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Post-Employment, “Revolving Door,” Laws for Federal Personnel

Abstract

[Excerpt] Conflict of interest regulations and restrictions on certain private employment opportunities for a federal officer or employee do not necessarily end with the termination of the officer’s or employee’s federal service. This report is intended to provide a brief history and description of the provisions of federal law restricting employment opportunities and activities of federal employees after they leave the service of the executive or legislative branches of the federal government. The conflict of interest provisions applicable after one leaves government service to enter private employment are often referred to as “revolving door” laws.

Keywords

federal employees, conflict of interest, "revolving door", private employment

Comments

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Post-Employment, “Revolving Door,” Laws for Federal Personnel

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Summary

Federal personnel may be subject to certain conflict of interest restrictions on private employment activities even *after* they leave service for the United States Government. These restrictions—applicable when one enters private employment after having left federal government service—are often referred to as “revolving door” laws. For the most part, other than the narrow restrictions specific to procurement officials or bank examiners, these laws restrict only certain *representational* types of activities for private employers, such as lobbying or advocacy directed to, and which attempt to influence, current federal officials.

Under federal conflict of interest law, at 18 U.S.C. § 207, federal employees in the executive branch of government are restricted in performing certain post-employment “representational” activities for private parties, including (1) a lifetime ban on “switching sides,” that is, representing a private party on the same “particular matter” involving identified parties on which the former executive branch employee had worked personally and substantially for the government; (2) a two-year ban on “switching sides” on a somewhat broader range of matters which were under the employee’s official responsibility; (3) a one-year restriction on assisting others on certain trade or treaty negotiations; (4) a one-year “cooling off” period for certain “senior” officials barring representational communications to and attempts to influence persons in their former departments or agencies; (5) a new two-year “cooling off” period for “very senior” officials barring representational communications to and attempts to influence certain other high-ranking officials in the entire executive branch of government; and (6) a one-year ban on certain former high-level officials performing certain representational or advisory activities for foreign governments or foreign political parties.

In the legislative branch, this law applies the one-year “cooling off” period, as well as the restrictions on representations on behalf of official foreign entities and assistance in trade negotiations, to Members of the House and to senior legislative staff. United States Senators are subject to a two-year “cooling off” period in which they may not lobby the Congress after leaving the Senate.

“Procurement personnel” in federal agencies are not only limited in their post employment representational, lobbying, or advocacy activities on behalf of private entities after leaving government service, but they are also prohibited from receiving compensation from certain private contractors for a period of time after being responsible for procurement action on certain large contracts as government officials.

The provisions of an executive order issued by President Obama on January 21, 2009, impose stricter limits on certain executive branch personnel. Full time, non-career presidential and vice-presidential appointees, including non-career appointees in the Senior Executive Service, and excepted service confidential, policy-making appointees, are barred after leaving the Administration from “lobbying” any executive branch official “covered” by the Lobbying Disclosure Act (2 U.S.C. § 1602(3)), or any non-career SES appointee, for the remainder of the Administration. Additionally, all appointees who are “senior” officials subject to the statutory one-year “cooling off” period on lobbying and advocacy communications to their former agencies, must now abide by such “cooling off” period for *two* years.

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Conflict of interest regulations and restrictions on certain private employment opportunities for a federal officer or employee do not necessarily end with the termination of the officer's or employee's federal service. This report is intended to provide a brief history and description of the provisions of federal law restricting employment opportunities and activities of federal employees after they leave the service of the executive or legislative branches of the federal government. The conflict of interest provisions applicable after one leaves government service to enter private employment are often referred to as "revolving door" laws.

Background: Legislative History and Intent of Provisions

Post-employment, "revolving door" statutes restricting certain subsequent private employment activities of former federal officers and employees were enacted as early as 1872, and again in 1944.¹ A portion of the current statutory provision, at 18 U.S.C. § 207, was enacted in 1962 as part of a major revision and recodification of the federal bribery and conflict of interest laws.² That post-employment conflict of interest law was then amended and broadened by the Ethics in Government Act of 1978,³ which added certain one-year "cooling-off" periods for high-level executive branch personnel, limiting their post-employment advocacy activities before the federal government for one year after leaving office. After President Reagan vetoed a major congressional revision of the post-employment law which had been passed by Congress in 1988,⁴ Congress adopted as part of the Ethics Reform Act of 1989 most of the changes in the vetoed legislation.⁵ The statute has been amended several times since 1989, including extensive technical amendments in 1990.⁶ In 2007, as part of legislation dealing with lobbying laws and internal congressional rules on gifts, changes were made to the revolving door statute increasing the one-year "cooling off" period for "very senior" executive officials and for U.S. Senators to two years, and broadening the one-year "cooling off" restrictions for covered senior Senate staff.⁷

¹ 17 Stat. 202 (1872); 58 Stat. 668 (1944) and 41 Stat. 131 (1919), recodified at 18 U.S.C. §284, June 25, 1948, 62 Stat. 698. See discussion in *The Association of the Bar of the City of New York, Special Committee on Conflict of Interest Laws, CONFLICT OF INTEREST AND FEDERAL SERVICE*, at 44-53 (1960).

² P.L. 87-849, 76 Stat. 119, October 23, 1962; see H.Rept. 748, 87th Cong., 1st Sess. (1961).

³ P.L. 95-521, Title V, 92 Stat. 1824, 1864, October 26, 1978.

⁴ S. 2334, 99th Congress (Senator Thurmond), was reported out favorably by the Senate Judiciary Committee (S.Rept. No. 99-396, 99th Cong., 2d Sess. (1986)), and in the 100th Congress the Senate Judiciary Committee again reported out legislation amending the post-employment laws (S. 237, S.Rept. No. 100-101, 100th Cong., 1st Sess. (1987)). An amendment in the nature of a substitute was offered by Senator Thurmond for himself and Senators Metzenbaum, Levin, and Specter on February 3, 1988, and the legislation (S. 237) was amended on the Senate floor and passed on April 19, 1988. In the House, the Judiciary Committee reported out a clean bill (H.R. 5043) on October 6, 1988 (H.R. Rpt. No. 100-1068, 100th Cong., 2d Sess.), which passed the House on October 12, 1988. Amendments were offered to the House bill and agreed to in the Senate on October 18, and after the House substituted compromise provisions for the bill, the House and Senate passed the legislation on October 21, 1988. The legislation was formally presented to the President on November 14, 1988, subsequent to the adjournment of the 100th Congress. The President announced his intention not to sign the bill on November 23, 1988, and issued a statement of disapproval. The "pocket veto" was effective on November 25, 1988, upon the President's failure to sign the bill.

⁵ P.L. 101-194, Title I, § 101(a), 103 Stat. 1716, November 30, 1989, as amended.

⁶ P.L. 101-280, 104 Stat. 149, May 4, 1990.

⁷ P.L. 110-81, September 14, 2007. See, S. 1, 110th Congress, Sections 101-105, 301, 531-532.

One of the initial and earliest purposes of enacting the "revolving door" laws was to protect the government against the use of proprietary information by former employees who might use that information on behalf of a private party in an adversarial type of proceeding or matter against the government, to the potential detriment of the public interest. As noted by the United States Court of Appeals in upholding the constitutionality of the "switching sides" prohibition of 18 U.S.C. § 207(a), "the purpose of protecting the government, which can act only through agents, from the use against it by former agents of information gained in the course of their agency, is clearly a proper one."⁸

Another interest of the government in revolving door restrictions was to limit the potential influence and allure that a lucrative private arrangement, or the prospect of such an arrangement, may have on a current federal official when dealing with prospective private clients or future employers while still with the government, that is, "that the government employee not be influenced in the performance of public duties by the thought of later reaping a benefit from a private individual."⁹ In a case dealing with another federal statute which relates in part to potential future private employment of a current federal official,¹⁰ the court noted that the statutory scheme was intended to deal with the "nagging and persistent conflicting interests of the government official who has his eye cocked toward subsequent private employment."¹¹ Additional interests asserted in the proposed amendments to 18 U.S.C. § 207 in the 99th and 100th Congresses were to prevent the corrupting influence on the governmental processes of both legislating and administering the law that may occur, and the appearances of such influences, when a federal official leaves his government post to "cash in" on his "inside" knowledge and personal influence with those persons remaining in the government.¹² As noted in the post-employment regulations promulgated under the statute by the Office of Government Ethics, the provisions of the law and regulation are directed at prohibiting "certain acts by former Government employees which may reasonably give the appearance of making unfair use of prior Government employment and affiliations"¹³

These purposes in adopting limitations on former employees' private employment opportunities must, however, also be balanced against the deterrent effect that overly restrictive provisions on career movement and advancement will have upon recruiting qualified and competent persons to government service.¹⁴ Furthermore, unduly restrictive provisions on the "revolving door" (that is, movement of government personnel into the private sector, and private sector employees into the government) may tend to isolate, or at least insulate government employees from private sector

⁸ *United States v. Nasser*, 476 F.2d 1111, 1116 (7th Cir. 1973).

⁹ *Brown v. District of Columbia Board of Zoning*, 423 A.2d 1276, 1282 (D.C. App. 1980); *note General Motors Corporation v. City of New York*, 501 F.2d 639, 648-652 (2d Cir. 1974), as to appearances of improprieties in such situations.

¹⁰ 18 U.S.C. § 208, which prohibits, in part, a federal employee from taking any official action for the government on a matter in which a firm or organization "with whom he is negotiating ... prospective employment, has a financial interest...."

¹¹ *United States v. Conlon*, 628 F.2d 150, 155, n. 26 (D.C. Cir. 1980), quoting CONFLICT OF INTEREST AND FEDERAL SERVICE, *supra* at 234.

¹² *See*, generally, discussion in S.Rept. No. 396, 99th Cong., 2d Sess. (1986), and S.Rept. No. 101, 100th Cong., 1st Sess. (1987).

¹³ 5 C.F.R. § 2637.101(c).

¹⁴ S.Rept. No. 170, 95th Cong., 1st Sess. 32 (1978); *note* discussion in President's Commission on Federal Ethics Law Reform, "To Serve With Honor," Report and Recommendations to the President, at 53 (1989).

concerns, considerations, and experiences of the general public to a degree not desirable for public policy reasons.

Executive Branch—Representational Activities

A criminal statute, codified at 18 U.S.C. § 207, applies in some respects to all employees in the executive branch after they leave government service. It restricts or regulates private “representational,” lobbying, and other advocacy type activities. Some parts of the statute also apply to legislative branch officials, and those are discussed in more detail later in this report in the part dealing with legislative branch restrictions.

Section 207 of title 18 provides a series of post-employment restrictions on “representational” activities for executive branch personnel when they leave government service, including (1) a lifetime ban on “switching sides” on a matter involving specific parties on which any executive branch employee had worked personally and substantially while with the government; (2) a two-year ban on “switching sides” on a somewhat broader range of matters which were under the employee’s official responsibility; (3) a one-year restriction on assisting others on certain trade or treaty negotiations; (4) a one-year “cooling off” period for certain “senior” officials barring representational communications before their former departments or agencies; (5) a two-year “cooling” period for “very senior” officials barring representational communications to and attempts to influence certain other high ranking officials in the entire executive branch of government; and (6) a one-year ban on certain officials in performing some representational or advisory activities for foreign governments or foreign political parties.¹⁵ Additionally, certain presidential and vice-presidential appointees in the Obama Administration are required to sign an ethics agreement which will further limit their post-government-employment lobbying and advocacy activities during the entire tenure of the Obama Administration and, for certain “senior” appointees, for one more year after leaving government service.

1. Lifetime Ban on “Switching Sides”

Section 207(a)(1) of title 18 of the United States Code provides a lifetime ban on every employee of the executive branch of the federal government “switching sides,” that is, representing a private party before or against the United States government in relation to a “particular matter” involving “specific parties,” when that employee had worked on that *same* matter involving those parties “personally and substantially” for the government while in its employ. This lifetime ban is a fairly narrow and case-specific restriction which in practice would apply to one who, after working substantially on a particular governmental matter such as a specific contract, a particular investigation, or a certain legal action involving specifically identified private parties, then leaves the government and attempts to represent those private parties before the government on that same, specific matter. The “switching sides” prohibition does not generally apply to broad policy making matters, including rulemaking of an agency, but rather, as noted by the Office of

¹⁵ An executive order, 12834, January 20, 1993, issued by President Clinton, had required senior presidential appointees to full-time government positions to take an “ethics pledge” which required observance of longer time periods, generally five-years, for some of the restrictions on private employment after leaving their government posts. That executive order was revoked on December 28, 2000 (E.O. 13184), and similar five-year bans were not re-instituted in the subsequent Bush Administration. An “ethics pledge” and further “revolving door” restrictions were instituted by the Obama Administration for certain high-level appointees (note discussion in this report on p. 6).

Government Ethics, "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties."¹⁶

This provision does *not* prohibit a former government official from doing *all* work for a private company or firm merely because the firm had done business with or had been regulated by the official's agency, or even had been directly affected by the former official's duties or responsibilities on a particular matter such as a contract. Rather, this particular prohibition is upon subsequent representational or professional advocacy types of activities, that is, where the former official makes "any communication or ... appearance" to or before the government "with the intent to influence" the government on the same matter on which the former official had personally and substantially worked while with the government.¹⁷

2. Two-Year Ban on "Switching Sides"

Section 207(a)(2) provides a two-year ban on all federal employees in the executive branch on the same types of representational, post-employment conduct involved in the lifetime ban, except that it extends to matters which were merely under the "official responsibility" of the federal official while he or she was with the government. This two-year restriction, while more limited in time than the previous ban discussed, is potentially broader in matters covered, as it does not require that the former government employee had personal and substantial involvement in the matter when that individual worked for the government, but rather merely that it was under his or her official responsibility.

3. Representations in Treaty or Trade Negotiations

Section 207(b)(1) of title 18 applies to all officers and employees of the executive branch (as well as Members of Congress and employees in the legislative branch) who had personally and substantially participated in ongoing trade or treaty negotiations on behalf of the United States within the last year of their employment and had access to certain non-public information. The law prohibits such former federal officers or employees, for one year after leaving the government, from representing, aiding or advising anyone, on the basis of such information, concerning United States trade or treaty negotiations.

4. "Senior" Officials: One-Year "Cooling Off" Period

Section 207(c)(1) provides a one-year "no contact" or "cooling off" period for "senior" level employees in the executive branch, whereby such former employees may not make advocacy contacts or representations to (that is, communications with "intent to influence"), or any appearance before officers or employees of their former departments or agencies, for one year after such senior level employees leave those departments or agencies. "Senior" level officers or employees of the executive branch include persons paid on the Executive Schedule, and those who are paid at a rate under other authority which is equal to or greater than 86.5% of the basic rate of pay for level II of the Executive Schedule; military officers in a pay grade of 0-7 or above; and certain staff of the President and Vice President. This one-year ban applies to *any* matter on

¹⁶ 5 C.F.R. § 2637.201(c).

¹⁷ See Office of Government Ethics Regulations, at 5 C.F.R. §§ 2637.101(c)(5), 2637.201(b).

which one seeks official action by the employee's former department or agency, regardless of whether or not the former official had worked on the matter while with the government. As discussed in more detail below, "senior" executive officials who are also covered full-time presidential or vice-presidential "appointees" in the Obama Administration will be covered by this restriction, under required ethics agreements, for an additional one year. Since this "cooling off" ban applies to communications to one's former agency or department in the executive branch, it does not restrict former executive branch officials from leaving the government and then immediately "lobbying" the United States Congress, its Members or employees.

5. "Very Senior" Officials: Two-Year "Cooling Off" Period

The restrictions of 18 U.S.C. § 207(d) apply to "very senior" officials of the executive branch, including the Vice President, officials compensated at level I of the Executive Schedule (Cabinet officers and certain other high-ranking officials), and employees of the Executive Office of the President and certain White House employees compensated at level II of the Executive Schedule. These officials, under amendments made to the law in 2007, may not for two years after leaving the government make representations or advocacy contacts on *any* matter before their former agencies, or to any person in an executive level position I through V in *any* department or agency of the entire executive branch of the federal government.¹⁸ Similar to the cooling off period for "senior" level employees, these restrictions on "very senior" officials do *not* prohibit any former executive branch official from leaving the federal government and immediately lobbying the Congress.

6. Representing Foreign Governments

18 U.S.C. § 207(f) bars, for one year after leaving the government, all "senior" or "very senior" employees of the executive branch (as well as Members of Congress and senior legislative staff)¹⁹ from performing certain duties in the area of representational or advocacy activities for or on behalf of a foreign government or a foreign political party, before any agency, department, or official in the entire U.S. government. This provision prohibits, for one year after leaving the government, those covered former officials from representing an official foreign entity "before any officer or employee of any department or agency of the United States" with intent to influence such United States official in his or her official duties,²⁰ and prohibits for one year, as well, a former senior or very senior official (including Members of Congress and senior legislative staff) from even *aiding* or *advising* a foreign entity "with the intent to influence a decision of any officer or employee of any department or agency of the United States."²¹ The definitions within this law expressly indicate that those officers and employees *to* whom such communications on behalf of foreign governments may not be made during this one-year period include Members of Congress.²² This one-year ban on representing or aiding or assisting in representations of foreign governments becomes a lifetime ban in the case of the United States Trade Representative or the Deputy United States Trade Representative.

¹⁸ 18 U.S.C. § 207(d)(1) and (2), P.L. 110-81, Section 101(a).

¹⁹ For those positions and compensation levels included in "senior" and "very senior" designations, *see* 18 U.S.C. § 207(c)(2), (d)(1), and (e)(1)-(7).

²⁰ 18 U.S.C. § 207(f)(1)(A).

²¹ 18 U.S.C. § 207(f)(1)(B).

²² 18 U.S.C. § 207(i)(1)(B).

The Office of Government Ethics has explained that the prohibition involves employment activities with a foreign government that bear upon attempts to influence an official of the U.S. government. Employment generally with a foreign government is not prohibited by this law, and general public relations or commercial activities for or on behalf of a foreign government might not involve the types of conduct prohibited unless they also involved attempts to influence United States government officials:

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.²³

7. Presidential and Vice-Presidential "Appointees" in Obama Administration

President Obama issued an executive order on January 21, 2009, which places two additional post-employment, "revolving door" restrictions on all full-time, non-career presidential or vice presidential appointees in the executive branch, including non-career SES appointees and appointees to positions in the excepted service which are of a confidential and policy-making nature (such as Schedule C appointees). These "appointees" must agree to a binding "ethics pledge" which will prohibit them, after leaving government service, from lobbying (that is, acting as a registered lobbyist under the Lobbying Disclosure Act of 1995, as amended [hereinafter LDA]) any executive branch official "covered" under the LDA (2 U.S.C. § 1602(3)), or any non-career SES appointee, for the remainder of the entire Obama Administration.²⁴

Additionally, all such "appointees" who are also "senior" executive branch officials covered by the one-year "cooling off" period of 18 U.S.C. § 207(c)(1), whereby such former officials may not lobby or make advocacy communications to certain officials in their former agencies and departments, must now abide by such "cooling off" period for *two* years.²⁵

Bank Examiners

Under amendments to the Federal Deposit Insurance Act, certain officers and employees of a "Federal banking agency or a Federal reserve bank," who are involved in bank examinations or inspections, are restricted from *any* compensated employment with those private depository institutions for a period of one year after leaving federal service.²⁶ This restriction applies to

²³ Office of Government Ethics Memorandum "Revised Material Relating to 18 U.S.C. § 207," November 5, 1992, at p. 11.

²⁴ Executive Order 13490, Section 5 (74 F.R. 4673-4674, January 26, 2009).

²⁵ Executive Order 13490, Section 4.

²⁶ P.L. 108-458, § 6303(b), 118 Stat. 3751 (2004); see now 12 U.S.C. § 1820(k).

employees who served for at least two months during their last year of federal service as “the senior examiner (or a functionally equivalent position),” and who exercised “continuing, broad responsibility for the examination (or inspection)” of a depository institution or depository institution holding company. These former employees are barred for one year from receiving any compensation as an “employee, officer, director, or consultant” from the depository institution, the depository institution holding company that controls such depository institution, or any other company that controls the depository institution, or from the depository institution holding company or any depository institution that is controlled by that the depository institution holding company.

Procurement Officials

Further limitations upon the post-government employment activities of certain officials exist under so-called “procurement integrity” provisions of federal law for those former federal officials who had acted as contracting officers or who had other specified contracting or procurement functions for an agency. These additional restrictions go beyond the prohibitions on merely “representational,” lobbying, or advocacy activities on behalf of private entities before the government, and extend also to any compensated activity for or on behalf of certain private contractors for a period of time after a former procurement official had worked on certain contracts for the government.

The current post-employment restrictions within the procurement integrity provisions of federal law are codified at 41 U.S.C. § 423(d).²⁷ Under such provisions, former federal officials who were involved in certain contracting and procurement duties for the government concerning contracts in excess of \$10 million, may not receive any compensation from the private contractor involved, as an employee, officer, consultant, or director of that contractor, for one year after performing those procurement duties for the government.

The types of contracting duties and decisions for the government which would trigger coverage under these provisions include acting as the “procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement” in excess of \$10 million; acting as the program manager, deputy program manager, or administrative contracting officer for covered contracts; or being an officer who personally made decisions awarding a contract, subcontract, modification of a contract or task order or delivery order in excess of \$10 million, establishing overhead or other rates valued in excess of \$10 million, or approving payments or settlement of claims for a contract in excess of the covered amount.

Officials of the Department of Defense who are involved personally and substantially in procurements of over \$10 million, are leaving the department, and know that they will be receiving compensation from a defense contractor within the next two years, must request within 30 days before their departure, an ethics opinion about what they can and cannot do for the defense contractor under current ethics laws and rules.²⁸

²⁷ See P.L. 104-106, § 4304(a), 110 Stat. 659, February 10, 1996. This law, the Defense Authorization Act of 1996, also repealed certain specific restrictions on post-employment activities of military personnel which had been codified at 10 U.S.C. § 2397, 2397b and 18 U.S.C. § 281. P.L. 104-106, Section 4304(b), 110 Stat. 664.

²⁸ P.L. 110-181, “National Defense Authorization Act for Fiscal Year 2008,” at Sec. 847, 122 Stat. 243 (2008), see also (continued...)

Negotiating Private Employment

Under legislation adopted in 2012, all "senior" officers and employees in the federal government will now have to report to their ethics offices negotiations that they are having for subsequent private employment. The "STOCK Act," enacted in April of 2012,²⁹ requires all of those federal officials who are required to file public financial disclosure reports (that is, generally, those earning a rate of salary equal to or more than 120% of the base salary for a GS-15),³⁰ to notify their ethics office in writing within three business days of the commencement of such "negotiations," and then to recuse themselves from any governmental matter for which such negotiations may create a conflict of interest.³¹

Executive Branch

In addition to the general reporting of negotiations under the STOCK Act by certain high-level officials, all federal employees in the executive branch who are seeking private employment may also incur restrictions on the performance of their current duties for the government under other provisions of federal law. The principal federal conflict of interest law, which is a criminal provision at 18 U.S.C. § 208, states, among other restrictions, that once any federal employee or officer in the executive branch begins "negotiating" subsequent employment with a private employer, that employee must disqualify (recuse) himself or herself from any official governmental duties, such as recommendations, advice, or decision making, on any particular matter which has a direct and predictable effect on the financial interests of that potential private employer.³²

The Office of Government Ethics has issued regulations concerning this potential conflict of interest, and has expanded by regulation certain disqualification requirements beyond bilateral "negotiations," applying such requirements where the employee has even merely "begun seeking employment." The regulations note that a federal employee has "begun seeking employment" not only if the employee is involved in a "discussion or communication" that is "mutually conducted" (even if the specifics of a job or employment are not discussed), but also if the employee has made an unsolicited communication regarding employment (other than merely asking for an application or sending a resume to someone who is affected by the employee's duties "only as part of an industry or other discrete class"), or if the employee has made a response other than a rejection to an unsolicited communication from a private source concerning employment. This status of "seeking employment" will continue until all possibilities of employment are rejected, and discussion ended, or two months have passed after an unsolicited communication had been made by the employee and no indication or interest or postponement of consideration was indicated.³³ During the time one is within this status of "seeking employment," the employee

(...continued)

regulations at 74 Fed. Reg. 2408, January 15, 2009.

²⁹ P.L. 112-105, 126 Stat. 291, April 4, 2012.

³⁰ The reporting of negotiations applies to everyone in the federal government who is "required to file a financial disclosure report under section 101 of the Ethics in Government Act of 1978." P.L. 112-105, Section 17, 126 Stat. 303.

³¹ P.L. 112-105, Section 17, 126 Stat. 303.

³² 18 U.S.C. § 208(a); note 5 C.F.R. § 2635.601; *United States v. Conlon*, 628 F.2d 150 (D.C.Cir. 1980); *CACI, Inc. - Federal v. United States*, 719 F.2d 1567 (Fed. Cir. 1983).

³³ 5 C.F.R. § 2635.603(b).

“should notify the person responsible for his assignment,” or if the individual is responsible for his or her own assignments, then the employee must take “whatever steps are necessary” to ensure compliance. Appropriate oral or written communication to one’s coworkers and supervisors concerning a required disqualification is suggested in the regulations, although written documentation of a recusal is not required in the regulations except to conform to a previous ethics agreement with the Office of Government Ethics.³⁴ Waivers from the disqualification requirements may be obtained in writing from the official responsible for the employee’s appointment.³⁵

In the area of procurement, even if no actual negotiations with a potential private employer are involved or have begun, certain “contacts” about prospective private employment between certain private contractors and federal procurement personnel may trigger reporting and recusal requirements. Agency officials who are “participating personally and substantially” in a federal procurement for a contract in excess of \$100,000³⁶ must report all contacts from or to a bidder or offeror on that contract, when those contacts are about the possibility for non-federal employment for that official. In addition to reporting the contacts made or received, the official must then either reject the possibility of future employment, or must disqualify himself or herself from further participation in the procurement until all discussions have ended without an employment agreement, or until the business is no longer a bidder or offeror in that procurement.³⁷ As noted in the previous section, procurement officials in the Department of Defense who are involved personally and substantially in procurements of over \$10 million, are leaving the department, and know that they will be receiving compensation from a defense contractor within the next two years, must request within 30 days before their departure, an ethics opinion about what they can and can not do for the defense contractor under current ethics laws and rules.³⁸

Legislative Branch

Changes in the rules of the House and Senate were adopted in 2007 regarding negotiations for future private employment by Members and certain staff. In the Senate, the general rule is that Senators may not begin private employment negotiations, or have arrangements for subsequent private employment, until their successors have been elected.³⁹ In the House, the general rule is that Members may not begin private employment negotiations, or have arrangements for subsequent private employment, while still serving in the House.⁴⁰ The exception to both the House and Senate rules allows for such negotiations to begin earlier, before a successor is elected in the Senate or one’s term is over in the House, if the Senator or Representative makes a disclosure statement within three business days concerning the commencement of such negotiations or agreements. However, in the Senate, this exception will not apply to, and thus will

³⁴ 5 C.F.R. § 2635.604(b),(c).

³⁵ 5 C.F.R. § 2635.605; 18 U.S.C. § 208(b)(1) and (3).

³⁶ The current “simplified acquisition threshold,” *see* 41 U.S.C. § 403(11).

³⁷ 41 U.S.C. § 423(c).

³⁸ P.L. 110-181, “National Defense Authorization Act for Fiscal Year 2008,” at Sec. 847, 122 Stat. 243 (2008), *see also* regulations at 74 F.R. 2408, January 15, 2009.

³⁹ Senate Rule XXXVII, para. 12(a).

⁴⁰ House Rule XXVII, cl. 1 (P.L. 110-81, Sections 301 and 532), as amended by H.Res. 5, 111th Congress.

not allow, such negotiations or arrangements for future private employment which involves "lobbying activities" until the Senator's successor has been elected.⁴¹

The congressional rules further provide that a Member of the House of Representative who is negotiating or has an arrangement for future employment prior to the expiration of his or her term of office must "recuse" or disqualify himself or herself from participating in any matter that may raise a conflict or interest, or the appearance of a conflict of interest, because of such negotiations or employment arrangements, and must notify the House Committee on Standards of Official Conduct of such recusal.⁴² In the Senate, the original disclosure statement of negotiations or arrangements is to be made public at the time it is made to the Secretary of the Senate; while in the House, the original notification of private employment negotiations or arrangements is not made public until and unless the Member must recuse himself or herself for conflict of interest purposes, and then the recusal notification as well as the original disclosure statement are made public.⁴³

"Senior" staff in both the House and Senate (i.e., those employees who are compensated in excess of 75% of a Member's salary) must notify the appropriate ethics committee within three business days that the staffer is negotiating or has any agreement concerning future private employment.⁴⁴ Covered Senate and House employees must then recuse themselves from official legislative matters that raise conflicts of interest because of their prospective private employment interests, and notify the appropriate ethics committees of such recusal. Covered Senate staffers must specifically recuse themselves from making any contact or communications with the prospective employer on issues of legislative interest to that employer.

The new provisions enacted under the STOCK Act in April of 2012 may affect staff who are not necessarily covered by the House or Senate Rule provisions, since the salary threshold is lower under the statutory provisions. As noted above, any staff person who is required to file public financial disclosure reports⁴⁵ is required to notify his or her ethics office in writing within three business days of the commencement of any private employment "negotiations," and then to recuse himself or herself from any governmental matter for which such negotiations may create a conflict of interest.⁴⁶

Legislative Branch—Representational Activities

The Ethics Reform Act of 1989 added post-employment restrictions for Members and certain senior congressional staffers, effective January 1, 1991, and these were amended by the lobbying

⁴¹ Senate Rule XXXVII, para. 12(b). "Lobbying activities" referred to are those defined by the Lobbying Disclosure Act of 1995, and thus would include behind-the-scenes advice and assistance to support "lobbying contacts." See 2 U.S.C. § 1602(7).

⁴² House Rule XXVII, cl. 4.

⁴³ Senate Rule XXXVII, para. 12(a); House Rule XXVII, cl. 4.

⁴⁴ Senate Rule XXXVII, para. 12(c); House Rule XXVII, cl. 2.

⁴⁵ The reporting of negotiations applies to anyone who is "required to file a financial disclosure report under section 101 of the Ethics in Government Act of 1978" (P.L. 112-105, Section 17, 126 Stat. 303), generally those compensated at a salary rate of 120% of the base salary of a GS-15 for at least 60 days in a calendar year, or at least one principal assistant of a Member's office if no staffer is compensated above the threshold amount.

⁴⁶ P.L. 112-105, Section 17, 126 Stat. 303.

and ethics reform legislation, titled the "Honest Leadership and Open Government Act of 2007."⁴⁷ Under the criminal provisions of this statute, individuals who were Members of the House are prohibited from "lobbying" or making advocacy communications on behalf of any other person to current Members of either house of Congress, or to any legislative branch employee, for one year after the individual leaves Congress. For a period of two years after leaving the Senate, Senators are prohibited from similar post-employment advocacy. Additionally, senior staff employees are subject to certain one-year "cooling off" periods regarding their advocacy contacts with their former offices; and both former Members and former senior staff are limited in representing official foreign interests before the U.S. government, and in taking part in certain trade and treaty negotiations, for one year after leaving congressional service.

1. "Cooling Off" Periods on Lobbying or Advocacy

There are now so-called "cooling off" periods of two different durations applicable in the legislative branch that restrict post-employment "lobbying" and advocacy activities. United States Senators are subject to a *two-year* post-employment advocacy ban, which restricts their lobbying anyone in Congress, or any employee of a legislative office, for two years after leaving the Senate.⁴⁸ Members of the House of Representatives, as well as "senior" legislative branch employees, are now subject to a one-year "cooling off" or "no contact" period after they leave congressional office or employment.⁴⁹ Members of the House of Representatives are prohibited for one year after leaving office from lobbying or making other advocacy contacts with any Member, officer, or employee of either house of Congress, or to any employee of a legislative office.⁵⁰

"Senior" legislative branch employees are subject to the post-employment restrictions if they are compensated at a rate equal to or above 75% of the rate of pay of a Member of the House or Senate, and are employed for more than 60 days.⁵¹ "Senior" *Senate* staff covered by these statutory provisions are prohibited for one year after leaving Senate employment from making advocacy communications to any officer, employee, or Member of the entire Senate.⁵² "Senior" *House* staff are barred for one year after leaving House employment from making advocacy communications only to their former employing office; that is, former "senior" employees of a Member of the House may not, for one year after they leave congressional employment, make advocacy or representational contacts to that Member or any of the Member's employees. House committee staffers covered by these provisions are barred for one year after leaving office from making such advocacy contacts and representations to any Member or employee of their former committees, or to any Member who was on the committee during the last year of the staffer's employment; and "senior" employees in House leadership offices are prohibited for one year after leaving employment from making advocacy communications to anyone in that leadership office.⁵³

⁴⁷ P.L. 110-81, September 14, 2007.

⁴⁸ 18 U.S.C. § 207(e)(1)(A).

⁴⁹ 18 U.S.C. § 207(e)(1)(B) and (e)(2)-(6).

⁵⁰ 18 U.S.C. § 207(e)(1)(A) and (B).

⁵¹ 18 U.S.C. § 207(e)(7).

⁵² 18 U.S.C. § 207(e)(1)(B), as amended by P.L. 110-81.

⁵³ 18 U.S.C. §207(e)(3),(4),(5), and (6).

Not all contacts or communications by former Members or employees with current Members or employees within the one-year period are barred, however. The prohibition goes only to advocacy-type of communications, that is, communications "with the intent to influence" a Member or officer or employee of the legislative branch concerning "any matter on which such person seeks official action" by that Member, officer or employee, or by either House of Congress. There are also several specific exceptions to the general prohibition, including, for example, exceptions for lobbying and advocacy work for state or local governments, testifying on matters under oath, and generally for representations or communications on behalf of political candidates, parties and political organizations.⁵⁴

2. Trade or Treaty Negotiations

All officers and employees of the government, including Members of Congress and congressional staff, who worked personally and substantially on a treaty or trade negotiation and who had access to information not subject to disclosure under the Freedom of Information Act, may not use such information for one year after leaving the government for the purpose of aiding, assisting, advising, or representing anyone other than the United States regarding such treaty or trade negotiation.⁵⁵

3. Representing Foreign Governments

Members of Congress, and those "senior" legislative branch employees who are covered by the one-year "cooling off" periods, are also prohibited for a year after leaving office or employment from representing an official foreign entity before the United States, or aiding or advising such entity with intent to influence any decision of an agency or employee of any agency or department of the U.S. government.⁵⁶

4. Lobbying Restrictions on Senate Staff

All employees of the Senate remain subject to the Senate Rule governing lobbying after they leave Senate employment. Senate Rule XXXVII, clause 9, applies to all former staffers who have become registered lobbyists, or are employed by a registered lobbyist or by an entity that retains lobbyists if the former staffer is to influence legislation. Such former staffers are prohibited for one year after leaving the Senate from lobbying the Senator for whom they used to work or the Senator's staff. Former committee staff are prohibited from lobbying the Members or the staff of that committee for one year. If the staffer is a "senior" employee, then the former staffer, in accordance with the statutory restriction, will be barred from lobbying any Member, officer, or employee of the entire Senate for one year.⁵⁷

⁵⁴ 18 U.S.C. § 207(j).

⁵⁵ 18 U.S.C. §207(b)(1).

⁵⁶ 18 U.S.C. §207(f).

⁵⁷ Senate Rule XXXVII, para. 9(a) (b), and (c), as amended by P.L. 110-81 [S. 1, 110th Congress], Section 531.

5. Floor Privileges of Former Members

Under congressional rules and practice, former Members are generally granted the privilege of admission to the floor of the Senate or House, respectively.⁵⁸ However, under the Rules of the House of Representatives, former Members of the House are not to be entitled to floor privileges if they have any "direct or pecuniary interest in any legislative measure pending before the House or reported by any committee," and are not entitled to admission if they are registered lobbyists or agents of a foreign principal, or employed by or otherwise represent "any party or organization for the purpose of influencing, directly or indirectly, the passage, defeat or amendment of any legislative measure pending before the House, reported by any committee" or under consideration of a committee.⁵⁹ The Senate rules have also been changed to withdraw floor privileges from a former Member or officer who is a registered lobbyist or agent of a foreign principal, or is in the employ of an organization for the purpose of influencing, directly or indirectly, the passage or defeat of legislation or any legislative proposal.⁶⁰ The House and Senate have both limited the access of such former Members, if those former Members are registered lobbyists or foreign agents, to the athletic and exercise facilities in the House and Senate.⁶¹

6. Acceptance of Civil Office by Retiring Member of Congress

A Member of Congress may not, before the expiration of his or her term, accept a civil office in the U.S. government if that office was created, or the salary for the office had been increased during the Member's current term.⁶² This constitutional provision would by its terms prevent a Member of Congress from retiring from Congress before his or her current term has expired, and accepting such a civil position with the federal government. It may be noted that the disqualification has on many occasions been avoided in regard to an office for which the salary was increased during the Member's term, by enacting legislation lowering the salary of that particular office back to its previous level.⁶³

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⁵⁸ Senate Rule XXIII; House Rule IV, clause 2(a)(15).

⁵⁹ Rules of the House of Representatives, House Rule IV, clause 4, as amended by H.Res. 648, February 1, 2006, and regulations of the Speaker, 123 *Cong. Rec.* 321 (January 6, 1977).

⁶⁰ Senate Rule XXIII, P.L. 110-81, Section 533.

⁶¹ Senate Rule XXIII, paragraph 3, P.L. 110-81, Section 533; see H.Res. 6, Section 511(c).

⁶² United States Constitution, Article I, Section 6, clause 2.

⁶³ See general discussion in archived CRS Report 87-579A, *Ineligibility of a Member of Congress for a Civil Office in the Federal Government Which Was Created, or for Which the Salary Was Increased, During the Time For Which the Member Was Elected*, June 30, 1987, available to congressional requesters from the author.