

**Office of Government Ethics**

**Report to the President and to Congressional  
Committees on the Conflict of  
Interest Laws Relating to Executive  
Branch Employment**

**January 2006**

## I. Report Background

In 2004, Congress directed the Office of Government Ethics (OGE), in consultation with the Department of Justice, to conduct a comprehensive review of, and submit a report to the President and to several Congressional Committees<sup>1</sup> on, the conflict of interest laws relating to executive branch employment.<sup>2</sup> See Section 8403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458 (December 17, 2004). This report summarizes the provisions and history of 18 U.S.C. §§ 203, 205, 207, 208, and 209,<sup>3</sup> and discusses what we consider to be the limitations and anomalies of their application to executive branch employees today, as well as the important core provisions that need to be retained.

We do not recommend eliminating any of the statutes wholesale. Rather, we recommend either that Congress maintain the status quo, or modernize the statute to more accurately reflect the needs of today's executive branch, while continuing to proscribe conduct that remains improper.

OGE identified the issues to be discussed in this report by drawing on our own extensive experience interpreting the statutes over the past 27 years, by undertaking a new study and holding numerous internal discussions about application of the statutes to today's Federal workforce, and by soliciting and considering oral and written input from a number of interested parties. Our outreach efforts included:

- placing a notice in the Federal Register seeking comments from agencies and the public;<sup>4</sup>
- requesting the written views of those non-Governmental organizations (NGOs) that we knew to be interested in these issues, as well as the

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<sup>1</sup> The Senate Committee on Homeland Security and Governmental Affairs, the Senate Judiciary Committee, the House Committee on Government Reform, and the House Judiciary Committee.

<sup>2</sup> This report makes a number of recommendations for amending the conflict of interest laws. Our recommendations reflect our knowledge and experience regarding these statutes in their application to *executive branch* employees, because OGE's role in overseeing efforts to prevent conflicts of interest is limited to employees of the executive branch. As such, we have no basis to determine, and take no position on, whether the recommended amendments would improve the conflict of interest statutes as applied to legislative and judicial branch employees.

<sup>3</sup> Although the Act did not direct us to include section 209 in our study and report, we have chosen to do so because this statute, along with sections 203, 205, 207, and 208, comprises what is commonly referred to as the "criminal conflict of interest statutes."

<sup>4</sup> 70 Federal Register 22661 (May 2, 2005).

Designated Agency Ethics Officials of a number of executive branch departments and agencies; and

-- inviting these same individuals to attend one of five focus group meetings at which we solicited their oral comments.<sup>5</sup>

The majority of the individuals and organizations who submitted comments in response to our outreach efforts agree with OGE's determination that these statutes should be modernized. While some favor more extreme measures, such as eliminating one or more of the statutes and decriminalizing the conduct that they proscribe, others favor more modest changes, such as more narrowly tailoring their application to specific groups of executive branch employees. We believe that this report represents a view that balances OGE's extensive institutional knowledge and experience with the range of comments that we received from interested organizations, both Governmental and non-Governmental.

## **II. Analysis of the Conflict of Interest Statutes**

The criminal conflict of interest statutes found in §§ 203, 205, 207, 208, and 209 of title 18 U.S.C. address Federal employees': (1) representational services before the Federal Government (§§ 203 & 205); (2) post-employment activities (§ 207); (3) participation in official matters in which they have financial interests (§ 208); and (4) receipt of supplementation of salary as compensation for their official services (§ 209).

Following is an analysis of each of these statutes, including a short overview of each statute's history. Although these statutes have existed in more or less their current forms for over 40 years, Congress enacted their precursors as early as the mid-nineteenth century. Thus, a short review of each statute's background is necessary to fully illustrate the reasoning behind our recommendations. The summary of each statute's history is followed by a discussion of issues that we consider particularly noteworthy. In some cases, we do not recommend any revisions. In others, we recommend that Congress consider amending a statute to resolve an identified problem in its application. In most instances in which we recommend statutory amendments, our goal is to increase public and employee respect for the conflict of interest rules by making their application better reflect the realities of today's Federal workforce, while at the same time protecting the integrity of Governmental processes and decision making.

### **A. 18 U.S.C. 205 & 203 (Representational Activities)**

18 U.S.C. §§ 205 and 203, which are closely related, generally prohibit Federal employees from representing private interests before the Government. Section 203

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<sup>5</sup> Appendix A is a list of the organizations and individuals who provided either oral or written comments.

prohibits such activity only when it is compensated. Section 205 is much broader in that it applies to both compensated and uncompensated representational activity.

i. Background

a. Section 205

18 U.S.C. § 205 is intended to prohibit current Federal employees from misusing their offices and influence by prohibiting them from seeking action from the Government on behalf of private interests, whether or not for pay.

Section 205's predecessor, which was eventually codified as 18 U.S.C. § 283, was the first of what we now think of as the conflict of interest laws. It was enacted in 1853 as part 2 of "An Act to prevent Frauds upon the Treasury of the United States." 10 Stat. 170 (1853); Manning, Federal Conflict of Interest Law, Harvard University Press (1964) p. 75. This law was one of the first attempts to address the ethical problems that arise when a public employee misuses his official position in order to benefit his private clients.

In 1962, Congress incorporated the limitations imposed by section 283 into new section 205, and greatly increased the scope of the prohibition. Although some amendments followed, the provisions of section 205 remain essentially the same today.

There were three striking differences between section 283 and section 205. First, whereas section 283 dealt only with "claims against the United States," section 205 is much broader, applying both to claims and to "particular matters in which the United States is a party or has a direct and substantial interest." This expansion was a response to court decisions that had defined "claims" as including only those matters in which a demand for money was made against the United States. Second, section 205 included specific provisions that applied to "Special Government Employees" as defined in 18 U.S.C. § 202.<sup>6</sup> The addition of this provision lifted a

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<sup>6</sup> See 18 U.S.C. § 202(a) for the definition of "special Government employee." SGEs are restricted by sections 203 and 205 only in connection with "particular matters involving specific parties." Furthermore, all SGEs are subject to the prohibitions of sections 203 and 205 only with respect to those matters in which the SGE "at any time participated personally and substantially as a Government employee or special Government employee." 18 U.S.C. §§ 203(c)(1), 205(c)(1). SGEs who have served the Government for more than 60 days during the immediately preceding period of 365 consecutive days also are subject to the prohibitions of sections 203 and 205 in connection with any covered matter that "is pending in the department or agency of the Government in which [the SGE] is serving." 18 U.S.C. § 203(c)(2); 18 U.S.C. § 205(c)(2). Thus, for example, an SGE may represent another person before the agency in which he or she serves, provided that he has not participated in the matter personally and substantially, until the point at which the SGE has actually served 60 days in any prior period of 365 days. Once the 61st day of service is reached, the SGE must discontinue such representation.

significant barrier to recruiting highly skilled experts into the Government on a short-term basis, one of the main purposes of the 1963 legislation. The same 1963 legislation also added a number of exceptions to section 205, now found at subsections (d) through (i).

In its present form, section 205 is divided into nine lettered subsections. The first three subsections contain the statute's basic prohibition. Subsection (a) prohibits an officer or employee of the United States, including employees in all three branches,<sup>7</sup> other than in the discharge of his official duties, from (1) acting as an agent or attorney for prosecuting any claim against the United States, or receiving any compensation for assisting in the prosecution of such a claim; and (2) acting as an agent or attorney before any "department, agency, court, court-martial, officer, or civil, military, or naval commission" in connection with a "covered matter"<sup>8</sup> in which the United States is a party or has a direct and substantial interest. Subsection (b) contains a parallel provision applicable to employees of the District of Columbia in connection with claims and other "covered matters" involving the District of Columbia. Subsection (c) states the more limited prohibition applicable to "Special Government Employees."

Subsections (d), (e), (f), (g), and (i) contain exceptions to the general rule. These exceptions, with some provisos, permit an employee to act as an attorney or agent for: someone who is the subject of a personnel administration proceeding (subsection (d)(1)(A)); an organization when a majority of the organization's members are current officers or employees of the United States (or the spouses or children of such employees) (subsection (d)(1)(B)); or immediate family members (subsection (e)). Exceptions also permit employees to: give testimony under oath or statements required to be made under penalty of perjury (subsection (g)); and participate, pursuant to specific statutes authorizing it, in labor-management activities (subsection (i)). For SGEs, an exception permits acting as an agent or attorney in connection with the performance of work under a grant by, or contract for the benefit of, the United States (subsection (f)).

Section 205 has been amended twice since 1962. In the Ethics Reform Act of 1989, Pub. L. 101-194, Congress created the lettered subparts, created the separate provisions for officers and employees of the United States and officers and employees of the District of Columbia, deleted the application of section 205's exceptions to section 203, and replaced the criminal penalties provision with a cross-reference to new section 216, which provides for both criminal and civil penalties, as well as injunctive relief. In the Federal Employee Representation Improvement Act of 1996, Pub. L. 104-

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<sup>7</sup> The prohibition, however, is not applicable to the President, Vice-President, Members of Congress, or Federal judges. See 18 U.S.C. § 202(c).

<sup>8</sup> "Covered matter" is defined in subsection (h) as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter."

177, Congress created two new exceptions in section 205.<sup>9</sup> First, in response to a Department of Justice interpretation of section 205 that prohibited Federal employees who are members of employee associations from representing those associations before the Government,<sup>10</sup> Congress amended section 205 to make the basic prohibition inapplicable to an employee who acts as an uncompensated agent or attorney for an employee association when a majority of the association's members are Federal employees (or the spouses or dependent children of such employees). This exception does not, however, cover claims, judicial or administration proceedings in which the organization is a party, or a grant or contract that provides Federal funds to the organization. Second, Congress added an exception that makes it clear that employees are not prohibited under section 205 from acting pursuant to various laws governing labor-management relations.

b. Section 203

Like section 205, 18 U.S.C. § 203 is intended to prohibit current Federal employees from misusing their offices and influence by prohibiting them from seeking action from the Government on behalf of private interests. However, section 203 prohibits only compensated representational activities.

Congress enacted 18 U.S.C. § 281, the precursor to 18 U.S.C. § 203, in 1864. This statute prohibited a member of Congress or an employee of the United States from

directly or indirectly receiv[ing] or agree[ing] to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission.

13 Stat. 123 (1864).

The provisions of section 281 were not modified substantially until 1962 when Congress promulgated 18 U.S.C. § 203. Unlike section 281, section 203 applies to individuals from outside the Government who make or promise to make forbidden payments to Government employees. Under section 281, any legal action against the payor had to be based on the theory that he was an aider and abettor. Section 203 also added the specific provisions that apply to "Special Government Employees" as defined in 18 U.S.C. § 202. Also, because there were several ambiguities about the scope of section 281's coverage, section 203 was drafted to apply to "an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia."

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<sup>9</sup> See also H.R. Rep. 230, 104<sup>th</sup> Cong., 1<sup>st</sup> Session.

<sup>10</sup> 18 Op. O.L.C. 212 (November 7, 1994).

Section 203 also expanded the list of transactions that were covered by section 281. Although section 281 had covered “any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter,” section 203 explicitly added an “application” and a “request for a ruling or other determination.” Section 203 also added the word “particular” to the term “other matter.”<sup>11</sup> In addition, unlike section 281, which covered any matter in which the Government was “a party or directly or indirectly interested,” section 203’s coverage is limited to “particular matters in which the United States is a party or has a direct and substantial interest.” Finally, if read literally, section 281 was violated if the *payment* for services was received during the individual’s Government service, whether or not those services were *provided* during his Government service. Section 203 makes irrelevant the *time* that the compensation is received and, instead, prohibits receiving compensation, at any time, for services *performed* during the individual’s Government employment.

In its current form, section 203 is divided into six subsections. The first three subsections contain the statute’s basic prohibition. Subsection (a) prescribes criminal penalties for an executive or legislative branch employee who directly or indirectly “demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another, “to the executive branch or a court in connection with any particular matter in which the United States is a party or has a direct and substantial interest, if any part of the representation occurs while that person is a Government employee. It also prohibits a non-employee from knowingly giving, promising, or offering such compensation to such an employee. Subsection (b) contains a parallel provision applicable to employees of the District of Columbia in connection with claims and other “covered matters” involving the District of Columbia. Subsection (c) states the more limited prohibition applicable to “Special Government Employees.” Subsections (d) through (f) contain exceptions similar to the ones included in section 205.

Although section 203 has been amended several times, none of these amendments has been particularly significant. For example, the Ethics Reform Act of 1989, Pub .L. 101-194, replaced the original version’s penalty provision with a cross-reference to new section 216, created separate provisions for officers and employees of the United States and officers and employees of the District of Columbia, and incorporated the prohibition’s list of exceptions from section 205.

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<sup>11</sup> This addition was intended “to emphasize that the restriction applies to a specific case or matter and not to a general area of activity.” H.R. Rep. 748, 87<sup>th</sup> Cong., 1<sup>st</sup> Sess. 20 (1961).

## ii. Discussion

### a. Breadth

Section 205 is very broad in that it applies to all employees regardless of level of responsibility or scope of duties, and to all particular matters regardless of whether those matters are related, or even appear to be related, to the employee's position or duties. When section 205 was promulgated, in the mid-eighteenth century, it may have been logical to assume that the average career Government employee could wield influence at other agencies because the Federal Government was a small fraction of the size it is today. Because neither a civil service system nor the claims court had been created,<sup>12</sup> private claims were handled either by acts of Congress or through negotiations made directly with the relevant departments. This resulted in "influence peddling, information selling, and dissipation of public funds" by Government employees who offered themselves as claims representatives for private clients before the Government. New York City Bar Association Report, Conflict of Interest and Federal Service (1960) at 32. Thus, section 205 was needed to ensure that public employees would be loyal to the Government, to curtail their misuse of information, and to prevent them from misusing their Government positions to further the interests of private clients.<sup>13</sup>

Today, the breadth of section 205 on occasion may seem to be disproportionate to the possibility that an average Federal employee might have influence outside the sphere of his own official duties, and outside of his own agency. Thus, the strict application of section 205 sometimes leads to unintended results.<sup>14</sup> Perhaps the most cited example is the employee who, though he does not work at the Social Security Administration (SSA), is nonetheless barred from accompanying an elderly mother-in-law or neighbor to the SSA, without compensation, to speak for her in an effort to work out a benefits issue. We also are aware that employees throughout the executive branch do volunteer work on their own time for organizations that provide services to individuals who need assistance securing Federal benefits. Section 205 limits the scope of the volunteer assistance that an employee may provide, even though few employees have any opportunity to exert undue influence based on their status as Federal employees.

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<sup>12</sup> The Claims Court was created in 1955; the Civil Service Act of 1883 created the Civil Service Commission.

<sup>13</sup> Cong. Globe, 32<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 1339 (1852); United States v. 679.19 Acres of Land, 113 F. Supp. 590, 593 (N.D. 1953); Bachman v. Pertshuk, 437 F. Supp. 973, 975 (D.C. 1977); U.S. v. Bailey, 498 F.2d 677, 680 (D.C. Circuit 1974); VanEe v. EPA, 202 F.3d 296, 306 (D.C. Circuit 2000).

<sup>14</sup> Although the scope of section 203 is comparable to that of section 205, its application may be more logical because representational activity that is undertaken for compensation tends to raise, more frequently, the appearance of conflicts of interest.



Similarly, section 205 in some cases may unnecessarily restrict the scope of activities that Federal employees can undertake in connection with matters that directly affect their own lives in circumstances where there would be no concerns about an appearance of a conflict of interest. For example, a Department of Education employee who resides in a neighborhood that adjoins a Federally managed park may not call the National Park Service on behalf of her homeowner's association to ask that the grass be mowed, or that a crumbling sidewalk be replaced. Finally, we are aware of at least one instance in which section 205 has prohibited a law student, who was also serving as an intern at an executive branch agency, from completing course requirements for a class that required students to provide representational services for clients before the Immigration and Naturalization Service.

In addition to the above cited examples, there are a number of situations in which it does not seem to make sense to prohibit an employee from making a representational communication even to his own agency. For example, an employee should be able to request, on behalf of a nonprofit organization, the use of Government facilities that generally are made available to non-Governmental groups.<sup>15</sup> Similarly, in most cases, an employee should be able to request that a Government speaker or other presenter, even one from his own agency, be assigned to address a nonprofit organization in which he is a member.

OGE believes that it would be possible to adopt certain limited regulatory exemptions to expand the range of allowable uncompensated representational activities that Government employees may undertake in circumstances where there would not be a conflict of interest or an appearance of a conflict of interest, without eroding the Government's strong interest in ensuring that employees do not use improperly the imprimatur or influence of their positions to benefit non-Federal interests. To accomplish this, we recommend that Congress give the Office of Government Ethics limited authority to issue regulatory exemptions to the general prohibitions of section 205. This authority to adopt de minimis exemptions would be tailored narrowly and exercised cautiously, recognizing the strong public policy concerns that are served by this statute. We believe, however, that there are cases in which the application of a regulatory exemption may be appropriate. For example, a regulatory exemption could permit a non-senior employee to reserve Federal facilities that are available to the public, including meeting rooms and ball fields, on behalf of non-Government entities.

Of course, the provisions of section 208 and the Standards of Ethical Conduct for Executive Branch Employees prohibiting an employee from participating in a matter in which he has a financial interest would still apply, so an employee would not be permitted to make agency decisions about his own request if he has a financial interest in the request. Additionally, any exemption would be crafted carefully in order to ensure

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<sup>15</sup> It is not uncommon for agencies to allow civic groups access to Government facilities, such as conference rooms or recreational fields (especially in the case of the military agencies).

that it permits only uncompensated representational activities that clearly would not create conflicts of interest or even the appearance of a conflict of interest.

As with the amendments enacted by Congress in 1996, as codified in section 205(d), such de minimis regulatory exemptions may well be tailored to permit certain kinds of representational contacts, while precluding such contacts with respect to other particular matters that may raise a possibility of an appearance of a conflict of interest or undue influence.

Such waiver authority would serve a purpose similar to that served by the waiver and de minimis exemption provision that currently exists at 18 U.S.C. § 208(b). When enacting the Ethics Reform Act of 1989, which provided this waiver authority to OGE, Congress recognized the need for such authority in the face of a broad, strict standard set forth in the statute:

Subsection (b) affords the government ample protection, yet provides a system whereby the government may utilize the services of its employees in situations in which under the present law a de minimis financial interest in a matter may either (1) compel disqualification under criminal penalties, resulting in obvious detriment to the government, or (2) result in disregard for the law.

H.R. Rep. 748, 87<sup>th</sup> Cong., 1<sup>st</sup> Sess., 24.

Pursuant to its authority under 18 U.S.C. § 208(b)(2), OGE issued on December 18, 1996, a final rule interpreting section 208 and providing for a number of de minimis regulatory exemptions to its basic prohibition. 5 C.F.R. part 2640. These exemptions range from categorical de minimis exemptions for ownership of various securities to specialized exemptions addressing issues that arise only at particular agencies. As a general matter, we believe that the success of these de minimis exemptions illustrates OGE's ability to develop and manage a regulatory exemption scheme without compromising the Government's interest in having an unbiased workforce and in maintaining the appearance of integrity.

OGE has had wide-ranging experience, during the past twenty-five years, in interpreting section 205, and has provided guidance through the issuance of interpretive opinions. Thus, we believe that we can continue to administer these provisions effectively, in conjunction with the authority to craft appropriate exemptions. This approach has the benefits of both flexibility and simplicity. Over the years, Congress has had to enact numerous pieces of legislation in order to add needed exceptions to the general prohibition in section 205. For example, as noted above, Congress passed the Federal Employee Representation Improvement Act of 1996 in response to an Office of Legal Counsel opinion that interpreted section 205 as barring Federal employee members of employee organizations from representing their organizations before the Government. Enacting statutory amendments can be time consuming, complicated, and sometimes unpredictable. Providing OGE with the authority to issue regulations addressing these issues would be simpler and would afford employees

relevant relief in a more timely manner. An appropriate standard for issuing section 205 exemptions must ensure that granting the waiver would not create the potential for, or the appearance of, the use of undue influence or unfair advantage.

b. Post-Employment Aspect of Section 203

The strict application of section 203 to former Government officials who have moved to the private sector creates an undesirable result. Section 203 prohibits an individual from sharing in compensation for representational services performed by someone else, such as a business partner, if those services were provided at a time when the individual was still a Government employee. Thus, for example, an employee who leaves Government service to join a law firm with a Federal practice may not accept any partnership share, bonus, or other payment that is calculated, in any part, based on fees received for representational services before the Government that had been performed by the firm while that individual was still a Government employee.

This post-employment application of section 203 can create administrative problems for law firms and other organizations that provide representational services, as it becomes a difficult accounting exercise to ensure that an individual's compensation does not include a share of "tainted" revenues. More importantly, other conflict of interest laws already guard against the most likely abuses. For example, Federal employees are prohibited, under 18 U.S.C. § 208, from participating in particular matters in which a prospective employer has a financial interest. In addition, former employees are already prohibited under 18 U.S.C. 207(a), from engaging in representational activities in connection with many particular matters in which they were involved for the Government. See also Model Rule 1.11, ABA Model Rules of Professional Conduct.

Furthermore, the presumed protection afforded by the post-employment application of section 203 is largely illusory, as a sophisticated employer can circumvent the restriction by offering an incoming employee an intentionally high "fixed" salary for the first year or so after he leaves Federal service, even though this salary would come from the same firm revenues, including revenues generated from representations before the Government at a time when the employee was still in Government service.<sup>16</sup> Thus, OGE believes that the post-employment application of the statute should be eliminated. This would not apply to compensation for services provided personally by the employee while still an executive branch employee.

c. Disharmony of Terms Used in Sections 203, 205 and 207

We also recommend that Congress make a minor amendment to sections 203 and 205 in order to make them more consistent with section 207. Sections 203 and 205 apply only to an employee who "acts as agent or attorney". Until 1989, section 207

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<sup>16</sup> It has long been recognized that the receipt of a non-contingent sum is permissible under section 203. See, e.g., OGE Informal Advisory Letter 99 x 24.

contained the same language. As part of the Ethics Reform Act of 1989, however, that language was replaced with the more descriptive, “knowingly makes, with the intent to influence, any communication to or appearance before [specified Government entities] on behalf of any other person.” Sections 203 and 205, however, still prohibit acting as “agent.” In recent years problems have arisen regarding the definition of the term “agent” as used in these statutes. Specifically, courts have superimposed the common law definition of agency on the conflict of interest laws, even though the two may serve different purposes. Compare O’Neill v. Department of Housing and Urban Development, 220 F.2d 1354, 1360-63 (Fed. Cir. 2000), with United States v. Zweig, 316 F. Supp. 1148, 1157 (S.D.N.Y. 1970). We believe that adopting the more descriptive terms now used in section 207 would improve the consistent interpretation and application of sections 203 and 205.

## **B. 18 U.S.C. 207 (Post-Employment)**

Section 207 of title 18 restricts the activities of individuals who leave Government service or who leave certain high-level positions in the executive branch. None of its provisions bars any individual, regardless of rank or position, from accepting employment with any private or public employer after Government service. Section 207 only prohibits former employees from engaging in certain activities on behalf of persons or entities other than the United States, whether or not done for compensation.

### **i. Background**

The first predecessor of section 207, codified later at 5 U.S.C. § 99, was enacted in 1872, although this law was not a criminal restriction. The first generally applicable criminal post-employment statute did not appear until 1944, well after the enactment of all of the other criminal laws that served as precursors of the modern conflict of interest statutes.<sup>17</sup> This statute, as revised and codified at 18 U.S.C. § 284, prohibited a former employee from “prosecut[ing] or act[ing] as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty” for a period of two years after terminating Government service. Like the restriction found today at section 207(a)(1), the prohibition of section 284 prohibited “switching sides” on a matter

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<sup>17</sup> Congress did enact one criminal post-employment restriction in 1919. See Act of July 11, 1919, 41 Stat. 131. However, this provision was extremely limited: as interpreted by the Department of Justice, it applied only to employees who served in the Government between 1917 and 1919, and some commentators questioned whether the law even applied to the very class of former officers that gave rise to the legislation. Office of Legal Counsel, DOJ, The Conflict of Interest Statutes, 79-80 (1956) (“DOJ Study”) reprinted in “Federal Conflict of Interest Legislation,” Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 89<sup>th</sup> Cong., 2d Sess. (May 25 and June 1, 1960); NYC Bar Report at 49; Manning at 184.

in which the former employee had been involved for the Government. Unlike section 207(a)(1), however, the restriction of section 284 was not a permanent bar and it applied only to "claims" against the United States.

In 1962, section 207 replaced these prior post-employment provisions. Section 207 contained two criminal post-employment restrictions, both of which replaced the old "claims" language with a broader description of covered Government matters: "particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest." The first restriction, often called the "life-time" or "permanent" ban, prohibited a former employee from acting as agent or attorney for anyone in connection with such a particular matter if the individual had participated personally and substantially as an employee in the same matter. With a few minor modifications in terminology and structure, this original version of the life-time ban in section 207 continues as current section 207(a)(1).

The second restriction in the 1962 version of section 207 prohibited similar conduct as the first, except that the former employee need not have participated personally and substantially in the matter for the Government, but need only have had "official responsibility" for the matter during the final year of the individual's Government service. This restriction largely corresponds to the current provision at section 207(a)(2), except that the original law imposed only a one-year ban, whereas current law, since the 1978 amendments, imposes a two-year ban.

By far, the two most commonly cited rationales for promulgating the post-employment statutes were preventing the misuse of inside information and preventing the use of undue influence by former officials. The centrality of these twin purposes has been recognized in various legislative materials, private studies, and judicial and administrative opinions, since 1872.<sup>18</sup>

Both of the original prohibitions in section 207 covered only representational contacts with the Government, not so-called "behind-the-scenes" assistance. Modern advocates of stronger measures to protect against information disclosure sometimes

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<sup>18</sup> See, e.g., Congressional Globe, 42d Cong., 2d Sess. 3109, May 6, 1872 (Sen. Edmunds); Congressional Record—House 14777 (August 7, 1961)(remarks of Rep. Cellar); S. Rep. 170, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 31 (1977); The President's Commission on Federal Ethics Law Reform, To Serve with Honor, 62-63 (1989); NYC Bar Report at 223; Center for Applied Ethics of the New York Society for Ethical Culture, The Revolving Door: Observations and Recommendations on the Ethical Aspects of the Movement of High Level Personnel Between Government Service and Private Enterprise 33 (1977); United States v. Medico Indus., Inc., 784 F.2d 840, 844 (7<sup>th</sup> Cir. 1986); 2 Op. O.L.C. 313, 316 (1978); OGE Informal Advisory Letter 84x15.

criticize this aspect of section 207.<sup>19</sup> However, despite occasional exceptions—such as the special restrictions governing trade agreements, treaties, and foreign entities—Congress generally has resisted efforts to incorporate “behind-the-scenes” prohibitions into section 207.<sup>20</sup>

Although the “revolving door” received relatively little Congressional attention through the mid-20<sup>th</sup> century, the opposite has been true in the past quarter century. Starting with the Ethics in Government Act of 1978, section 207 has been amended 13 times (not including the relatively technical amendments in 1994 and 1998).<sup>21</sup>

No discussion of the purposes of section 207 would be complete without an analysis of the important countervailing interests that have caused Congress to temper its post-employment restrictions. Chief among these interests is “the government’s

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<sup>19</sup> Perhaps not surprisingly, the American Bar Association has leveled this criticism, which is consistent with the overall focus on protection of client confidences that is found in the bar rules. See American Bar Ass’n Committee on Government Standards, Keeping Faith: Government Ethics & Government Ethics Regulation, 45 Admin. L. Rev. 287, 329-31(1993). The Wilkey Commission also emphasized the need for greater attention to behind-the-scenes disclosure of sensitive information. To Serve With Honor at 61-67.

<sup>20</sup> As discussed more fully below, Congress did pass a relatively broad behind-the-scenes restriction in 1978, but it was substantially limited by amendments in 1979, and was repealed altogether in 1989. In 1988, Congress passed another broad behind-the-scenes restriction, by adding “aiding and advising” to the existing permanent ban on representation with respect to matters in which the former employee participated personally and substantially for the Government. See H.R. Rep. 1068, 105<sup>th</sup> Cong., 2d Sess. 23. In this instance, however, the President disapproved the bill. See President Reagan Memorandum of Disapproval, November 23, 1988. When the next Congress took up the cause of ethics law reform again, it did not incorporate the “aiding and advising” phrase into section 207(a)(1). See Ethics Reform Act of 1989, P.L. 101-194, § 101(a), November 30, 1989.

<sup>21</sup> Pub. L. 95-521, Title V, § 501(a), 92 Stat. 1864, Oct. 26, 1978 ; Pub. L. 96-28, 93 Stat. 76, June 22, 1979; Pub. L. 101-189, Div A, Title VIII, Part B, § 814(d)(2), 103 Stat. 1499, Nov. 29, 1989; Pub. L. 101-194, Title I, § 101(a), 103 Stat. 1716, Nov. 30, 1989; Pub. L. 101-280, §§ 2(a), 5(d), 104 Stat. 149, 159, May 4, 1990; Pub. L. 101-509, Title V, § 529 [Title I, § 101(b)(8)(A)], 104 Stat. 1440, Nov. 5, 1990; Pub. L. 102-25, Title VII, § 705(a), 105 Stat. 120, April 6, 1991; Pub. L. 102-190, Div C, Title XXXI, Part C, § 3138(a), 105 Stat. 1579, Dec. 5, 1991; Pub. L. 102-395, Title VI, § 609(a), 106 Stat. 1873, Oct. 6, 1992; Pub. L. 104-65, § 21(a), 109 Stat. 704, Dec. 18, 1995; Pub. L. 104-179, §§ 5, 6, 110 Stat. 1567, Aug. 6, 1996; Pub. L. 104-208, Div A, Title I, § 101(f) [Title VI, § 635], 110 Stat. 3009-363, Sept. 30, 1996; Pub. L. 107-347, Title II, § 209(d)(1), (3), 116 Stat. 2930, Dec. 17, 2002; Pub. L. 108-136, Div A, Title XI, Subtitle C, § 1125(b)(1), 117 Stat. 1639, Nov. 24, 2003.

objective in attracting experienced and qualified persons to public service."<sup>22</sup> The potency of this interest is perhaps best illustrated by the circumstances immediately following the enactment of relatively strict new revolving door restrictions in the Ethics in Government Act (EIGA) of 1978. Before these new restrictions even became effective, Congress amended section 207 to lighten the new restrictions, in response to expressions of concern about the expected impact on recruitment and retention.<sup>23</sup> A quarter century after these extraordinary legislative events, concerns continue to be voiced about the impact of revolving door restrictions on Federal recruitment and retention.<sup>24</sup> Closely related is the concern not to interfere unnecessarily with the legitimate right of former employees to "move on with their lives" and make a living.<sup>25</sup>

Another interest in avoiding excessive post-employment legislation is that the Government sometimes derives a benefit from communicating with former employees. For instance, there often is an interest in receiving information from former officials about the operations of Government. "The knowledge of an experienced former official may be made to operate against the Government, but it may also contribute to the ends of the Government."<sup>26</sup> This concept is embodied in several exceptions that are now found in section 207, although most of them are subject to significant limitations and/or procedural requirements. These include exceptions for special knowledge,<sup>27</sup> scientific

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<sup>22</sup> S. Rep. 170 at 32.

<sup>23</sup> Predictions were particularly dire with respect to the consequences of the new bar on certain behind-the-scenes assistance. See H.R. Rep. 115, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3-6 (1979); Congressional Record, S 3871, April 4, 1979; The Washington Post, Editorial, A20, February 5, 1979; New York Times, 22, Column 4, March 21, 1979.

<sup>24</sup> See, e.g., National Academy of Sciences, Science and Technology in the National Interest: Ensuring the Best Presidential and Federal Advisory Committee Science and Technology Appointments 202 (2004) ("laws restricting post-Government employment have become the biggest disincentive to public service" for scientists and engineers).

<sup>25</sup> As one commentator noted, shortly after the 1978 and 1979 post-employment legislation was enacted, "[t]ypically, cost-benefit analysis focuses primarily on costs that can be expressed in dollars or in losses of Government efficiency. That is understandable, given the way most cost-benefit issues are posed, but in a free society some other costs are also relevant . . . . Restrictions that deter these persons [who are not willing to work permanently for the Government] from fulfilling their desire for Government positions represent a significant cost affecting the freedom of those individuals to plan their careers." Morgan, Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency, 1980 Duke L. J. 1

<sup>26</sup> New York City Bar Report at 224.

<sup>27</sup> 18 U.S.C. § 207(j)(4) (exception to 207(c), (d), and (e)).

and technological information,<sup>28</sup> certain activities on behalf of international organizations in which the United States participates,<sup>29</sup> certain activities on behalf of Government-owned/contractor-operated laboratories,<sup>30</sup> and actions on behalf of the United States.<sup>31</sup>

The text of section 207 today is longer than sections 203, 205, 208 and 209 combined. Whereas the 1962 version of section 207 included two post-employment prohibitions, section 207 now includes seven different prohibitions applicable to executive branch employees: 207(a)(1) (life-time ban on matters where personal and substantial participation), 207(a)(2) (two-year ban for matters under official responsibility), 207(b) (treaty and trade agreement negotiations), 207(c) (one-year cooling-off period for senior employees), 207(d) (one-year cooling-off period for very senior employees), 207(f) (representing and assisting foreign entities), and 207(l) (contract advice by former detailees under the Information Technology Transfer Program).<sup>32</sup>

## ii. Discussion

### a. Complexity

The complexity of section 207 is criticized frequently and it would be difficult to deny that the statute is, indeed, complex. Some restrictions, such as the lifetime ban in 207(a)(1), apply to all employees, regardless of level of position or subject matter. Other restrictions, however, apply only to employees holding positions at certain levels of authority or pay: 207(a)(2) (supervisory employees), 207(c)(senior employees), 207(d) (very senior employees), 207(f) (senior and very senior employees). Some restrictions are subject matter-specific or client-specific: 207(b)(trade agreement and treaty matters), and 207(f) (foreign entity clients). Some restrictions apply only to

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<sup>28</sup> 18 U.S.C. § 207(j)(5) (exception to 207(a), (c), and (d)).

<sup>29</sup> 18 U.S.C. § 207(j)(3) (exception to all prohibitions).

<sup>30</sup> 18 U.S.C. § 207(k) (exception to all prohibitions). This authority is narrowly prescribed and has never been used since its enactment in 1989.

<sup>31</sup> 18 U.S.C. § 207(j)(1) (exception to all prohibitions where actually carrying out "official duties" on behalf of United States); see also section 207(a)(1), (a)(2), (b), (c), (d), (e), (l) (all exempting actions on behalf of United States, without the official duties requirement); compare § 207(f) (no categorical exemption for activity on behalf of United States, but still subject to the official duties exception in section 207(j)(1)).

<sup>32</sup> This does not include section 207(e), which applies only to legislative branch employees. The present study will address neither the effectiveness of section 207(e) nor any recommendations for revision, inasmuch as OGE has no expertise or experience in the interpretation and application of the post-employment restrictions as applied to the legislative branch.



positions in certain agencies or employees in certain programs: 207(f)(2) (special lifetime restrictions for the U.S. Trade Representative and Deputy), and 207(l) (special restriction applicable to Information Technology Exchange Program assignees). The applicable durations of the various restrictions also vary: 207(a)(1) (life of the matter), 207(a)(2) (two years), 207(b)(one year), 207(c) (one year), 207(d) (one year), 207(f) (one year, except lifetime for the United States Trade Representative and Deputy), and 207(l)(one year). Most of the restrictions, including those that affect the most employees, are limited to representational communications and appearances, but three narrowly applicable provisions—207(b), 207(f), and 207(i)—also cover behind-the-scenes activities, thus adding an additional layer of complexity.

Nevertheless, the statute's complexity creates few real practical problems for the majority of employees since the average executive branch employee is affected by only one restriction in section 207: the lifetime ban in section 207(a)(1) with regard to certain matters in which the individual participated personally and substantially. Most employees are not supervisors, senior or very senior officials, IT Exchange Program assignees, or persons with duties pertaining to trade agreement or treaty negotiations. Thus, the multiple layers of restrictions criticized by some commenters would not appear to create particular burdens for most employees covered by section 207.

It is difficult to opine on whether the statute's complexity is justified on policy grounds. Each of the restrictions in section 207 has its own justification and legislative history. Viewed in the aggregate, these restrictions may yield a complex scheme, but viewed individually, each restriction has a clear and reasonable purpose. For example, the American Bar Association has long opposed special post-employment restrictions that are dependent on the nature of the subject matter or the identity of the former employee's client, such as sections 207(b) and (f),<sup>33</sup> but these provisions address a special concern about perceived abuse of influence and inside information by former high level officials on behalf of foreign interests.<sup>34</sup> A similar point can be made about section 207(l), which reflects specific Congressional concern over the unique access that private sector IT assignees may acquire with respect to potentially large

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<sup>33</sup> American Bar Ass'n Committee on Government Standards, Keeping Faith: Government Ethics & Government Ethics Regulation, 45 Admin. L. Rev. 287(1993) ("ABA Report")

<sup>34</sup> Sections 207(b) and 207(f) were enacted in 1989, the culmination of work in three successive Congresses in response to allegations and findings that first came to light in 1986. See H. Rep. 1068, 100<sup>th</sup> Cong., 2d Sess. 10 (1988); Hearings Before the Committee on the Judiciary, United States Senate, "A Bill to Amend Section 207 of Title 18, United States Code, to Prohibit Members of Congress and Officers and Employees of Any Branch of the United States Government from Attempting to Influence the United States Government or from Representing or Advising a Foreign Entity for a Prescribed Period after Such Officer or Employee Leaves Government Service, and for Other Purposes," 99<sup>th</sup> Cong., 2d Sess., April 29 and June 18, 1986; GAO, Foreign Representation: Former High-Level Federal Officials Representing Foreign Interests, 2 (1986).

IT procurements. OGE cannot readily dismiss the special concerns that led to the enactment of these tailored restrictions, nor does the aggregate complexity of the statute seem reason enough to pare away these individual provisions. In addition, as noted above, the great majority of former employees are subject to only section 207(a)(1), so the statute's complexity is not a pervasive problem.

Like the statute's various prohibitions, each of its exemptions has a purpose and history that cannot be dismissed lightly. Notwithstanding this fact, OGE has identified one particularly long and complex exemption, section 207(k), that could be eliminated from the statute without significant adverse consequences. Section 207(k), which was enacted in 1989, is very narrowly targeted at employees who come into Government after working at a national laboratory and who then leave Government service to work in one of those laboratories again. The provision is subject to an array of specific limitations and procedures. For example, no more than 25 employees may have such waivers at any time, the waiver authority resides in the President and is non-delegable, and waiver recipients must file periodic reports. Not surprisingly, the authority has never been exercised. Especially in view of the fact that OGE recommends a broader and more administrable "national interest waiver authority" (see discussed below), OGE sees little practical reason for Congress to retain section 207(k).

#### b. National Interest Waiver

As discussed above, the restrictions of section 207 have always been tempered, to some degree, by the consideration that it is sometimes in the interest of the Government to communicate with former employees about certain matters. Most notably, the statute, since 1962, has provided a waiver mechanism for an agency head to permit certain communications of a scientific or technological nature that otherwise would violate the statute, where such communications are determined to be in the "national interest." 18 U.S.C. § 207(j)(5).<sup>35</sup>

Over the years, however, many agencies have reported to OGE that the existing waiver authority is too narrow, particularly in its limitation to scientific and technological subjects, to permit sufficient Government access to the information and views of former employees in certain matters. See S. Conf. Rep. No. 95-127, at 77 (1978) (exemption authority not applicable to social sciences and non-technical disciplines). Agency ethics officials broadly support expanding flexibility for the Government to permit contact, under controlled circumstances, with former employees who possess unique knowledge or perspectives in fields such as national security or other areas involving specialized experience. Agencies similarly have expressed the need for freedom to communicate with former lower level employees who possess specialized expertise in various crucial areas. For example, NASA has advised OGE that, in order to implement the

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<sup>35</sup> As currently written, section 207(j)(5) requires such determinations to be published in the Federal Register after the agency consults with OGE. This waiver provision applies to the prohibitions in sections 207(a), (c) and (d), but not (b), (f) or (l).

President's Vision for Space Exploration, it will be necessary to engage private organizations, such as nonprofit research centers, to carry out some of the operations that currently are performed by NASA employees. Many of these private organizations are staffed by former NASA employees, and in many of these cases, the necessary communications would not be limited strictly to scientific and technological subjects.<sup>36</sup>

OGE is certainly mindful of the potential for abuse of influence and inside information when former employees participate in the performance of Government contracts, and, in fact, OGE has taken a fairly strict approach concerning the application of section 207 to such situations. See OGE Informal Advisory Letter 99 x 19 (communications made during the performance of Government contract are not on behalf of the United States and may be made with the intent to influence the Government); 03x06 (same). At the same time, OGE is not aware that the use of the existing waiver authority of section 207(j)(5) has led to any particular abuses in such situations, and OGE believes that this authority can and should be expanded somewhat to permit agency contacts with former employees who do not meet the scientific and technological subject matter qualifications required under current law.

Therefore, OGE recommends that section 207 be amended, either by expanding the current waiver provision in section 207(j)(5) beyond simply scientific and technological communications, or by creating a new exemption provision that employs many of the same limitations and procedural requirements at (j)(5), particularly the requirements of OGE consultation, publication, and a certification of national interest. Like current section 207(j)(5), the proposed new waiver authority would not apply to the restrictions in section 207(b), (f) or (l), nor would the waiver affect other statutory restrictions beyond section 207, such as post-employment safeguards in the Procurement Integrity Act, 41 U.S.C. § 423. It is also envisioned that the OGE consultation process would involve the tailoring of additional limitations, as appropriate to the situation, such as limitations on the kinds of communications (e.g., restrictions against communications in adversarial settings such as a contract claim or bid protest), the classes of employees to which the waiver would apply (e.g., certain procurement officials could be excluded from some waivers), time limitations on when the communications could occur, and other circumstances surrounding the post-employment activity. Similarly, in consultation with OGE, agencies could impose special oversight requirements in these waivers (e.g., contact logs to document and describe certain kinds of contacts with former employees), as deemed necessary. Such appropriate limitations and requirements could be advanced by requiring, in the statute, that the agency head take into consideration the potential for unfair advantage or influence on the part of the former employee. With these safeguards, OGE believes that a waiver provision for section 207 can be implemented responsibly and judiciously, in furtherance of important national interests.

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<sup>36</sup> In addition, in some cases, an agency that is undergoing a transition involving the departure of certain employees may have a need to communicate with these former employees in order to facilitate both the transition and ongoing mission-related activities.

### c. Senior Employee Definition

The Ethics in Government Act of 1978 imposed a "cooling off" period on senior employees, which prohibits them from making representational contacts with their former agencies for one year after leaving Government service (section 207(c)). It always has been difficult, however, to define the class of employees who have sufficient influence to warrant this broad restriction. While there always has been broad consensus that personnel paid according to the Executive Schedule (generally Senate-confirmed Presidential appointees) should be covered, Congress and the executive branch have wrestled with the question of which other senior executives should be covered by section 207(c).

Originally, the law specified that employees at the GS-17 level, as well as employees holding positions designated by OGE as involving "significant decision-making or supervisory authority," would be covered.<sup>37</sup> Less than a year later, the law was amended to narrow this class exclusively to persons paid at the GS-17 level, where designated by OGE.<sup>38</sup> Because OGE encountered significant administrative and interpretive difficulties in applying the designation criteria in a consistent fashion across the executive branch,<sup>39</sup> Congress ultimately eliminated the need for an OGE designation, instead covering all employees paid at the equivalent of GS-17 or above.<sup>40</sup> Less than a year later, Congress replaced the GS-17 salary standard with a provision covering any employee whose rate of basic pay was equivalent to the lowest pay level in the Executive Schedule (EL 5).<sup>41</sup>

For a few years, under this standard, employees in the Senior Executive Service were covered only if employed at SES levels 5 and 6. However, in the mid-1990s, the phenomenon of "salary compression" threatened to include SES level 4 employees as well, with little notice to affected employees and without any accretion of responsibilities or influence on their part, thus necessitating a short-term waiver of the restrictions by

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<sup>37</sup> Pub. L. 95-521, § 501(a), October 26, 1978.

<sup>38</sup> Pub. L. 96-28, § 2, June 22, 1979.

<sup>39</sup> See, e.g., GAO, Information on Selected Aspects of the Ethics in Government Act of 1978, 22 (1983) (discussing OGE findings that the Act provides few meaningful standards for designation, the class of positions eligible for designation covers employees without sufficient stature to warrant restriction, and the process is undermined by difficulties in obtaining current and accurate information about positions in agencies, due to reorganizations, changes in administration and personnel changes).

<sup>40</sup> Pub. L. 101-194, §101(a), November 30, 1989.

<sup>41</sup> Pub. L. 101-509, Title V, § 529, November 5, 1990 (Federal Employees Pay Comparability Act).

OGE in January, 1996.<sup>42</sup> In response, Congress amended section 207(c) later that year to replace the EL 5 standard with a standard based on the rate of basic pay for SES level 5, reflecting a determination that SES level 4 employees should be excluded.<sup>43</sup> OGE subsequently received anecdotal reports from several agencies that some SES level 4 employees were intentionally declining promotions to the SES 5 level for the purpose of avoiding the section 207(c) restriction. Given the reality of continued pay compression, as well as the fact that SES 4 employees could make up much of the difference in salary through locality pay increments that did not count toward basic pay under section 207(c), declining promotion to SES 5 had little practical effect on these employees, but it did allow them to avoid becoming subject to the restrictions of section 207(c).

In 2003, as part of its overhaul of the Senior Executive Service, including the conversion to a "pay-for-performance" system, Congress eliminated not only all of the fixed pay levels but also locality pay for the SES (with the provision that initial rates of basic pay would include as basic pay any amounts previously received as locality pay).<sup>44</sup> At the same time, Congress replaced the now obsolete reference to SES level 5, in section 207(c), with a new salary-based standard: 86.5 % of EL II (EL II being the maximum rate of basic pay permitted for an SES employee in an agency with an OPM-approved pay-for-performance-system).<sup>45</sup> Under this new standard, most SES employees now are covered by section 207(c), including many employees who were formerly classified below the SES 5 level and thus were not covered previously. As many of these employees have pointed out, the expansion of coverage is a function of changes to the SES system itself, rather than a considered determination that lower-paid SES employees now should be viewed as having the level of responsibility and influence to justify their inclusion.

OGE has considered a number of options for readjusting the standard for section 207(c) coverage, particularly in light of its impact on members of the SES: return to some version of a position designation system; set the triggering percentage higher than 86.5 % of EL II; only cover "noncareer" SES employees; or cover the entire SES, both career and noncareer. The following discussion reflects our analysis of each of these options.

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<sup>42</sup> See OGE Memorandum DO-96-001, January 4, 1996. This waiver was extended on June 6, 1996, see OGE Memorandum DO-96-030. See also 61 Federal Register 14326 (April 1, 1996) (notice and revocation of waiver).

<sup>43</sup> Pub. L.104-179, § 6, August 6, 1996; see H. Rep. 104-595 at 9 (1996) ("With this section, SES level 4 employees will not be subject to the post-employment restrictions of section 207 of title 18, as was the intention by the 1989 Ethics in Government Act amendments.").

<sup>44</sup> Pub. L. 108-136, § 1125(a), November 24, 2003.

<sup>45</sup> Id., § 1125(b)(1).

OGE strongly opposes any return to a designation system for determining which individual SES positions will be subject to section 207(c), whether the positions would be designated by OGE or by individual agencies. In addition to the historic problems noted above with respect to the original designation process enacted in 1978 and amended in 1979, the Department of Justice has expressed concern that uneven designation of positions across the executive branch would create the potential for misunderstanding on the part of employees, particularly employees who move between agencies or have significant interaction with peers at other agencies. Moreover, OGE notes the possibility that employees and former employees could raise legal challenges, either pre-enforcement or in an actual prosecution, to the final agency actions designating their positions. Cf. Sullivan v. Devine, No. 81-C-3810 (N.D. Ill.) (upholding challenge to different treatment of different United States Attorneys under prior version of section 207(c)), vacated as moot, 456 U.S. § 986 (1982).

OGE also has considered the option of simply raising the salary threshold, for example, from 86.5% to 96% of EL II, which is a figure that has been suggested by some. The basic pay equivalent of 96% of EL II today would be \$151,776. The basic pay equivalent of 86.5%, the current threshold, is \$140,216.50. We understand, from the Office of Personnel Management, that the 96% figure would represent roughly the halfway point between EL III and EL II.<sup>46</sup> This option would succeed in excluding many SES employees who were covered for the first time by the 2003 amendments. One drawback to this solution, however, would be the potential that employees would engage in some degree of "gamesmanship" by declining pay increases in order to avoid triggering the threshold, while still enjoying a relatively high salary (just under 96% of the maximum \$162,100 currently allowable). A second potential drawback is that unsuspecting employees could find themselves shifting in and out of coverage in different years, depending on how their pay is adjusted, based on performance criteria, and how those adjustments relate to any changes (or the absence of change) in the rate of pay for EL II. A third problem is that one would expect variation among agencies in terms of the pay levels assigned to comparable positions, as a consequence of various factors, including the tendency of some agencies to set average SES pay levels higher or lower than other agencies.<sup>47</sup>

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<sup>46</sup> As noted above, the equivalent of EL II is the highest salary permitted for an SES employee in an agency with an OPM-approved pay-for-performance system. For agencies without OPM-approved plans, the maximum pay would be equivalent to EL III, so any revision to section 207(c) that would set the threshold above EL III would have to make some provision for covering employees in agencies without approved plans. This is a relatively technical matter, and OGE believes that various alternatives could be implemented.

<sup>47</sup> For example, initial data collected by OPM concerning the implementation of the pay-for-performance system for the SES demonstrate that there can be significant differences among agencies in terms of average SES pay. See Memorandum of Linda M. Springer, Director, OPM, to Heads of Executive Departments and Agencies, "FY 2004 SES Performance Ratings, Awards, and Salaries," Data Chart Attachment on (continued)

The third alternative, to limit section 207(c)'s coverage to noncareer SES members, i.e., "political appointees,"<sup>48</sup> would reflect the belief that these employees are the most likely to acquire influence, and to come into Government for shorter periods of time, thus giving at least the appearance that their Government service is motivated by a desire to wield their influence for personal gain later. It would be regrettable, however, to impugn the motives of noncareer SES members, who perform an important role in our democratic system by helping to effect the policies of any administration. In addition, it should be recognized that high level career employees also can and do acquire significant influence in their agencies.<sup>49</sup> Limiting section 207(c)(2)(ii) to noncareer employees also would seem inconsistent with the coverage of career military personnel (O-7 and above) in paragraph (iv) of the same provision. OGE does not support the creation of such a double standard between civilian and military personnel.

The option of covering the entire SES, both career and noncareer, as a per se category, has obvious merits. It would provide considerable clarity and uniformity in the treatment of SES employees, and it would eliminate the potential for gamesmanship within the pay system. Moreover, the per se approach would eliminate pay as a surrogate marker for level of influence, which is increasingly hard to justify, in light of the new pay-for-performance principles governing the SES.<sup>50</sup> A principal objection to this approach is that the entire SES was not previously covered, as a per se category, by the senior employee restriction. Employee expectations, based on historical treatment under section 207(c), should not be lightly dismissed, not only because of recruitment and retention concerns but also because of considerations of fairness and notice. The

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"Compensation for Career, Non-Career and Limited Term SES Employees," October 4, 2005 (average rates of basic pay for FY 2004 ranges from \$142,699 at OMB and \$143,624 at DOD, to \$151,395 at SBA and \$151,969 at USDA). Although many factors, including agency budget, may affect these different rates of pay, it would be hard to argue that these differences reflect any factors, such as perceived level of influence and responsibility, that are relevant to the purposes of the post-employment law.

<sup>48</sup> The House passed such a provision in connection with the original legislative efforts that produced section 207(c), but the language was altered before final enactment by both houses in 1978. The House bill that went to conference would have covered employees, GS-16 and above, in positions "excepted from the competitive service by reason of being of a confidential or policymaking character." H. Conf. Rep. 95-127, at 75 (1978); see also H.R. Rep. 95-800, at 40 (1977).

<sup>49</sup> The potential power and influence of career executives has often been noted, among other places, in advice routinely given to incoming Presidential appointees. See, e.g., Trattner & McGinnis, The Prune Book 9-10 (2004).

<sup>50</sup> To the extent that the new SES system is consciously grounded in pay-for-performance principles, pay does not necessarily serve as an accurate barometer of responsibility and influence.

latter concerns, however, are somewhat muted, as the 2003 amendments have had the effect of covering most of the SES during the past two years anyway, apparently without harming recruitment and retention efforts within the SES.<sup>51</sup>

On balance, therefore, OGE believes that the best alternative to the current standard is to recognize the entire SES as a per se category under section 207(c)(2)(ii). This leaves the question of how to deal with civilian employees in non-SES systems (other than Executive Level personnel, who are already covered per se). Currently, these employees are covered if they meet the salary criteria, i.e., 86.5% of EL-II. Of course, the use of pay as a criterion for these employees is subject to the same objections discussed above with respect to the SES — perhaps even more so, since alternative pay systems often are designed to enhance recruitment and retention of personnel with special expertise, rather than to recognize their level of responsibility within the agency hierarchy.<sup>52</sup> OGE believes that the best approach is to cover positions in non-SES systems to the extent that they are comparable to SES positions, in terms of management authority and otherwise. Under this standard, the agency with principal authority for managing the system would be required to determine whether that system, or some level of positions within the system, is SES-equivalent. Such determinations would be published, and OGE would be provided with copies in order to facilitate oversight.

d. Behind-the-scenes Assistance/Information Disclosure

One criticism that has been leveled against section 207 over the years has concerned its failure, generally, to proscribe “behind-the-scenes” assistance.<sup>53</sup> Critics assert that this omission fails to recognize the potential harm caused by the disclosure of confidential information. Although OGE appreciates this concern, we do not recommend amending section 207 to add any new behind-the-scenes restrictions.

There are several reasons why behind-the-scenes restrictions are the exception, rather than the rule, under section 207. In 1978, when Congress added a behind-the-

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<sup>51</sup> The current minimum basic pay for the SES is \$107,550. Although this figure is below the current section 207(c) threshold (\$140,216), the new system was designed to ensure that amounts formerly included as locality pay for employees already in the SES would be included as part of basic pay, thus resulting, at least initially, in much higher rates of basic pay than these employees previously received. According to OPM, the net result has been that most SES employees who were already in the service received a new rate of basic pay in excess of the new section 207(c) threshold.

<sup>52</sup> For example, in 2002, the Securities and Exchange Commission, pursuant to its special authority under Pub. L. 107-123, instituted a “pay parity plan” permitting it to provide enhanced compensation to certain experts, without increasing their duties or responsibilities. See 67 Federal Register 55844 (August 30, 2002).

<sup>53</sup> E.g., To Serve With Honor at 61-67.



scenes provision applicable to senior employees, there was such a backlash of opposition from various quarters, including the media and numerous agencies, that the provision was substantially revoked before its effective date. The primary concern about this provision was that it would create serious barriers to recruitment and retention. Although Congress enacted other behind-the-scenes restrictions in 1989 (sections 207(b) and (f)) and again in 2002 (section 207(l)), these more recent provisions are very narrowly tailored (they apply only to foreign affairs and IT exchange), and so have not occasioned the same level of concern. Apart from recruitment and retention concerns, there also has been a general reluctance to turn section 207 into a criminal "official secrets" act. To some extent, this reflects a perception that Government employees may have important insights about the workings of Government and that the public can have an interest in what former employees have to say about matters of public concern.<sup>54</sup> Finally, some commenters have raised concerns about the clarity and enforceability of some behind-the-scenes restrictions. On balance, therefore, we do not believe that Congress should expand the behind-the-scenes restrictions in section 207.

#### e. Employment Bans

Some have suggested that certain high level officials should be subject to a time-limited ban on employment with agency contractors and certain other outside entities.<sup>55</sup> Rather than prohibiting representational activity or assistance with regard to agency matters, such a bar would prohibit departing employees from accepting employment with a particular entity that may have been affected by the employee's official duties. This restriction would be similar to those that currently exist in the Procurement Integrity Act,<sup>56</sup> and in the recently enacted legislation limiting employment with financial institutions overseen by senior bank examiners.<sup>57</sup> Of course, these restrictions are not criminal and have a relatively narrow scope, applying only to particular categories of employees involved in very specific Government activities. Some of the recommendations currently being advanced would have broader application. For instance, some support covering all senior officials involved in certain types of policy

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<sup>54</sup> See To Serve With Honor at 64 ("We cannot overemphasize the care that must be exercised in drafting such a prohibition. A vague or overbroad restriction might impermissibly chill the exercise of First Amendment rights."); Conrad v. United Instruments, 988 F. Supp. 1223,1226 (W.D. Wis. 1997) ("While such limitations may protect the confidentiality of the deliberative process . . . , they can also silence former employees who seek to expose incompetence and corruption within the federal government")

<sup>55</sup> E.g., Project on Government Oversight, The Politics of Contracting 35 (2004) (POGO Report).

<sup>56</sup> 41 U.S.C. § 423(d).

<sup>57</sup> 12 U.S.C. § 1820(k); 12 U.S.C. §1786(w).

matters affecting outside entities.<sup>58</sup> Such proposals have gained strength recently, in response to the Druyun Air Force procurement scandal.

On the other hand, some observers have specifically recommended against new restrictions in response to the Druyun affair.<sup>59</sup> Instead, some have recommended better procurement oversight. Others have recommended more transparency with respect to employment negotiations and recusals, or better enforcement of existing laws. Many people have opined that "the system worked" in the Druyun case, i.e., she was caught and convicted. Several also have pointed out that no enhanced restrictions will prevent a determined individual from willfully engaging in corrupt behavior, so it makes little sense to change the laws applicable to all employees in response to a few cases of determined corruption.

OGE certainly is concerned about activity of the type involved in the Druyun case. Although Ms. Druyun was convicted, her prosecution did not necessarily undo the harm already done to the Government, including harm to public confidence in Government procurement processes. At the same time, however, we do not believe that imposing an additional criminal ban on employment with certain entities is the appropriate response. Because section 207 has never prohibited employment per se, but only certain post-employment activities, this approach would reflect an unprecedented use of the criminal sanction. A general employment ban would impose serious enough limitations on the post-employment opportunities of Federal employees that OGE is concerned that recruitment and retention efforts would be harmed, for example, in the case of certain scientific and technical disciplines.<sup>60</sup> As an alternative, Congress may wish to revisit the Procurement Integrity Act exception that permits former employees, such as Ms. Druyun, to go to work for a contractor division or affiliate that does not produce the same or similar products or services as the contractor entity

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<sup>58</sup> E.g., POGO Report at 35.

<sup>59</sup> E.g., Report of the Defense Science Board Task Force on Management Oversight in Acquisition Organizations 3 (2005).

<sup>60</sup> A recent report by the National Academies observed: "In its 1992 study of this issue, the National Academies committee reported that presidential recruiters, as well as scientists and engineers who have been approached by recruiters, found that the laws restricting postgovernment employment have become the biggest disincentive to public service. Overlapping, confusing, and in some respects overbroad measures that were suspended with the passage of the 1989 Ethics Reform Act have come back into effect, and there is constant pressure to broaden the restrictions further by banning officials involved in specific procurement actions from working in any capacity for any competing contractors for 1 or 2 years." National Academy of Sciences, et al., Science and Technology in the National Interest: Ensuring the Best Presidential and Federal Advisory Committee Science and Technology Appointments 202 (2004).

with which the former employee's official duties were concerned. 41 U.S.C. § 423(d)(2).<sup>61</sup>

f. Trade Agreements

Section 207(b) contains special post-employment restrictions with respect to former employees who participated in negotiations on behalf of the United States with respect to treaties and certain trade agreements. This provision, along with section 207(f), was the culmination of work in three successive Congresses, the original impetus for which was concern raised in 1986 about "a high-level federal official [who] 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."<sup>62</sup>

The specific definition of "trade agreement," as used in section 207(b)(2)(A), refers only to the fast track trade agreement authority of section 1102 of the Omnibus Trade and Competitiveness Act of 1988 (codified at 19 U.S.C. § 2902), which expired in 1993. When Congress restored similar fast track authority in 2002, it did so by creating new provisions, see 19 U.S.C. § 3803, rather than by amending the prior fast track law that is referenced in section 207(b). Congress, however, made no conforming changes to section 207(b) to reference the new fast track provisions. Consequently, section 207(b) no longer covers any existing trade agreement authorities. Section 207(b), however, still applies to treaty negotiations.

Beyond noting that Congressional concern over trade agreements was the original impetus for promulgating section 207(b), OGE expresses no view on whether

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<sup>61</sup> OGE has no recommendation on this subject, which is beyond the scope of this report. We note, however, that Congress, the Government Accountability Office and various parts of the executive branch are examining ways in which to implement additional ethical principles and controls in Government contracting, in response to the Druyun case, and OGE expects to continue playing a role in such efforts. E.g., GAO, Defense Ethics Program: Opportunities Exist to Strengthen Safeguards for Procurement Integrity (2005).

<sup>62</sup> H. Rep. 1068, 100<sup>th</sup> Cong., 2d Sess. 10 (1988). Additionally, a 1986 GAO report found that 76 former high-level Federal officials "represented foreign interests before the Government after leaving office during fiscal years 1980-85." GAO, Foreign Representation: Former High-Level Federal Officials Representing Foreign Interests 2 (1986). See also Hearings Before the Committee on the Judiciary, United States Senate, "A Bill to Amend Section 207 of Title 18, United States Code, to Prohibit Members of Congress and Officers and Employees of Any Branch of the United States Government from Attempting to Influence the United States Government or from Representing or Advising a Foreign Entity for a Prescribed Period after Such Officer or Employee Leaves Government Service, and for Other Purposes," 99<sup>th</sup> Cong., 2d Sess., April 29 and June 18, 1986 (1986 Hearings).

section 207(b) should be amended to again cover fast track trade agreement authority. OGE has had little experience in interpreting or implementing section 207(b) and even less experience in the area of trade agreements generally, so OGE is not in a good position to assess the need for special controls in this unique context. OGE, however, wanted to bring this issue to the attention of the President and Congress.

g. Duration of Cooling-off Periods

Some observers have recommended that the cooling-off periods for senior and very senior employees, 18 U.S.C. § 207(c) & (d), should be extended beyond the current one year. In fact, President Clinton subjected certain of his noncareer senior officials to a five-year cooling-off period with respect to their former agencies. This prohibition, however, was not a criminal restriction, was subject to certain limitations not found in section 207, and ultimately was revoked.<sup>63</sup> Some commenters recommend a cooling-off period longer than one year, but shorter than five.<sup>64</sup>

OGE does not believe that the cooling-off periods should be expanded beyond the current one year. Adding an additional year or more would place a significant new burden on senior and very senior employees, especially if the change were imposed on current career members of the SES and other career senior employees. (Even the Clinton ban was carefully limited to noncareer employees). OGE also believes that

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<sup>63</sup> Executive Order 12834, 58 Federal Register 5911 (January 22, 1993). Near the end of his Presidency, President Clinton revoked Executive Order 12834, effective on noon of January 20, 2001. Executive Order 13184, 66 Federal Register 697 (December 28, 2000). As the Counsel to the President explained at the time: "Indeed, as President Clinton is about to leave office, we have been urged by many, including the sponsors of the Presidential Appointee Initiative, to reexamine the need for continued application of the Executive Order. We agreed that a reevaluation makes sense at this time." Statement by Counsel to the President Beth Nolan, December 28, 2000.

<sup>64</sup> Even the President of Common Cause, an organization that has long advocated tougher revolving door restrictions, concluded that the five-year period "may have been a bit too long." Testimony of Scott Harshbarger, President of Common Cause, Hearings Before the Committee on Governmental Affairs, United States Senate. The State of the Presidential Appointment Process, 107<sup>th</sup> Cong., 1<sup>st</sup> Session, April 4-5, 2001, at 29. See also American Bar Ass'n Committee on Government Standards, Keeping Faith: Government Ethics & Government Ethics Regulation, 45 Admin. L. Rev. 287, 331 (1993) (one-year imposed by section 207 "may in fact be somewhat too brief" but "we are convinced that the five-year cooling-off period chosen by Executive Order 12834 is considerably too long"; "risk that the abusive power of personal influence and contacts will survive not only the passage of time but also the vicissitudes of politics is too insignificant to justify such substantial curtailment of citizens' professional lives after they leave government").

such an added restriction could adversely affect the recruitment and retention of new Federal employees.<sup>65</sup>

### **C. 18 U.S.C. 208 (Financial Conflicts)**

Section 208 is the cornerstone of the executive branch ethics program. It prohibits an employee from participating personally and substantially in any particular matter in which he has a financial interest, or in which certain others with whom he is associated have a financial interest.<sup>66</sup> The provision is aimed at preventing self-dealing. Its purpose is to promote public confidence in Governmental processes by barring employees from participating in Government matters that would have beneficial or adverse financial effects on them.

#### **i. Background**

In 1863, Congress enacted 18 U.S.C. § 434 specifically to address concerns about the official participation of Government employees in “business transactions” with banks, commercial corporations, and mercantile or trading firms in which they held financial interests.<sup>67</sup> Section 434 prohibited “an officer, agent or member of,” or anyone “directly or indirectly interested in the pecuniary profits or contracts of,” a “corporation, joint-stock company, or association, or of any firm or partnership, or other business entity” to participate “as an officer or agent of the United States for the transaction of business with such business entity . . . .” Subsequent amendments to section 434 expanded the prohibition to include acting as an officer or agent for the Government in the transaction of business with “any business entity” in which he was an officer, agent or member, or in whose pecuniary profits or contracts he had a direct or indirect interest.

Promulgated in 1962, 18 U.S.C. § 208 superseded section 434. Unlike section 434, which applied to anyone acting as an officer or agency of the United States, section 208 applies only to employees of the executive branch of the U.S. Government (including special Government employees (SGEs)); employees of independent agencies of the U.S.; Federal Reserve bank directors, officers, or employees; and employees of the District of Columbia. Furthermore, rather than

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<sup>65</sup> See, e.g., Stewart Powell, “Clinton’s ethics rules called obstacle to filling key posts,” Washington Times, February 28, 1994.

<sup>66</sup> Imputed to the employee are the financial interests of “his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment.”

<sup>67</sup> Introduced as a floor amendment by Senator Howard of Michigan, the new statute had almost no legislative history and was enacted without discussion.

applying only to financial interests in “business entities,” section 208 applies to all of the employee’s financial interests. Similarly, section 208 requires disqualification not only from “business transactions,” but from any “judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter,” in which the employee has a financial interest. And, as noted above, section 208 extends the disqualification requirement to interests of persons other than the executive branch employee by imputing the financial interests of certain others to him.

Whereas there was some question whether a financial interest had to be “substantial” in order to be covered by section 434, section 208 clearly applies to all matters in which the employee has a financial interest, even if that financial interest is insubstantial. Unlike section 434, however, Congress incorporated into section 208 a method for waiving insubstantial conflicts of interest (section 208(b)(1)), as well as a provision for promulgating regulatory exemptions for classes of financial interests that are too remote or too inconsequential to affect the integrity of Government employees’ services (section 208(b)(2)). Section 208 also requires, as an element of the offense, that the employee have knowledge of the disqualifying financial interest.

The current version of section 208 is substantially identical to the 1962 version. In recent years, most of the legal developments surrounding section 208 have dealt with the regulatory exemptions promulgated pursuant to section 208(b)(2). As noted above, this section authorizes the Director of OGE, by regulation published in the Federal Register, to exempt certain financial interests from the application of section 208(a) if such interests are too remote or too inconsequential to affect the integrity of employees’ services to the Government.

## ii. Discussion

### a. Breadth

The breadth of 18 U.S.C. § 208 has led to many concerns about the reasonableness of the statute’s application. Some argue that the statute should bar only “malicious” or “willful” conduct. Others believe that the statute should apply only where the employee holds a “significant” financial interest, or where the matter in question is a “particular matter involving specific parties.” Some people also decry the perceived lack of statutory definitions for key terms, such as “particular matter.” OGE is sensitive to these concerns but, for the reasons discussed below, we do not recommend addressing them with any amendments.

Although “knowledge” of the financial interest is an element of section 208,<sup>68</sup> the law does not require any mental state with regard to the other elements.<sup>69</sup> Some have

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<sup>68</sup> The statute prohibits personal and substantial participation in a “particular matter in which, *to his knowledge*, he, his spouse, minor child, general partner . . . has a financial interest.” 18 U.S.C. § 208(a) (emphasis added).

suggested that non-willful violations of section 208 should not carry criminal penalties at all. They believe that the statute should be amended so that only “willful” or “malicious” violations constitute criminal violations.<sup>70</sup> OGE disagrees. Congress intentionally drafted section 208 as a prophylactic measure with a workable, objective standard that prohibits specified conduct regardless of the actor’s intent. Thus, the statute not only makes it illegal to “succumb to temptation,” but also “to enter into relationships fraught with temptation.” Andrew Stark, *Conflict of Interest in American Public Life*, 4 (2000). See also U.S. v. Mississippi Valley Generating Company, 364 U.S. 520 (1961) (recognizing that the statute may be violated even absent actual corruption or actual loss suffered by the Government as a result of the defendant’s conflict of interest). We agree that section 208 should prohibit not only conduct that is motivated by concern for one’s own financial interests, but also conduct that might appear to be motivated by such concerns. After all, the purpose of the provision is to promote public confidence in Governmental decision-making. Requiring the public (or a prosecutor) to sort through an employee’s motivation in any given case would be a Herculean task, and would not bolster public confidence in the integrity of Government operations. Thus, we do not recommend changing the scienter element.

Section 208 also is criticized as being overbroad because it applies without regard to the magnitude of the conflicting financial interest at issue. Although OGE understands the desire to exclude matters involving “insubstantial” financial interests from the statutory prohibition, we also consider “insubstantiality” to be a relative term that defies clearly understood meaning in the abstract. In addition, Congress already has provided agencies with the statutory authority to waive insubstantial conflicts of interest on a case-by-case basis, and has provided OGE with the authority to promulgate regulatory exemptions.<sup>71</sup> OGE has exercised that authority to promulgate a

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<sup>69</sup> United States v. Hedges, 912 F.2d 1397, 1401 (11<sup>th</sup> Cir. 1990). The applicable penalty provision, 18 U.S.C. § 216, does provide enhanced penalties for “willful,” violations, but willfulness is not a basic element of the crime. A “willful” violation of section 208 is punishable by up to five years imprisonment, 18 U.S.C. § 216(a)(2), and a non-willful violation is punishable by up to one year imprisonment. 18 U.S.C. § 216(a)(1).

<sup>70</sup> The American Bar Association, for instance, has advocated this view, opining that “[t]he availability of criminal sanctions for its violation . . . gives 18 U.S.C. section 208 an indefensible ‘Sword of Damocles’ quality.” Thus, they have recommended “limiting possible penalties to civil and administrative sanctions”, or in the alternative, limiting criminal penalties to cases involving “the corrupt exercise of official power for the purpose of enriching oneself or an affiliate . . . .” 45 Admin. L. Rev. 287, 305 (1993).

<sup>71</sup> “[B]ecause it is unfair to require the Government employee to act at his peril in drawing the line between substantial and trivial interests, . . . the prohibition shall not apply if the officer or employee first advises the official responsible for appointments to his position of the nature and circumstances of the matter and makes full disclosure of his interest in it and receives in advance a written determination that the interest is too insubstantial to be likely to affect the integrity of the service, or if by general rule or

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number of exemptions that are based on the value or significance of the financial interest in question.

Similarly, many people criticize the section's application to any "particular matter," preferring that it apply only to "particular matters involving specific parties" as does section 207. Although OGE agrees that an employee's participation in a party matter in which he has a financial interest usually would raise real conflict of interest concerns, we also believe that participation in broader matters of general applicability can sometimes pose significant conflicts of interest. In addition, OGE has exercised its regulatory authority to exempt certain matters of general applicability.

Critics also consider several of section 208's terms to be vague and they advocate amending the statute to include explicit definitions of its various elements, most notably for the term "particular matter." Although we agree that section 208 applies broadly, we do not favor changing or defining these terms statutorily. Most of the statute's terms are now defined in OGE's regulations, and we anticipate continuing to improve these regulations as needed.

#### b. National Interest Waiver

A number of agencies have advocated that Congress amend section 208 to include a new paragraph that would permit an employee to participate in a particular matter in which he has a financial interest if the agency head certifies in writing that, for purposes of national security, national defense preparedness, or the health or safety of the people of the United States, the Government has need for his services on a particular matter or matters. OGE agrees, in light of the recent events, that such a provision is needed.<sup>72</sup> In times of national emergency, it would be cumbersome, at best, to resolve potential conflicts of interest on the part of highly qualified experts. In some cases, the barriers posed by section 208 can prevent the hiring or efficient use of needed experts. This provision would permit an agency to procure the services of an expert quickly, without requiring him to first sever his other employment relationships or to divest his potentially conflicting financial interests.

We recommend that the proposed waiver authority be subject to important limitations in order to ensure that it would not be invoked lightly. Such limitations could include, for example, requiring the non-delegable approval of the employee's agency head, and making the authority available only in situations of national importance, such as matters involving national security, defense preparedness, or public health and safety. It could even provide for consultation with OGE prior to the issuance of a waiver

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regulation published in the Federal Register, the financial interest has been exempted from the prohibition as too remote or inconsequential." H.R. Rep. No. 748, 87<sup>th</sup> Cong., 1<sup>st</sup> Sess. 20 (1961).

<sup>72</sup> OGE submitted to Congress a similar proposal in 1991, in response to certain exigencies arising from the Persian Gulf War.



unless the need for action is immediate and urgent. This waiver might be invoked, for example, in the event of a terrorist attack so that the Government may receive the immediate assistance of an executive in the national power grids industry. In order to issue the waiver, the agency head would be required to determine that the nation's interest in quickly receiving the expertise of such an individual outweighs the concern that his assistance would create a financial conflict of interest. Implementing regulations could provide examples of proper applications of this statutory waiver provision.<sup>73</sup>

c. Limiting Section 208 to Outside Interests

Like its predecessor, 18 U.S.C. § 434, section 208 is intended primarily to protect the Government decision-making process from the influence or taint of outside financial interests.<sup>74</sup> Notwithstanding this principal focus on outside interests, section 208 occasionally has been interpreted as applying to certain financial interests that cannot fairly be characterized as "outside," in that they arise solely pursuant to Federal employment and official assignments. For example, section 208 sometimes limits the ability of Federal employees to participate, in their official capacities, on boards of directors of private organizations. It also sometimes has been interpreted to limit the participation of Federal employees in official matters that would affect their own Federal salaries and benefits.

A number of agencies assign employees to participate, in their official capacities, on the boards of directors of outside organizations, believing that such service can promote Federal interests, including cooperative efforts with outside organizations whose activities further agency missions. A 1996 opinion of the Office of Legal Counsel (OLC), Department of Justice, impacted this practice by concluding that the financial interests of an organization are imputed to an employee who serves, even in his or her official Government capacity, as an officer or director of the organization. See OLC opinion dated November 19, 1996, and subsequent DAEOgram DO-97-015, issued April 2, 1997. This opinion was based, in large part, on the recognition that an employee serving on the board of an outside organization in his or her official capacity may face conflicting obligations, i.e., a conflict between the fiduciary duties that the employee owes to the outside organization and the employee's primary duty of loyalty to the Federal Government.

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<sup>73</sup> This provision would be intended for use only when the operations of the Government, or a major Governmental function, would be impaired by the inability to confer quickly with a particular expert.

<sup>74</sup> The 1962 Senate Report on the bill that became section 208 stated that "[t]he disqualification of the subsection embraces any participation on behalf of the Government in a matter in which the employee has an *outside* financial interest, even though his participation does not involve the transaction of business." S. Rep. No. 2213, 87<sup>th</sup> Cong., 2d Sess. 12 (1962) (emphasis added).

Prior to the issuance of this opinion, many agencies (including OGE) did not view section 208 as applying to interests that relate strictly to employment in the executive branch of the Federal Government. However, since the opinion has been issued, unless an employee is serving in an ex officio capacity or the employee can decline all fiduciary responsibilities in accordance with state law, an agency generally must issue a section 208(b)(1) waiver to permit an employee to serve in his official capacity on an outside board of directors.

OGE believes that the conflict identified by OLC may be more theoretical than real, particularly because employees assigned to serve on outside boards remain subject to important Federal controls, such as the authority to review and approve (or deny) the official activity in the first place, and the authority to order the individual to limit the activity, or even resign the position, in the event of a true conflict with Federal interests. In addition, an agency generally approves such activities only where the organization's interests are in consonance with the agency's own interests. In an era when "public/private partnerships" are promoted as a positive way for Government to achieve its objectives more efficiently, ethics officials find it difficult to explain and justify to agency employees why a waiver is required for official board services that have been determined by the agency to be proper.

Although OGE could exercise its regulatory authority to exempt financial interests arising from official service on boards of directors, we believe that this change should be effectuated by Congress. Thus, OGE recommends that Congress amend section 208 to specify that the financial interests of an organization are not imputed to an employee who serves as an officer or director of such organization in his or her official capacity. This new provision, however, should make clear that the provision itself does not create the authority for agencies to assign employees to serve on outside boards. This language is necessary to help ensure that agencies and employees will not misconstrue the conflict of interest law as the underlying authority for assigning employees to participate on outside boards, as it is up to each agency, in consultation with the Department of Justice if necessary, to determine whether it has authority under its organic act or other relevant legislation to assign employees to serve in a particular organization.<sup>75</sup>

Similarly, OGE does not believe that section 208 generally needs to apply to financial interests that relate specifically to one's status as a Federal employee, i.e., from one's Federal salary and benefits. For example, an employee should not be barred from asking for a promotion or bonus, or from submitting a request for payment of travel expenses. Although OGE has addressed this concern by promulgating 5 C.F.R. § 2640.203(d), which exempts all disqualifying financial interests that arise from Government salary and benefits, this exemption has limitations. Specifically, it

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<sup>75</sup> Although some agencies have indicated a preference for the waiver requirement, as it provided for a method of monitoring employees' official service on outside boards, thus reducing the opportunity for abuse, such monitoring may be done by other means than through the requirement that waivers be issued.

does not permit an employee to make: (1) determinations that individually or specially affect his own salary and benefits, or (2) determinations, requests, or recommendations that individually or specially relate to, or affect, the salary or benefits of any other person specified in section 208. Of course, such determinations or recommendations by an employee may create at least an appearance of a conflict of interest in some cases, but a statutory proscription is not needed because agencies can preclude such improper conduct by using appropriate internal controls.

Therefore, OGE recommends that section 208 be amended to emphasize that it does not cover financial interests arising solely from Federal salary or benefits. To the extent that such situations occasionally may raise some concerns, we believe that the criminal conflict of interest law is not the appropriate tool for addressing those concerns. Instead, agencies may rely on nepotism restrictions, management controls and other requirements and procedures that are more appropriate.

#### **d. Imputing the Financial Interests of LLC Members**

Under 18 U.S.C. 208(a), the personal financial interests of an employee's general partner are attributed to the employee and, consequently, the employee can not participate in a particular Government matter that would affect his general partner's financial interest. In recent years, however, many individuals have chosen to conduct business through limited liability corporations (LLCs), rather than general partnerships. Depending on the state law, these ventures sometimes are structured very much like corporations or general partnerships. We believe that an employee who is a member of an LLC that is organized much like a general partnership under the relevant law should be prohibited under section 208 from participating in a particular matter that would affect the financial interests of the managing member, whose position is akin to that of a general partner. Thus, we recommend that Congress consider amending section 208 to apply to LLCs that are organized as general partnerships.

#### **D. 18 U.S.C. 209 (Supplementation of Salary)**

Section 209 prohibits Federal officers or employees from receiving any salary, or contribution to or supplementation of their salary, from private sources as compensation for their services to the executive branch or to an independent agency. It also prohibits the payment of any salary, or contribution to or supplementation of salary, to a Federal officer or employee under circumstances where its receipt would be a violation. This ban on outside compensation for Government work is designed to keep outside interests from intruding on the Federal Government's ability to create and manage its programs independently, and to avoid conflicts between the receipt of such compensation and the employee's duty to make decisions in the public interest, in order to ensure that the employee's sole loyalty is to the Government. In other words, it prohibits an executive branch employee from serving two masters by receiving compensation from an outside source to perform his official duties.

## i. Background

The predecessor to section 209 was enacted as part of the fiscal year 1918 appropriations bill. Act of Mar. 3, 1917, ch. 163, §1, 39 Stat. 1106. This uncodified provision responded to concerns about existing arrangements between the Bureau of Education (which was then a part of the Department of the Interior) and private organizations that studied and promoted educational policies. These arrangements provided for the Government to pay a nominal salary of one dollar a year to certain full-time Bureau employees (so-called “dollar-a-year men”) to perform their Government responsibilities, while the outside organizations would pay the balance of the employees’ actual salaries. See 54 Cong. Rec. 2039-47 (Jan. 26, 1917). The Bureau also employed and paid dollar-a-year men who performed only occasional services for the Government and who held positions in public or private school systems. Thus, the 1918 legislation addressed the “alarm that the foundations were wielding undue and noxious influence on national educational policy.” New York City Bar Association Report, Conflict of Interest and Federal Service (1960) at 54.<sup>76</sup>

The appropriations language was first codified in 1934 at 5 U.S.C. § 66. In 1948, this provision was transferred to title 18 as section 1914, with minor amendments. In 1963, section 1914 was superseded by 18 U.S.C. § 209.

Although similar to its predecessors, section 209 contained a number of amended provisions. For example, whereas section 1914 applied to payments made “in connection with” an individual’s Government services, section 209 applied to payments made “as compensation for” those services.<sup>77</sup> Section 209 also included higher maximum penalties than had been imposed under section 1914.

The original version of section 209 contained three exceptions. Subsection (b) permitted Federal employees to continue to receive payments from bona fide pension, health or other benefit plans maintained by former employers. Subsection (c) exempted from the prohibition special Government employees and others serving the Government without compensation. Finally, subsection (d) permitted Federal employees to accept gifts and awards from private tax-exempt sources in connection with work-related

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<sup>76</sup> Senator Chamberlain, in his debate on the issue, argued that the dollar-a-year men could disseminate the views of their sponsoring foundations through the use of the franking privilege. See, 54 Cong. Rec. 2039 (Jan. 26, 1917). A 1956 Memorandum to the Attorney General on the Conflict of Interest Statutes noted that Senator Chamberlain and some of his colleagues also apparently believed that these persons were using their prestige and standing as Government officials to influence the Government into endorsing and publicizing the educational views of these private organizations. Id. at 119.

<sup>77</sup> This change was made to clarify that, in order for a payment to be prohibited by section 209, the payor’s intent must be to compensate the individual for service to the Government. H.R. Rep. No. 748, 87<sup>th</sup> Cong, 1<sup>st</sup> Sess., at 24-25.

training at non-Government sites, and payments to facilitate attendance at meetings, in accordance with the Government Employees Training Act. See 5 U.S.C. § 4111.

Congress added subsection (e) in 1979 to exempt the payment (and acceptance) of actual relocation expenses incurred by a participant in an executive exchange or fellowship program that meets certain criteria.<sup>78</sup> Following the 1981 assassination attempt on President Reagan, Congress added subsection (f), which allows Government employees who are injured during an assassination, assault or kidnapping attempt against the President, Vice President or a Member of Congress, to receive contributions from charitable organizations. The E-Government Act of 2002 added subsection (g), which permits private sector IT employees who are detailed to Federal agencies, under a program that was established by that Act, to continue to receive their pay and benefits from their private employers.<sup>79</sup> Finally, subsection (h) was added to section 209 in 2004 as part of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.<sup>80</sup> This provision permits members of the Reserves on active duty to receive any part of the salary or wages that those individuals would have received from civilian employers if their employment had not been interrupted by the call to active duty.

## ii. Discussion

### a. Decriminalization

The basic principle that a Federal employee should not be paid by a private source to perform Government work remains valid today. If an employee were to be paid by two masters for the same work, the employee's loyalties would be divided and the integrity of his services to the Government would be compromised. Thus, prohibiting the supplementation of Government employees' salaries is a reasonable restriction that helps to preserve the public's confidence in Government operations.

Because violations of 18 U.S.C. § 209 are rarely prosecuted, however, some have suggested that this prohibition should be decriminalized and that its prohibitions

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<sup>78</sup> Pub. L. 96-174.

<sup>79</sup> Pub. L. 107-347. The E-Government Act of 2002 established an information technology exchange program between the Federal Government and the private sector, to provide training for Federal IT employees. This program permits Federal IT employees to be detailed to the private sector, and also allows private sector employees to be detailed to Federal agencies. In the latter case, the private sector employee's pay and benefits continue to be paid by the private sector employer, at no cost to the Government, but "the employee is deemed a Federal government employee for purposes of Federal employee ethics and revolving door requirements..." H.R. Rep. 107-787, at 72 (2002).

<sup>80</sup> Pub. L. 108-375.

should, instead, be the subject of a regulation. OGE disagrees, as we believe that the conduct precluded by section 209 is significant enough to deserve criminal treatment. In addition, although we have no reason to believe that there are significant numbers of violations of section 209, we are aware that the Department of Justice sometimes uses section 209 as an alternative to prosecuting alleged violations of sections 201 and 203.

b. Interplay Between Section 209 and the Gift Statutes

OGE recommends that Congress enact a technical amendment to section 209 that would make it clear that the statute does not prohibit the acceptance of any items that employees are permitted to accept properly under the various gift rules and statutes. These rules, at 5 C.F.R. § 2635, Subpart B, are authorized by 5 U.S.C. §§ 7301, 7351(c), and 7353(b), and by title IV of the Ethics in Government Act of 1978. They permit Federal employees to accept certain items under specified circumstances, such as discounts offered to all Federal employees and gifts motivated by family or personal relationships, rather than by the employee's official position.

Gifts and other items permitted to be accepted under OGE and agency supplemental regulations have been viewed as falling outside the scope of section 209 because they are merely gratuitous and are not intended to compensate for Government services. Nevertheless, the absence of any provision in section 209 relating to these regulatory exceptions raises unnecessary questions. See Crandon v. United States, 494 U.S. 152, 183 (1990)(Scalia, J., concurring)(section 209 cannot be said to permit regulations allowing, for example, acceptance of certain awards.) A clarifying amendment would eliminate these questions.

c. Participation in Private Sector Incentive Programs

OGE recommends that Congress amend section 209 to permit the participation of Federal employees in private sector programs that offer inducements such as the repayment or forgiveness of student loans for those who enter Federal service. This provision could be implemented through the issuance of waivers on a program-wide, rather than an individual, basis. We recommend that this exemption be limited to programs that have been subjected to two levels of review. First, the Office of Personnel Management should determine that the participation of Federal employees in the program serves the Government's interests. Proposals meeting OPM's requirements should then be reviewed by OGE to determine whether the proposed benefits and other relevant aspects of the program present a sufficiently reduced potential for conflicts of interest that participation would not likely impair the integrity of the employee's services to the Government.<sup>81</sup> Subjecting the programs to review by both OPM and OGE would diminish the risk of the abuses that section 209 was designed to prevent.

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<sup>81</sup> OGE, for example, may condition its approval on participating employees' recusals from particular matters affecting the payors.

This amendment could assist recruitment and retention of qualified individuals into Government service, could permit short term acquisition of critical expertise that otherwise would be unavailable, and could enhance the exchange of ideas between the public and private sectors. Moreover, this proposal is a logical extension of efforts Congress has already undertaken to remove unnecessary barriers to the exchange of expert personnel with the private sector under conditions that still preserve the integrity of Government operations. See, e.g., the Intergovernmental Personnel Act, 5 U.S.C. §§ 3371-3376; and the Information Technology Exchange Program, section 209(c), (g)(2) of the E-Government Act of 2002.

## **E. Application of the Statutes to Contractors**

Increasingly, over the past several years, we have been receiving expressions of concern from agency officials about the potential for conflicts of interest on the part of contractor personnel. Many agencies have become increasingly reliant on contractor personnel to perform functions that resemble duties once performed by Government employees. Moreover, the work of Government contractors often is performed in settings where Government employees work closely alongside contractor employees who must be trusted for daily advice and other services. For example, some contractors provide recommendations to agencies about specific procurements. Nevertheless, there is no general law prohibiting a contractor employee from making procurement recommendations that would affect the financial interests of another company in which the individual has a personal financial interest or with which he is negotiating for future employment. Of course, the same conduct, if engaged in by an agency employee, would violate 18 U.S.C. § 208. Thus, some commenters suggest that the criminal conflict of interest statutes should apply to contractors, as well as to employees.<sup>82</sup>

OGE is not presently recommending that any of the criminal conflict of interest statutes be amended to cover contractor personnel. For one thing, it is beyond the scope of OGE's experience and expertise to evaluate the scope of problems in this area, and we would have to defer to others with more knowledge of procurement policies and practices. Moreover, it may well be that other, non-criminal restrictions or requirements may be adequate to address the concerns; we note, for example, that some agencies have relied on the "organizational conflict of interest" provisions in the Federal Acquisition Regulation (FAR)<sup>83</sup> or agency supplemental FARs<sup>84</sup> to require

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<sup>82</sup> It is well established that the criminal conflict of interest statutes do not apply to Government contractors and their employees. See, e.g., 4B Op. O.L.C. 441 (1980). Note, however, that employees of Government contractors may be subject to the bribery and illegal gratuity statute, 18 U.S.C. § 201. See United States v. Thomas, 240 F.3d 445 (5<sup>th</sup> Cir. 2001).

<sup>83</sup> 48 C.F.R. §§ 9.500-9.508.

certain contract clauses and other measures to mitigate the potential for conflicts on the part of contractor personnel. Nevertheless, OGE believes it is appropriate to identify this as an emerging ethics issue for further consideration.<sup>85</sup>

### **III. Summary of Recommendations**

As discussed above, OGE recommends that Congress take the following actions in order to modernize the application of the criminal conflict of interest statutes.

- Authorize the Office of Government Ethics to issue narrowly tailored regulatory exemptions to the general prohibitions of 18 U.S.C. § 205 for de minimis activities.
- Eliminate the post-employment application of 18 U.S.C. § 203 by providing that the prohibition applies only to compensation received while the person is an executive branch employee.
- Amend 18 U.S.C. §§ 203 and 205 so that, rather than applying to an employee who “acts as agent or attorney,” they apply to an employee who “knowingly makes, with the intent to influence, any communication to or appearance before [specified Government entities] on behalf of any other person.”
- Eliminate 18 U.S.C. § 207(k), a current exemption from the post-employment prohibition that applies only to an employee who comes into Government after working at a national laboratory and who then leaves Government service to work in one of these laboratories again.
- Expand the current waiver provision at 18 U.S.C. § 207(j)(5) beyond permitting scientific and technological communications, or create a new exemption provision, to permit communications that are in the national interest.
- Amend 18 U.S.C. § 207(c), the one-year cooling off provision for senior employees, so that it covers all members of the SES, both career and non-career.

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<sup>84</sup> E.g., 48 C.F.R. § 970.0371 (Department of Energy supplemental FAR provision governing conduct of employees of management and operating contractors).

<sup>85</sup> In an effort to highlight concerns about such issues, OGE recently testified on the subject of contractor employee ethics before the Acquisition Advisory Panel, which was established under section 1423 of the National Defense Authorization Act for Fiscal Year 2004. OGE also has held a number of meetings about this issue with agency ethics officials and others over the last several years.



- Amend 18 U.S.C. § 208 to create the authority for an agency head to grant a “national interest waiver” that would permit an employee to participate in a particular matter in which he has a financial interest, for purposes of national security, national defense preparedness, or the health or safety of the people of the United States, the Government has need for his services on a particular matter or matters.
- Amend 18 U.S.C. § 208 to clarify that it does not apply to financial interests arising because of one’s status as a Federal employee, for example because of the receipt of Federal salary or benefits.
- Amend 18 U.S.C. § 209 to make clear that the statute does not prohibit the acceptance of any items that employees are permitted to accept properly under the various gift rules and statutes.
- Amend 18 U.S.C. § 209 to permit the participation of Federal employees in private sector programs that offer inducements such as the repayment or forgiveness of student loans for those who enter Federal service.

## **Appendix A**

### **Outreach**

The following is a list of organizations and individuals who provided their views in order to aid us in writing this report.

#### **Provided Oral Comments at Focus Group Meetings:**

Senior Executives Association  
Defense Industry Initiative  
Center for Public Integrity  
National Treasury Employees Union  
American Bar Association  
Department of Education  
Nuclear Regulatory Commission  
Department of Energy  
Federal Deposit Insurance Corporation  
Overseas Private Investment Corporation  
Department of Veterans Affairs  
Environmental Protection Agency  
Office of the U.S. Trade Representative  
Central Intelligence Agency

#### **Provided Written Comments:**

Senior Executives Association  
Defense Industry Initiative  
National Defense Industrial Association  
Pillsbury Winthrop Shaw Pittman  
National Treasury Employees Union  
American Federation of Government Employees  
American Bar Association  
Project on Government Oversight  
Department of Agriculture  
Central Intelligence Agency  
Department of Education  
Environmental Protection Agency  
Equal Employment Opportunity Commission  
Federal Deposit Insurance Corporation  
National Labor Relations Board  
Nuclear Regulatory Commission  
Social Security Administration, Office of the  
Inspector General  
Department of the Treasury, Inspector General  
For Tax Administration  
Tennessee Valley Authority, Inspector General  
Department of Veterans Affairs