SUMMARY OF THE RULES APPLICABLE TO A JOB SEARCH

January 2009

Restrictions When Seeking Employment

These restrictions can be summarized in one sentence: **You may not work simultaneously on a matter affecting a potential employer while seeking a job with the potential employer.** The specific rules are set forth in 5 C.F.R. 2635.604, which is part of the Standards of Conduct regulations for executive branch employees (regulation):

5 CFR 2635.604 prohibits an employee from participating personally and substantially in a particular matter that she knows will have an effect on the financial interests of a prospective employer with whom she is **seeking employment**.

Restrictions When Negotiating for Employment

You may not work simultaneously on a matter affecting a potential employer while negotiating for a job with the potential employer. The specific prohibition is set forth in 18 U.S.C. 208, a statute with criminal sanctions:

18 USC 208 prohibits an employee from participating personally and substantially in a particular matter in which he knows a person with whom he is **negotiating for employment** or with whom he has an **arrangement for future employment** has a financial interest.

The scope of conduct covered by Section 2635.604 (seeking employment) is broader than the criminal statute. Under the regulation, simply sending a resume or not rejecting an approach by a potential future employer will trigger the regulation. The employee actually must be negotiating or have an agreement for employment in order to trigger the criminal statute, 18 U.S.C. 208. The only remedy that applies when an employee begins seeking employment is disqualification. The Department generally does not waive disqualification for something so significant as the financial interests of a future employer.

Frequently Asked Questions

When am I seeking employment?

You are seeking employment under the regulation when you send a resume, call a potential employer, or you do not immediately reject the possibility of employment with someone who has approached you about a job. Postponing employment discussions until you have finished working on a matter does not relieve you of the conflict or need for recusal. You must either reject an unsolicited communication about a job, or, if you wish to follow up, you must disqualify yourself immediately from the matter.

Do I need to notify anyone if I received an unsolicited inquiry regarding future employment?

If an entity or person who is involved in a matter assigned to you initiates discussions regarding future employment, you should report the inquiry and your response to a supervisor. Even if you immediately decline the offer or invitation to apply, it is appropriate for the agency to consider what action, if any, is appropriate. In most instances, an immediate declination will not warrant recusal or disqualification.

The Procurement Integrity Act, 41 U.S.C. 423(c), states that an official participating personally and substantially in a procurement for a contract in excess of the simplified acquisition threshold ($100,000) who is contacted by a bidder regarding non-federal employment during the conduct of the procurement shall: report the contact in writing to his supervisor and the Designated Agency Ethics Official (Lee J. Lofthus, Assistant Attorney General for Administration) and reject the offer; or be disqualified until the bidder no longer is a participant in the procurement or employment discussions have terminated.

What if I use a headhunter or other resource?

You must be disqualified from a matter if the headhunter tells you the name of the prospective employer he has approached or communicated with on your behalf. Similarly, you are seeking employment if you provide your resume to another individual (a former colleague, friend, mentor, etc.) who will make an introduction or submit your resume on your behalf. Both the regulation and the statute have a knowledge test. Once you know that a prospective employer has been supplied with your resume, you are disqualified from matters involving that entity. 5 C.F.R. 2635.603(c).

May a prospective employer pay my travel expenses for an interview?

Yes, because such payment qualifies for the exception from the gift acceptance prohibition for a gift based on an outside business relationship. You do not need approval to accept these paid expenses, but if the expenses (whether paid directly or by reimbursement) exceed $305, you must report it on your financial disclosure report, either confidential (Form 450) or public (SF 278).

What steps do I need to take for disqualification and recusal?

You need to inform fellow employees, including subordinates, peers, and supervisors who would communicate with you about a matter, that they may not discuss matters involving the entity/individual with whom you are seeking employment. It is important to notify all persons who may approach you on a given matter, although the scope of notice will be determined on a case-by-case basis. An ethics official can assist you in determining who must be notified. In addition, you may be able to arrange for another member of the staff to screen matters that are presented to you and, thus, serve as a "gate keeper." While not required in all instances, we recommend that you create a written record of your disqualification/recusal, including the persons notified, or notify persons of your recusal by memoranda or electronic mail.

If I do not reach an agreement with the prospective employer, can I return to work on the project from which I was recused?

You should assume that your involvement in a particular matter will cease permanently at the time you begin seeking, and especially negotiating, with a prospective employer. See 5 C.F.R. 2635.606(b). In limited circumstances, you may be able to obtain a waiver to return to work on a matter. For example, if two months pass after you send your resume with no response, management may consider granting a waiver for you to return to your duties. A waiver of the prior disqualification also is possible if the prospective employer's involvement in the matter is attenuated (as compared to being a party or representing a party), or if the discussions were brief and/or not substantive, and did not reach the point of negotiating employment.

What action do I need to take if I have an arrangement or agreement for future employment that precedes my resignation?

If you have an arrangement or agreement of future employment, you must recuse yourself from any matters involving the future employer. It is highly unlikely that a waiver will be granted to allow you to work on a matter involving the future employer.

SUMMARY OF THE RULES APPLICABLE TO POST-GOVERNMENT EMPLOYMENT

Post-Government Employment Restrictions

Most of the ethics restrictions on former employees are found in **18 U.S.C. § 207**, a criminal statute. While the ethics statutes and regulations do not bar self-representation or assistance behind-the-scenes in a particular matter with parties, lawyers must be mindful of their bar rules, which generally do bar behind-the-scenes assistance when an employee has worked personally and substantially in a particular matter with parties.

Lifetime Ban: 18 U.S.C. § 207(a)(1) prohibits a former employee from communicating with or appearing before any court or federal agency with the intent to influence on behalf of someone other than the United States on a particular matter involving specific parties in which he participated personally and substantially while with the government and in which the United States is a party or has a direct and substantial interest.

This prohibition lasts for the **lifetime of the matter** and is very similar to the bar rule that prohibits switching sides. However, most bar rules also prohibit all aspects of representation, including counseling or other behind-the-scenes assistance. See ABA Model Rule 1.11.

Two Year Ban: 18 U.S.C. § 207(a)(2) prohibits a former employee from communicating with or appearing before any court or federal agency with the intent to influence on behalf of someone other than the United States on a particular matter involving specific parties that he knows was pending under his official responsibility during his last year of government service and in which the United States is a party or has a direct and substantial interest. "Official responsibility" is defined in 18 USC **§** 202 as "the direct administrative or operating authority, whether intermediate of final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct government actions." The scope of official responsibility will be determined by those areas assigned by statute, regulation, Executive Order, job description or delegation of authority. 5 CFR 2637.202(b)(2).

This is a **two-year bar** and there is no parallel bar rule. **It is important to note that an employee's recusal from a matter does not remove it from his official responsibility**. These are matters that the employee may not have worked on at all and may not have even known were pending while the employee was serving. After you leave government, if you are not sure if a matter was pending under your official responsibility, you may call the Deputy Designated Agency Ethics Official (DDAEO) for the office where you last worked, or the Departmental Ethics Office, who will assist in making this determination.

Everything in the Department is pending under the official responsibility of the Attorney General.

One Year Ban: 18 USC 207(b) bars a former employee from representing, aiding or advising on the basis of confidential information, on behalf of someone other than the United States, on an

ongoing treaty, or a trade negotiation under the Omnibus Trade and Competitiveness Act of 1988, in which she participated personally and substantially during her last year as a senior employee.

This is a **one-year bar**. The Department generally is not involved in trade agreements to which the statute applies, but some Justice employees have been involved in treaty negotiations.

One Year Ban: 18 U.S.C. § 207(c) bars a former **senior employee** from communicating to or appearing before the agency in which he served during his last year of government service, with the intent to influence, on behalf of another person on a matter on which he seeks official action. A senior employee includes Executive Level officials, and any individual who is paid at a rate of basic pay equal to or greater than 86.5% of the rate for Level II of the Executive Schedule, which is $153,105 as of January 2009. Therefore, SES officials whose pay is at least $153,105, and Senior Level or other non-GS employees whose basic pay is at least $153,105, are "senior employees" who are covered by this bar.

This is a **one-year bar** and covers direct contacts with Department officials as well as appearances in court (including submission of pleadings) when the Department of Justice is participating in the matter. **Senate-confirmed presidential appointees** are barred from representations before the whole Department. **Members of the SES and other senior level employees** (including employees who receive a base salary of $153,105 or higher as of January 2009) in components designated as separate are barred from representations to their own components.[1] In addition, an employee may not appear or communicate with an otherwise permissible component if his communications are shared, with attribution, with members of his former office. All circumstances are considered in assessing whether there is an inference of intent for attribution when communications are made with a permissible component. For example, a former Criminal Division employee cannot contact DEA if circumstances support an inference of intent that his communications with DEA will be shared, with attribution, with the Criminal Division. However, a former Criminal Division employee can contact an employee in the Civil Division on a new matter during the one year period as long as there is no inference or indication that his communications will be shared, with attribution, with the Criminal Division.

SES and senior level staff of the senior management offices and SES and senior level staff in components not designated separate are barred from their own offices and from all components

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[1] Separate components include all bureaus, divisions (except NSD), each U.S. Attorney's Office (USAO) and each U.S. Trustee's Office (USTO). Each USAO is designated separate from other USAOs, and similarly for USTOs, but the Executive Office for U.S. Attorneys and Executive Office for U.S. Trustees are not designated separate from any USAO or USTO, respectively.

not designated separate.[2] In addition, an employee may not appear or communicate with an otherwise permissible component if his communications are shared, with attribution, with members of an office not designated separate. All circumstances are considered in assessing whether there is an inference of intent for attribution when communications are made with a permissible component. For example, a former ODAG employee cannot contact the Civil Division if circumstances support an inference of intent that his communications with Civil will be shared, with attribution, with the Associate AG's office.

Two Year Ban: 18 U.S.C. § 207(d) bars a **former cabinet official** from making, with the intent to influence, a communication to or appearance before, any Executive Level official in the Executive Branch on behalf of someone other than the United States.

This is a **two-year bar.**

There are some exceptions to subsections 207(c) and (d) for representing certain types of organizations, such as a state or local government or an organization with 501(c)(3) status.

One Year Ban: 18 U.S.C. § 207(f) bars a former **senior employee** from representing a foreign entity before an agency of the United States, or aiding or advising a foreign entity with the intent to influence an employee of a federal agency, even without direct representations to the federal employee on the foreign entity's behalf.

This is a **one-year bar** and covers employees paid at the Executive Level and any individual who is paid at a rate of basic pay equal to or greater than 86.5% of the rate for Level II of the Executive Schedule, which is $153,105 as of January 2009.

Additional Restrictions

18 USC § 203 bars a former employee from sharing in fees for representations before a federal agency or a court rendered by another at the time the former employee was with the government on matters in which the United States is a party or has a direct and substantial interest.

The consequence of Section 203 is that if a former government employee joins a law firm that has a government practice, she should receive a salary for a period of time. Alternatively, her share of fees must be screened so that her share does not include fees from cases with the United States that were earned by representations from members of the firm before a federal agency or a court while she was with the government.

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[2] The following offices are not designated 'separate' for purposes of Section 207(c): the Senior Management Offices (OAG, ODAG, and OASG), OSG, JMD, OIG, OLC, OLA, OIP, OPD, OPR, PAO, PRAO, COPS, EOIR, IGA, INTERPOL, NSD, and NDIC.

DDAEOs and the Departmental Ethics Office (DEO) are available to provide guidance on seeking employment and post-employment issues, including post-employment queries that arise after you leave the Department. The names and contact information for DDAEOs and the Departmental Ethics Office are available on the Department's website: http://www.usdoj.gov/jmd/ethics

Departmental Ethics Office
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