



United States
Office of Government Ethics
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DO-08-020

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Don W. Fox
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SUBJECT: Final Post-Employment Rule

The Office of Government Ethics (OGE) today is publishing a final post-employment rule, which will be effective July 25, 2008. 73 Federal Register 36168 (June 25, 2008), available at <http://edocket.access.gpo.gov/2008/pdf/E8-13394.pdf> and <http://edocket.access.gpo.gov/2008/E8-13394.htm>. This rule constitutes the first comprehensive post-employment guidance in regulation form since 18 U.S.C. § 207 was substantially revised in 1989. The new guidance will be codified at part 2641 of title 5 of the Code of Federal Regulations. The final rule also revokes part 2637 of title 5.

These regulations are being issued pursuant to Executive Order 12731, which provides that the Office of Government Ethics "shall be responsible for . . . promulgating, with the concurrence of the Attorney General, regulations interpreting the provisions of the post-employment statute, section 207 of title 18." E.O. 12731, § 201(c). OGE has obtained the concurrence of the Department of Justice and also has consulted with the Office of Personnel Management, as provided in the Ethics in Government Act of 1978, 5 U.S.C. app. § 402(b). The final rule generally follows the proposed rule, see 68 Federal Register 7844 (February 18, 2003), although certain changes have been made in response to comments received by OGE, as discussed in the preamble to the final rule.

Background

The new rule interprets and implements the current version of 18 U.S.C. § 207. Section 207 was substantially revised in 1989, and several subsequent amendments have been enacted. The 1989 and later amendments added a number of new criminal restrictions,¹ deleted other restrictions,² added new exceptions,³ and made extensive revisions to the remaining restrictions and exceptions in section 207.⁴

¹ For the executive branch, these include the two-year "cooling-off period" for "very senior" employees, 18 U.S.C. § 207(d), a one-year ban on representing or assisting foreign entities, § 207(f), a one-year ban on representing or assisting others in connection with certain trade agreement or treaty negotiation matters, § 207(b), and a restriction on contract advice by former private sector assignees under the Information Technology Exchange Program, § 207(l).

² This includes the former two-year prohibition against assistance by former senior employees in connection with matters in which they participated personally and substantially, 18 U.S.C. § 207(b)(ii), and the former provision governing the activities of partners of employees, § 207(g). Also removed was the provision, formerly in section 207(j), on agency administrative actions for violations.

³ A new exception for representing international organizations, § 207(j)(3), was added in 1989, and an exception for representing political candidates and campaign organizations, § 207(j)(7), was added in 1996. The 1989 amendments also added a new position exemption authority, applicable to the senior employee cooling-off restriction, § 207(c)(2)(C).

⁴ The various revisions to the pre-1989 law are too numerous to list here. They range from a host of general provisions, such as a new subsection on the status of detailees in section 207(g) and a new definitions provision in section 207(i), to such important adjustments as the succession of amendments in 1989, 1990, 1996, 2002, and 2003 to the categories of "senior employees" subject to the one-year cooling-off period of section 207(c). For a more detailed discussion of the history of amendments to section 207, see OGE's Report to the President and to Congressional Committees on the Conflict of Interest Laws

(continued)

OGE published a short interim rule in 1991 for the limited purpose of implementing OGE's authority, under the 1989 amendments, to provide certain exemptive relief from the one-year cooling-off restriction of 18 U.S.C. § 207(c). That interim rule was codified at 5 C.F.R. part 2641. The new final rule, also to be codified in part 2641, will augment the brief existing guidance concerning OGE's authority to exempt positions and designate separate agency components for purposes of section 207(c). However, the new rule also adds guidance concerning all of the substantive prohibitions in section 207, not just section 207(c), as well as all of the exceptions in the statute.

Prior to the 1989 statutory amendments, OGE issued interpretive guidance in 5 C.F.R. part 2637. Until now, OGE has continued to publish part 2637, with a note indicating that section 207 has been substantially revised. The new final rule removes part 2637 in its entirety. In many instances, the final rule uses text and examples similar to those found in part 2637; however, in view of the number and significance of the statutory changes, the new rule necessarily must be viewed as a substitution rather than a mere revision of part 2637. Ethics officials should retain the last published edition of part 2637 (the C.F.R. revised as of January 1, 2008), in order to provide advice to former employees who terminated service while the prior version of section 207 was effective (July 1, 1979 through December 31, 1990). See 5 C.F.R. § 2641.102(b).

Summary of the Post-Employment Rule

Subpart A of the final rule includes a number of general provisions. These provisions deal with the purpose and applicability of the rule, as well as enforcement and ethics advice. Also included are definitions of key terms, e.g., "agency," "former employee," and "person." See 5 C.F.R. § 2641.104.

Subpart B is the substantive core of the rule. It contains separate provisions explaining each of the seven restrictions in the revised statute applicable to former employees of the executive branch:

Relating to Executive Branch Employment 11 ff. (January 2006), http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/reports_plans/rpt_title18.pdf.

- Section 2641.201 sets out the statutory elements of the lifetime ban on representation in connection with a particular matter involving specific parties in which a former employee participated personally and substantially, 18 U.S.C. § 207(a)(1). Note that this section provides guidance with respect to a number of elements, such as "intent to influence," that are common to several of the prohibitions, and subsequent sections within subpart B contain cross-references to the discussion of these common elements in section 2641.201.
- Section 2641.202 sets out the statutory elements of the two-year ban on representation in connection with a particular matter involving specific parties which was pending under a former employee's official responsibility, 18 U.S.C. § 207(a)(2).
- Section 2641.203 sets out the one-year prohibition on representing, aiding or advising on the basis of covered nonpublic information in connection with trade agreement or treaty negotiations in which a former employee participated personally and substantially, 18 U.S.C. § 207(b). Several of the subsections have been reserved for more detailed guidance with respect to certain statutory elements in the future.
- Section 2641.204 sets out the statutory elements of the one-year cooling-off restriction applicable to former senior employees, 18 U.S.C. § 207(c). Note that the definition of "senior employee," which is critical to the application of this provision, is found in section 2641.104.
- Section 2641.205 sets out the statutory elements of the two-year cooling-off period applicable to former very senior employees, 18 U.S.C. § 207(d). Note that the definition of "very senior employee" is found in section 2641.104.
- Section 2641.206 sets out the one-year prohibition, applicable to former senior and very senior employees, on representing, aiding or advising certain foreign entities, 18 U.S.C.

§ 207(f). Several of the subsections have been reserved for more detailed guidance with respect to certain statutory elements in the future.

- Section 2641.207 sets out the one-year restriction on representing, aiding, counseling or assisting in representing in connection with a contract with the former agency of an assignee under the Information Technology Exchange Program, 18 U.S.C. § 207(l). Several of the subsections have been reserved for more detailed guidance with respect to certain statutory elements in the future.

Subpart C of the rule sets out the elements of the various exception provisions in section 207. Note that section 2641.301(l) contains a reference chart listing all of the exceptions and the prohibitions to which each exception applies.

Finally, Appendices A and B to the rule simply reflect current positions that OGE already has exempted from the prohibition of section 207(c) and current departmental components that OGE already has designated as separate agencies for purposes of section 207(c). The final rule effects no substantive change to the existing Appendices in part 2641.

Conclusion

The publication of this final post-employment rule is a significant development for the executive branch ethics program. The new rule will provide important guidance for ethics officials, current and former employees, and others. OGE will provide training for ethics officials in the near future and stands ready to assist agencies in applying the regulations.