in a number of political and civil service federal employees leaving or threatening to leave their positions.<sup>13</sup> As a result,

in 1979, the postemployment restrictions were amended to limit certain of the restrictions to approximately 1,000 political appointees and military officers paid at or above the rank of lieutenant general and to carve out certain exceptions to the ban on contacting agencies if the former employee was representing state or local Governments, institutions of higher education, or nonprofit hospital or medical research organizations.<sup>14</sup>

In 1989, the Ethics Reform Act further modified the postemployment conflict-of-interest restrictions by extending the restrictions on former employees of the executive branch to former officers, employees, and elected officials of the legislative branch.<sup>15</sup> These restrictions appear to have been implemented largely in response to continuing public concerns regarding allegedly unethical postemployment actions by Government personnel. In 1988, for example, the U.S. House of Representatives Committee on the Judiciary reported:<sup>16</sup>

[I]n 1986, new concerns about the post-employment activities of government personnel were raised when a high-level federal official left government office and immediately became a consultant for a foreign entity regarding the textile negotiations on which the former employee had worked during his government service. Later allegations of unethical post-employment conduct by Michael K. Deaver and Franklyn C. Nofziger (Mr. Nofziger was convicted of violations of the post-employment statute), and general allegations of unethical conduct among government employees have led to a reconsideration of the adequacy of the current ethics statutes. One of the statutes regarding which questions have been raised...imposes post-employment restrictions on former Executive Branch employees. Questions have also been raised as to whether former Members of Congress and congressional staff should be subject to similar restrictions.

Therefore, ultimately, the Ethics Reform Act extended the postemployment restrictions in 18 U.S.C.A. § 207 to members of Congress, their personal staff, committee staff, and leadership staff.

In 2004, diminished public confidence stemming from a major Government procurement scandal prompted Government action to ensure compliance with postemployment restrictions by DOD personnel. Principal Deputy Assistant Secretary of the Air Force for Acquisition and

Management Darleen Druyun pleaded guilty to criminal conspiracy and admitted to negotiating a job with Boeing while overseeing a deal between the Air Force and Boeing.<sup>17</sup> In response, Deputy Defense Secretary Paul Wolfowitz directed changes to Department of Defense ethics regulations, including mandating that information on postemployment restrictions be included in DOD ethics training and requiring that all DOD personnel leaving the DOD receive guidance on applicable postemployment restrictions.<sup>18</sup>

Furthermore, more recently, in January 2009, the DOD issued an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement a provision of the National Defense Authorization Act for Fiscal Year 2008 requiring certain DOD officials (primarily officials who participated personally and substantially in a DOD acquisition exceeding \$10 million or who held a senior position as defined in the Act), within two years after leaving service in the DOD and before accepting compensation from a DOD contractor, to request a written opinion from a DOD ethics official regarding the applicability of postemployment restrictions to the activities that the former official may undertake on behalf of the contractor.<sup>19</sup> In addition, both the Act and interim rule provide that a DOD contractor may not knowingly provide compensation to certain former DOD officials, within two years after such former official leaves service in the DOD, without first determining that the former official has sought and received (or has not received after 30 days of seeking) a written opinion from the appropriate DOD ethics official regarding the applicability of postemployment restrictions to the activities that the former official is expected to undertake on behalf of the contractor.<sup>20</sup>

Finally, the latest substantive statutory revisions to the postemployment conflict-of-interest statute, 18 U.S.C.A. § 207, are contained in the Honest Leadership and Open Government Act of 2007.<sup>21</sup> Among other things, that Act extended the one-year restriction on the ability of very senior personnel of the executive branch and independent agencies to influence certain Government officers and employees to two years after the termination of that person's service in that position. Furthermore, the Act attempted

to regain public confidence by making changes in federal election and lobbying laws, as well as in the House and Senate rules.<sup>22</sup>

## OGE Postemployment Conflict-Of-Interest Regulations

In response to the complexity and various amendments to the postemployment restrictions, the OGE has published regulatory guidance explaining the scope and content of the postemployment conflict-of-interest statute, 18 U.S.C.A. § 207, with regard to former executive branch employees. In 1980, the OGE first published regulations, codified in Title 5 of the *Code of Federal Regulations* at Part 737 (now 5 C.F.R. Part 2637), to “supplement and particularize the restrictions on post employment activity” established by the Ethics in Government Act of 1978.<sup>23</sup> These regulations were modified over the years, with the last substantive revision in 1993.<sup>24</sup> This original guidance contained in 5 C.F.R. Part 2637 only applies to Government employees terminating their employment *before* January 1, 1991.<sup>25</sup> For this reason, the OGE's most recent regulatory guidance, dated June 25, 2008, removed Part 2637 in its entirety, with the proviso that the last published edition of Part 2637 will be retained by agency ethics officials for interpretative guidance.<sup>26</sup>

For executive branch employees terminating their employment *on or after* January 1, 1991, the OGE's guidance regarding applicable postemployment conflict-of-interest restrictions is codified at 5 C.F.R. Part 2641. Similar to Part 2637, these regulations have been modified over the years and as recently as June 25, 2008.<sup>27</sup> This recent OGE regulatory guidance regarding the restrictions currently set forth in 18 U.S.C.A. § 207 is the subject of this BRIEFING PAPER and is discussed further below.

## All Former Employees

Certain postemployment restrictions apply to *all* former employees of the executive branch, regardless of whether the employee is a senior employee, very senior employee, or special Government employee. In this regard, it should be noted that the OGE's guidance regarding the

definition of “employee” was recently revised to clarify that this term includes both employees serving with or without compensation.<sup>28</sup> Specifically, “employee” for purposes of postemployment restrictions on executive branch employees is defined as<sup>29</sup>

any officer or employee of the executive branch or any independent agency that is not a part of the legislative or judicial branches. The term does not include the President or the Vice President, an enlisted member of the Armed Forces, or an officer or employee of the District of Columbia. The term includes an individual appointed as an employee or detailed to the Federal Government under the Intergovernmental Personnel Act (5 U.S.C. 3371–3376) or specifically subject to [18 U.S.C.] section 207 under the terms of another statute. It encompasses senior employees, very senior employees, special Government employees, and employees serving without compensation.

And, a “former employee” is “an individual who has completed a period of service as an employee.”<sup>30</sup>

#### ■ Permanent Restriction

All former employees are permanently restricted from “knowingly, with an intent to influence,” making “any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which [the former employee] participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.”<sup>31</sup> This “permanent” restriction commences upon an employee’s termination from Government employment and “lasts for the life of the particular matter involving specific parties in which the employee participated personally and substantively.”<sup>32</sup> The permanent restriction, however, does not apply to a former employee who is (1) acting on behalf of the United States, (2) acting as an elected state or local government official, (3) communicating “scientific or technological” information pursuant to certain procedures or certification, (4) testifying under oath, (5) acting on behalf of an international organization pursuant to a waiver, or (6) acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver.<sup>33</sup>

The OGE’s regulations provide that a former employee makes a “communication” when he

“imparts or transmits information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in written correspondence, by electronic media, or by any other means.”<sup>34</sup> And, a former employee makes an “appearance” when he is “physically present before an employee of the United States, in either a formal or informal setting.”<sup>35</sup>

For the prohibition to apply, the communication or appearance must be *to or before* an employee of the United States.<sup>36</sup> An employee of the United States includes the President, the Vice President, and any current federal employee who is detailed to or employed by any agency, any independent agency in the executive, legislative, or judicial branch, any federal court, or any court-marital.<sup>37</sup> Moreover, the communication or appearance must be made *on behalf of* another person.<sup>38</sup> A communication or appearance is made on behalf of another person if the former employee is acting as that person’s agent or attorney or if (a) the former employee is acting “with the consent of the other person, whether express or implied” and (b) the former employee is acting “subject to some degree of control or direction by the other person in relation to the communication or appearance.”<sup>39</sup>

This permanent prohibition (as do many of the other prohibitions contained in 18 U.S.C.A. § 207 as discussed further below) applies only to a communication or appearance made with “the intent to influence.”<sup>40</sup> In this regard, the OGE’s recent guidance provides further clarity regarding the statutory element of the intent to influence in 18 U.S.C.A. § 207. Expressly, the regulations provide that a communication or appearance is made with “the intent to influence” when made for the purpose of (1) “[s]eeking a Government ruling, benefit, approval, or other discretionary Government action” or (2) “[a]ffecting Government action in connection with an issue or aspect of a matter which involves an appreciable element of actual or potential dispute or controversy.”<sup>41</sup> In one relevant example of such an intent to influence, the OGE describes the following situation:<sup>42</sup>

A former Government employee calls an agency official to complain about the auditing methods being used by the agency in connection with an

audit of a Government contractor for which the former employee serves as a consultant. The former employee has made a communication with the intent to influence because his call was made for the purpose of seeking Government action in connection with an issue involving an appreciable element of dispute.

Thus, if a former employee makes a communication or appearance for the purpose of seeking or affecting Government action, the communication or appearance will be considered to have been made with the intent to influence.

Similarly, the OGE's recent regulations provide guidance regarding what is *not* an intent to influence. Such examples of a communication or appearance *not* made with the intent to influence include communications or appearances made solely for the purpose of making a routine request (such as an inquiry as to the status of a matter), making a communication (at the invitation of the Government and during a routine Government site visit) concerning work performed under a Government contract, and purely social contacts.<sup>43</sup> The OGE regulations include the following pertinent example of such an intent *not* to influence:<sup>44</sup>

An agency official visits the premises of a prospective contractor to evaluate the testing procedure being proposed by the contractor for a research contract on which it has bid. A former employee of the agency, now employed by the contractor, is the person most familiar with the technical aspects of the proposed testing procedure. The agency official asks the former employee about certain technical features of the equipment used in connection with the testing procedure. The former employee may provide factual information that is responsive to the questions posed by the agency official, as such information is requested by the Government under circumstances for its convenience in reviewing the bid.

This example adds, however, that “the former employee may *not* argue for the appropriateness of the proposed testing procedure or otherwise advocate any position on behalf of the contractor,” as this action may involve an intent to influence.<sup>45</sup>

It should also be noted that the regulations provide that a former employee's “mere physical presence,” without any communication by the former employee, may be tantamount to an appearance with an intent to influence. Therefore,

whether such an appearance constitutes an intent to influence requires a consideration of certain factors including, among other considerations, whether (1) the former employee has been given “actual or apparent authority to make any decisions, commitments, or substantive arguments in the course of the appearance”; (2) the former employee's presence is “relatively prominent”; (3) the former employee is paid for making the appearance; and (4) the appearance is before “former subordinates or others in the same chain of command as the former employee.”<sup>46</sup> One OGE example of such intent to influence by the former employee's mere physical presence is as follows:<sup>47</sup>

A former Regional Administrator of the Occupational Safety and Health Administration (OSHA) becomes a consultant for a company being investigated for possible enforcement action by the regional OSHA office. She is hired by the company to coordinate and guide its response to the OSHA investigation. She accompanies company officers to an informal meeting with OSHA, which is held for the purpose of airing the company's explanation of certain findings in an adverse inspection report. The former employee is introduced at the meeting as the company's compliance and governmental affairs adviser, but she does not make any statements during the meeting concerning the investigation. She is paid a fee for attending this meeting. She has made an appearance with the intent to influence.

Additionally, the permanent restriction applies only to communications or appearances in connection with the “same particular matter” involving specific parties in which the former employee participated as a Government employee.<sup>48</sup> The OGE regulatory guidance states that, in determining whether the same particular matter is involved, “all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed.”<sup>49</sup> In addition, the recent OGE guidance added new language emphasizing specific considerations of the same particular matter with regard to contracts. For example, the OGE regulations state that, generally, successive or otherwise separate contracts will be viewed as different matters from each other, absent some indication that one contract contemplated the other or that both are in support of the same

specific proceeding.<sup>50</sup> Two of the several useful examples of the “same particular matter” included in the OGE’s recent guidance consist of the following:<sup>51</sup>

An employee drafted one provision of an agency contract to procure new software. After she left Government, a dispute arose under the same contract concerning a provision that she did not draft. She may not represent the contractor in this dispute. The contract as a whole is the particular matter involving specific parties and may not be fractionalized into separate clauses for purposes of avoiding the prohibition of 18 U.S.C. 207(a)(1).

\* \* \*

In the previous example, a new software contract was awarded to the same contractor through a full and open competition, following the employee’s departure from the agency. Although no major changes were made in the contract terms, the new contract is a different particular matter involving specific parties.

Finally, it should be noted that this permanent restriction on communications to or appearances before a U.S. employee in connection with a particular matter applies only to matters in which the former employee participated “personally and substantially” as a Government employee. “Personally” means to participate directly or through direct and active supervision.<sup>52</sup> “Substantially” means that the employee’s involvement is “of significance” to the matter.<sup>53</sup> And, it should be noted that a former employee’s participation includes not only affirmative actions in the employee’s official capacity, but also purposeful forbearance.<sup>54</sup> The OGE’s recent guidance added a useful example for determining whether a former employee’s forbearance may be considered participation.<sup>55</sup>

The director of an agency office must concur in any decision to grant an application for technical assistance to certain nonprofit entities. When a particular application for assistance comes into her office and is presented to her for decision, she intentionally takes no action on it because she believes the application will raise difficult policy questions for her agency at this time. As a consequence of her inaction, the resolution of the application is deferred indefinitely. She has participated personally and substantially in the matter.

Therefore, it is important to remember that this permanent restriction may apply both to former affirmative actions and decisions *not to act*.

## ■ Two-Year Restriction

All former employees are also restricted, for a period of two years, from “knowingly, with the intent to influence,” making “any communication to or appearance before an employee of the United States on behalf of any other person 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 Government service.”<sup>56</sup> This prohibition, like the permanent restriction described above, does not apply to a former employee who is (1) acting on behalf of the United States, (2) acting as an elected state or local Government official, (3) communicating “scientific or technological” information pursuant to certain procedures or certification, (4) testifying under oath, (5) acting on behalf of an international organization pursuant to a waiver or (6) acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver.<sup>57</sup>

In addition, identical to the permanent restriction, the communication or appearance must be *to or before* an employee of the United States for the prohibition to apply. As noted above, in this regard, an employee of the United States includes the President, the Vice President, and any current federal employee who is detailed to or employed by any agency, any independent agency in the executive, legislative, or judicial branch, any federal court, or any court-marital.<sup>58</sup> Moreover, as in the case of the permanent restriction, the communication or appearance must be made *on behalf of* another person, which means that the former employee must be (a) acting as that person’s agent or attorney or (b) acting “with the consent of the other person, whether express or implied” and “subject to some degree of control or direction by the other person in relation to the communication or appearance.”<sup>59</sup>

Both this two-year prohibition and the permanent restriction apply only to communications or appearances in connection with the same particular matter involving specific parties in which the former employee participated as a

Government employee.<sup>60</sup> As discussed above, the OGE regulatory guidance states that, in determining whether the same particular matter is involved, “all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed.”<sup>61</sup> The OGE guidance on specific considerations for determining whether the same particular matter is involved with regard to contracts and examples applicable to the permanent restriction are likewise applicable to the two-year prohibition.<sup>62</sup>

Finally, it should be noted that a communication or appearance is not prohibited under this two-year restriction unless “at the time of the proposed post-employment communication or appearance, the former employee knows or reasonably should know that the matter was actually pending under his official responsibility within the one-year period prior to his termination from Government service.”<sup>63</sup> The OGE guidance notes that 18 U.S.C.A. § 207(a)(2) requires only that the former employee “reasonably should know” that the matter was pending under his official responsibility, and, therefore, if facts suggest that a matter could have been pending under the former employee, the former employee should seek further information from an agency ethics official.<sup>64</sup>

### ■ One-Year Restriction

All former employees are also restricted, for a period of one year, on the basis of “covered information,” from knowingly representing, aiding or advising any person regarding “an ongoing trade or treaty negotiation in which, during [the former employee’s] last year of Government service, [the former employee] participated personally and substantially as an employee.”<sup>65</sup> “Covered information” means “agency records which were accessible to the former employee which he knew or should have known were designated as exempt from disclosure under the Freedom of Information Act.”<sup>66</sup> Similar to the permanent and two-year restrictions discussed above, this prohibition does not apply to a former employee who is acting on behalf of the United States, acting

as an elected state or local government official, testifying under oath, acting on behalf of an international organization pursuant to a waiver, or acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver.<sup>67</sup> However, this prohibition may apply to a former employee who is communicating “scientific or technological” information pursuant to certain procedures or certification, as this exemption is not expressly included with regard to the one-year restriction on former employees.<sup>68</sup>

### Former Senior Employees

In addition to the restrictions on *all* former employees, certain postemployment restrictions apply specifically to former *senior* employees. In this regard, the OGE’s recent guidance added a new category of senior employee and revised the definition of “senior employee” to conform with revisions to 18 U.S.C.A. § 207(c).<sup>69</sup> Specifically, assignees from private sector organizations under the Information Technology Exchange Program, created by the E-Government Act,<sup>70</sup> were added as senior employees.<sup>71</sup> In addition, the recent OGE guidance also revised the rate of basic pay equivalent for senior employees from the former level 5 of Senior Executive Service to 86.5% of level II of the Executive Schedule.<sup>72</sup> In this regard, the current definition of “senior employee” is an employee, other than a very senior employee, who is:<sup>73</sup>

(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 employee is paid at a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule; or, for a period of two years following November 24, 2003, 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; for purposes of this paragraph, “rate of basic pay” does not include locality-based adjustments or additional pay such as bonuses, awards and various allowances;

(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) An active duty commissioned officer of the uniformed services serving in a position for which the pay grade (as specified in 37 U.S.C. 201) is pay grade O-7 or above; or

(6) Assigned from a private sector organization under chapter 37 of 5 U.S.C. (Information Technology Exchange Program).

#### ■ One-Year Restriction On Representations To Former Agency

All former senior employees are prohibited, for one-year after termination of service in a senior position, from “knowingly, with an intent to influence,” making “any communication to or appearance before an employee of an agency in which [the former senior employee] served in any capacity within the one-year period prior to [the former senior employee’s] termination from a senior position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former senior employee seeks official action by any employee of such agency.”<sup>74</sup> It should be noted that this one-year restriction commences when the senior employee concludes his service in a senior employee position, and it does not necessarily commence from termination of Government employment.<sup>75</sup> Furthermore, it should be noted that certain positions in the Department of Justice and the Securities and Exchange Commission have been waived from the application of this one-year restriction.<sup>76</sup>

The OGE guidance provides that a former senior employee seeks official action when the circumstances establish that he is making his communication or appearance for the purpose of inducing a current Government employee to make a decision or to otherwise act in his official capacity.<sup>77</sup> This prohibition on seeking official action applies to (1) “any particular matter involving a specific party or parties,” (2) the “consideration or adoption of broad policy options that are directed to the interest of a large and diverse group of persons,” (3) a new matter that was “not previously pending at or of interest to the former senior employee’s former agency,” and (4) a matter “pending at any other agency in the executive branch, an independent agency, the legislative branch, or the judicial branch.”<sup>78</sup>

Two useful OGE examples for determining what is or is not a matter on which a former senior employee seeks official action include the following:<sup>79</sup>

A former senior employee at the National Capital Planning Commission (NCPC) wishes to contact a friend who still works at the NCPC to solicit a donation for a local charitable organization. The former senior employee may do so since the circumstances establish that he would not be making the communication for the purpose of inducing the NCPC employee to make a decision in his official capacity about the donation.

\* \* \*

A former senior employee at the Department of Defense wishes to contact the Secretary of Defense to ask him if he would be interested in attending a cocktail party. At the party, the former senior employee would introduce the Secretary to several of the former senior employee’s current business clients who have sought the introduction. The former senior employee and the Secretary do not have a history of socializing outside the office, the Secretary is in a position to affect the interests of the business clients, and all expenses associated with the party will be paid by the former senior employee’s consulting firm. The former senior employee should not contact the Secretary. The circumstances do not establish that the communication would be made other than for the purpose of inducing the Secretary to make a decision in his official capacity about the invitation.

As these examples illustrate, it is important to consider all facts when determining whether a former senior employee may be seeking official action in violation of this one-year prohibition.

#### ■ One-Year Restriction On Representations On Behalf Of Foreign Entity

Former senior employees are also prohibited, for one year, from “knowingly represent[ing] a foreign government or foreign political party before an officer or employee of an agency or department of the United States, or aid[ing] or advis[ing] such a foreign entity, with the intent to influence a decision of such officer or employee.”<sup>80</sup> However, it should be noted that former U.S. Trade Representatives or Deputy U.S. Trade Representatives are permanently restricted from representing a foreign government or foreign political party in this capacity.<sup>81</sup> And, certain positions in the Department of Justice and the Securities and Exchange Commission

have been waived from the applicability of this one-year restriction.<sup>82</sup> Finally, for purposes of this one-year restriction only, the OGE's recent guidance clarifies that an officer or employee includes the President, the Vice President, and members of Congress.<sup>83</sup>

## Former Very Senior Employees

Certain postemployment restrictions also apply specifically to former *very senior* employees. A "very senior employee" is an employee who is:<sup>84</sup>

(1) Employed in a position which is either listed in 5 U.S.C. 5312 or for which the rate of pay is equal to the rate of pay payable for level I of the Executive Schedule;

(2) Employed in a position in the Executive Office of the President which is either listed in 5 U.S.C. 5313 or for which the rate of pay is equal to the rate of pay payable for level II of the Executive Schedule;

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

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

Therefore, very senior employees include the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Labor, the Secretary of Transportation, the Secretary of Energy, the Secretary of Veterans Affairs, the Secretary of Homeland Security, the Director of the Office of Management and Budget, the Director of National Intelligence, and the U.S. Trade Representative.<sup>85</sup> Very senior employees also include the Deputy Secretaries of State, Defense, Labor, Transportation, and Energy, the Director of Central Intelligence, the Secretaries of the Air Force, Army, and Navy, the Director of the National Science Foundation, the Deputy Attorney General, and the Administrator of the Federal Emergency Management Agency.<sup>86</sup>

### ■ Two-Year Restriction On Representations To Former Agency

In addition to the restrictions on all former employees, former very senior employees are prohibited, for two years, from "knowingly, with an intent to influence," making "any communication to or appearance before any official

appointed to an Executive Schedule position listed in 5 U.S.C. 5312–5316 or before any employee of an agency in which [the former very senior employee] served as a very senior employee within the one-year period prior to his termination from a very senior employee position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former very senior employee seeks official action by any official or employee."<sup>87</sup> It should be noted that a communication to a subordinate of an official listed in 5 U.S.C.A. §§ 5312–5316 may also be prohibited by this two-year restriction if the communication is made with the intent that the information is to be conveyed to the official and attributed to the former very senior employee.<sup>88</sup> In this regard, the OGE's guidance provides the following relevant examples:<sup>89</sup>

The former Secretary of the Department of Labor may not represent another person in a meeting with the current Secretary of Transportation to discuss a proposed regulation on highway safety standards.

\* \* \*

In the previous example, the former very senior employee would like to meet instead with the special assistant to the Secretary of Transportation. The former employee knows that the special assistant has a close working relationship with the Secretary. The former employee expects that the special assistant would brief the Secretary about any discussions at the proposed meeting and refer specifically to the former employee. Because the circumstances indicate that the former employee intends that the information provided at the meeting would be conveyed by the assistant directly to the Secretary and attributed to the former employee, he may not meet with the assistant.

Therefore, the postemployment restrictions may effectively prohibit a very senior employee's communications with both an official listed in 5 U.S.C.A. §§ 5312–5316 and the official's subordinates.

### ■ One-Year Restriction On Representations On Behalf Of Foreign Entity

Similar to former senior employees, very senior employees are also prohibited, for one year, from "knowingly represent[ing] a foreign government or foreign political party before an officer or employee of an agency or department of the United

## Summary Of Postemployment Conflict-Of-Interest Restrictions On Former Employees Of The Executive Branch

	Permanent Restriction	Two-Year Restriction	One-Year Restriction
<b>Former Employees</b>	Any communication to or appearance before, with the intent to influence, an employee of the United States on behalf of any other person 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.	Any communication to or appearance before, with the intent to influence, an employee of the United States on behalf of any other person 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 Government service.	On the basis of covered information, representing, aiding, or advising any person regarding an ongoing trade or treaty negotiation in which, during his last year of Government service, he participated personally and substantially as an employee.
<b>Former Senior Employees</b>	The permanent restriction set forth above with regard to former employees applies to former senior employees.	The two-year restriction set forth above with regard to former employees applies to former senior employees.	The one-year restriction set forth above with regard to former employees applies to former senior employees. In addition: Any communication to or appearance before, with the intent to influence, an employee of an agency in which he served in any capacity within the one-year period prior to his termination from a senior position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former senior employee seeks official action by any employee of such agency. Representing a foreign government or foreign political party before an officer or employee of an agency or department of the United States, or aiding or advising such a foreign entity, with the intent to influence a decision of such officer or employee.
<b>Former Very Senior Employees</b>	The permanent restriction set forth above with regard to former employees applies to former very senior employees.	The two-year restriction set forth above with regard to former employees applies to former very senior employees. In addition: Any communication to or appearance before, with the intent to influence, any official appointed to an Executive Schedule position listed in 5 U.S.C.A. §§ 5312–5316 or before any employee of an agency in which he served as a very senior employee within the one-year period prior to his termination from a very senior employee position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former very senior employee seeks official action by any official or employee.	The one-year restriction set forth above with regard to former employees applies to former very senior employees. In addition: Representing a foreign government or foreign political party before an officer or employee of an agency or department of the United States, or aiding or advising such a foreign entity, with the intent to influence a decision of such officer or employee.
<b>Information Technology Exchange Program Assignees</b>			Representing, aiding, counseling or assisting in representing any other person in connection with any contract with the agency to which the assignee was assigned.

States, or aid[ing] or advis[ing] such a foreign entity, with the intent to influence a decision of such officer or employee.”<sup>90</sup>

### Former Information Technology Exchange Program Assignees

In 2002, 18 U.S.C.A. § 207(c) was amended to include postemployment restrictions on a new category of former employee: Information Technology Exchange Program assignees.<sup>91</sup> Specifically, the E-Government Act of 2002 created the Information Technology Exchange Program under which certain information technology

personnel of a private sector organization may be assigned to a federal agency for a period of time. In this regard, 18 U.S.C § 207 was revised to include a postassignment prohibition on such former information technology personnel, and the OGE’s recent guidance includes a new section addressing this revision. Specifically, any employee of a private sector organization that is assigned to an agency under the Information Technology Exchange Program is prohibited, for one year after his termination of assignment, from knowingly representing, aiding, counseling, or assisting in representing “any other person in connection with any contract with that agency.”<sup>92</sup>

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## GUIDELINES

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These *Guidelines* are designed to assist you in complying with postemployment restrictions on former employees of the executive branch. They are not, however, a substitute for professional representation in any specific situation.

1. If you are uncertain whether a former Government employee may be affected by any restrictions set forth in 18 U.S.C.A. § 207 and discussed in 5 C.F.R. Part 2641, it is prudent to seek advice from a designated agency ethics official in the former employee’s agency.

2. Where possible, when hiring a former Government employee, request that, before the employee commences employment, the employee provide a letter from a designated agency ethics official that sets forth the postemployment restrictions on that employee.

3. Require former Government employees, in their employment agreement, to acknowledge their understanding of and agreement to all applicable postemployment restrictions.

4. Ensure that the company’s code of business ethics and conduct and compliance program address potential postemployment restrictions on former Government employees.

5. Establish internal controls to regulate the activities of former Government employees subject to postemployment restrictions.

6. Train all employees who may initiate contact with prospective Government hires on postemployment restrictions, in addition to other limitations that govern the hiring of former Government employees.

7. Monitor closely the activities of former Government employees subject to postemployment restrictions.

8. Avoid assigning former Government employees to projects that have the possibility of implicating postemployment restrictions.

9. Given new Government contractor business ethics compliance program and disclosure requirements, violations of postemployment restrictions may trigger mandatory disclosure requirements by Government contractors.

10. Be aware that failure to disclose violations of postemployment restrictions to the Government may subject a Government contractor to suspension and/or debarment.

11. Note that the postemployment restrictions attach to the former Government employee and therefore, may apply whether or not the employee becomes employed by a Government contractor. For example, such postemployment restrictions may apply to a former Government employee who is hired by a law firm.

## ★ REFERENCES ★

- 1/ S.Rep.No.95-170,at31 (1977),asreprinted in 1978 U.S.C.C.A.N. 4216, 4247.
- 2/ Several years have passed since the last Briefing Paper addressing this topic in depth. See Goddard, "Business Ethics in Government Contracting—Part I," Briefing Papers No. 03-06 (May 2003); Levy, Pankowski & Flyer, "A Contractor's Guide to Hiring Government Employees," Briefing Papers No. 96-8 (July 1996). In part because of this long period, this Paper is written as a stand-alone resource, not as a subsequent edition. This Paper, however, contains material that of necessity overlaps with previous Papers on this issue, the authors of which are gratefully acknowledged. See also Irwin & Ryan, "Leveraging the Human Resources Function in Government Contractor Compliance," Briefing Papers No. 08-12 (Nov. 2008).
- 3/ See 46 GC ¶ 181.
- 4/ Pub.L.No.110-81, 121 Stat.735 (Sept.14, 2007).
- 5/ 73 Fed. Reg. 36168 (June 25, 2008).
- 6/ Pub.L.No.87-849, 76 Stat. 1119 (1962).
- 7/ Pub.L.No.87-849, § 1(a), 76 Stat. 1119, 1123 (1962) (amending 18 U.S.C.A. § 207).
- 8/ S.Rep.No.95-170,at32(1977),asreprinted in 1978 U.S.C.C.A.N. 4216, 4248 ("The more stringent requirements are justified. Today public confidence in government has been weakened by a widespread conviction that federal officials use public office for personal gain, particularly after they leave government service. There is a sense that a 'revolving door' exists between industry and government; that federal officials 'go easy' while in office in order to reap personal gain afterward. That in turn leads to a suspicion that personal profit was the motivation for the appointment in the first instance. All of this is repulsive to universally held principles of public service.").
- 9/ Pub.L.No.95-521, § 401, 92 Stat. 1824 (1978).
- 10/ Pub.L.No.100-598, § 3, 102 Stat. 3031 (1988).
- 11/ Pub.L.No.95-521, § 402, 92 Stat. 1824 (1978).
- 12/ Pub.L.No.95-521, § 501(a), 92 Stat. 1824 (1978) (amending 18 U.S.C.A. § 207); see also S. Rep. No. 95-170, at 32 (1977), as reprinted in 1978 U.S.C.C.A.N. 4216, 4248.
- 13/ H.R. Rep. No. 100-1068, at 10 (1988).
- 14/ Pub.L.No.96-28,93Stat.76(1979) (amending 18 U.S.C.A. § 207); see also H.R. Rep. No. 100-1068, at 10 (1988).
- 15/ Pub.L.No.101-194, 103 Stat.1716 (1989) (amending 18 U.S.C.A. § 207).
- 16/ H.R. Rep. No. 100-1068, at 10 (1988).
- 17/ See 46 GC ¶ 181.
- 18/ DOD Press Release No. 1309-04, "Post-Government Service Employment Restriction Changes Announced," <http://www.defenselink.mil/releases/release.aspx?releaseid=8079> (Dec. 20, 2004) (announcing changes to DOD Directive 5500.7-R).
- 19/ Pub.L.No.110-181, § 847(a)(1), 122 Stat. 3, 243 (2008); 74 Fed. Reg. 2408 (Jan. 15, 2009); see 51 GC ¶ 30.
- 20/ Pub.L.No.110-181, § 847(a)(4), 122 Stat. 3, 243 (2008); 74 Fed. Reg. 2408 (Jan. 15, 2009).
- 21/ Pub.L.No.110-81, § 101, 121 Stat.735, 736 (2007) (amending 18 U.S.C.A. § 207).
- 22/ See generally Dover, Gilliland & Bell, "Lobbying Disclosure Act/Edition II," Briefing Papers No. 08-8 (July 2008).
- 23/ 45 Fed. Reg. 7402 (Feb. 1, 1980).
- 24/ 58 Fed. Reg. 69176 (Dec. 30, 1993).
- 25/ Introductory note to 5 C.F.R. pt. 2637 ("The post-employment conflict of interest restrictions of 18 U.S.C. 207 were substantially revised effective January 1, 1991, by the Ethics Reform Act of 1989, Public Law No. 101-194, 103 Stat. 1716, with technical amendments enacted by Public Law No. 101-280, 104 Stat. 149 (1990). The Office of Government Ethics has published substantive guidance for the executive branch concerning the amended version of 18 U.S.C. 207 in part 2641 of this subchapter. This part 2637 will continue to provide guidance concerning the previous version of section 207, which will continue to apply to individuals terminating Government service prior to January 1, 1991.").
- 26/ 73 Fed. Reg. 36168 (June 25, 2008).
- 27/ 73 Fed. Reg. 36168 (June 25, 2008).
- 28/ 73 Fed. Reg. 36168, 36170 (June 25, 2008).
- 29/ 5 C.F.R. § 2641.104 (emphasis added).
- 30/ 5 C.F.R. § 2641.104.

- 31/ 5 C.F.R. § 2641.201(a); 18 U.S.C.A. § 207(a)(1).
- 32/ 5 C.F.R. § 2641.201(c).
- 33/ 5 C.F.R. § 2641.201(b).
- 34/ 5 C.F.R. § 2641.201(d)(1).
- 35/ 5 C.F.R. § 2641.201(d)(2).
- 36/ 5 C.F.R. § 2641.201(a); 18 U.S.C.A. § 207(a)(1).
- 37/ 5 C.F.R. § 2641.201(f).
- 38/ 5 C.F.R. § 2641.201(a); 18 U.S.C.A. § 207(a)(1).
- 39/ 5 C.F.R. § 2641.201(g)(1).
- 40/ 5 C.F.R. § 2641.201(a); 18 U.S.C.A. § 207(a)(1).
- 41/ 5 C.F.R. § 2641.201(e)(1).
- 42/ 5 C.F.R. § 2641.201(e)(1), Example 2.
- 43/ 5 C.F.R. § 2641.201(e)(2).
- 44/ 5 C.F.R. § 2641.201(e)(2), Example 7.
- 45/ 5 C.F.R. § 2641.201(e)(2), Example 7 (emphasis added).
- 46/ 5 C.F.R. § 2641.201(e)(4).
- 47/ 5 C.F.R. § 2641.201(e)(4), Example 1.
- 48/ 5 C.F.R. § 2641.201(h)(5).
- 49/ 5 C.F.R. § 2641.201(h)(5)(i).
- 50/ 5 C.F.R. § 2641.201(h)(5)(ii).
- 51/ 5 C.F.R. § 2641.201(h)(5), Examples 1 & 2.
- 52/ 5 C.F.R. § 2641.201(i)(2).
- 53/ 5 C.F.R. § 2641.201(i)(3).
- 54/ 5 C.F.R. § 2641.201(i)(1).
- 55/ 5 C.F.R. § 2641.201(i), Example 7.
- 56/ 5 C.F.R. § 2641.202(a); 18 U.S.C.A. § 207(a)(2).
- 57/ 5 C.F.R. §§ 2641.201(b), 2641.202(b).
- 58/ 5 C.F.R. §§ 2641.201(f), 2641.202(f).
- 59/ 5 C.F.R. §§ 2641.201(g)(1), 2641.202(g).
- 60/ 5 C.F.R. §§ 2641.201(h)(5), 2641.202(h).
- 61/ 5 C.F.R. §§ 2641.201(h)(5), 2641.202(h).
- 62/ 5 C.F.R. §§ 2641.201(h)(5), 2641.202(h).
- 63/ 5 C.F.R. § 2641.202(j)(7).
- 64/ 5 C.F.R. § 2641.202(j)(7), note to para. (j).
- 65/ 5 C.F.R. § 2641.203(a); 18 U.S.C.A. § 207(b).
- 66/ 5 C.F.R. § 2641.203(a); see 5 U.S.C.A. § 552.
- 67/ 5 C.F.R. §§ 2641.201(b), 2641.202(b), 2641.203(b).
- 68/ 5 C.F.R. § 2641.203(b).
- 69/ 73 Fed. Reg. 36168, 36171 (June 25, 2008).
- 70/ Pub. L. No. 107-347, 116 Stat. 2899 (2002).
- 71/ 5 C.F.R. § 2641.104.
- 72/ 73 Fed. Reg. 36168, 36171 (June 25, 2008).
- 73/ 5 C.F.R. § 2641.104.
- 74/ 5 C.F.R. § 2641.204(a); 18 U.S.C.A. § 207(c).
- 75/ 5 C.F.R. § 2641.204(d).
- 76/ Appendix A to 5 C.F.R. pt. 2641; see 5 C.F.R. § 2641.204(b)(10), 2641.301(j).
- 77/ 5 C.F.R. § 2641.204(i)(1).
- 78/ 5 C.F.R. § 2641.204(i)(2).
- 79/ 5 C.F.R. § 2641.204(i), Examples 1 & 2.
- 80/ 5 C.F.R. § 2641.206(a); 18 U.S.C.A. § 207(f).
- 81/ 5 C.F.R. § 2641.206(c)(2); 18 U.S.C.A. § 207(f)(2).
- 82/ Appendix A to 5 C.F.R. pt. 2641.
- 83/ 5 C.F.R. § 2641.206(a); see 18 U.S.C.A. § 207(i)(1)(B).
- 84/ 5 C.F.R. § 2641.104.
- 85/ 5 U.S.C.A. § 5312.
- 86/ 5 U.S.C.A. § 5313.
- 87/ 5 C.F.R. § 2641.205(a); 18 U.S.C.A. § 207(d).
- 88/ 5 C.F.R. § 2641.205(g).
- 89/ 5 C.F.R. § 2641.205, Examples 4 & 5.
- 90/ 5 C.F.R. § 2641.206(a); 18 U.S.C.A. § 207(f).
- 91/ Pub. L. No. 107-347, § 209(d)(1), (3), 116 Stat. 2899, 2930 (2002).
- 92/ 5 C.F.R. § 2641.207(a); 18 U.S.C.A. § 207(l).

# BRIEFING PAPERS

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