

**OFFICE OF GOVERNMENT ETHICS**

**AGENCY: Office of Government Ethics**

**5 CFR Parts 2637 and 2641**

**Post-Employment Conflict of Interest; Exemption  
Procedures and Agency Component Designations for  
the Executive Branch**

**RIN 3209-AA08**

**56 FR 3961**

**Friday, February 1, 1991**

---

**ACTION:** Interim rule with request for comments.

**SUMMARY:** Since 1980, 5 CFR part 2637 (formerly 5 CFR part 737) has provided guidance concerning the post-employment conflict of interest restrictions of 18 U.S.C. 207. As a result of recent amendments to 18 U.S.C. 207 effective January 1, 1991, executive branch employees terminating Government service on or after that date will be subject to substantially revised post employment restrictions. The Office of Government Ethics intends to publish a comprehensive revision of its regulatory guidance to reflect these amendments. This guidance will be published in this new part 2641. Pending the completion of this comprehensive revision, however, the Office of Government Ethics is issuing this interim rule in new part 2641: (1) To establish procedures to exempt senior employee positions from 18 U.S.C. 207(c); (2) to designate separate agency components for purposes of 18 U.S.C. 207(c) as authorized by 18 U.S.C. 207(h); and (3) to establish procedures for the future designation and modification of agency component designations.

Former employees, ethics officials, and others will continue to consult part 2637 for guidance concerning the previous version of 18 U.S.C. 207, which will continue to apply to individuals terminating Government service prior to January 1, 1991.

**DATES:** Interim rule effective January 1, 1991. Comments from agencies and the public are invited and must be received by March 4, 1991.

**ADDRESSES:** Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917, Attention: Ms. Loring.

**FOR FURTHER INFORMATION CONTACT:** Julia S. Loring or Barbara Mullen-Roth, Office of Government Ethics, telephone (202/FTS)523-5757, FAX(202/FTS)523-6325.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Substantive Discussion of Exemption and Agency Component Designation Procedures**

The post-employment conflict of interest restrictions of 18 U.S.C. 207 were substantially revised by the Ethics Reform Act of 1989, Public Law No. 101-194, 103 Stat. 1716, with technical amendments enacted by Public Law No. 101-280, 104 Stat. 149 (1990). Effective January 1, 1991, 18 U.S.C. 207 sets forth revised substantive prohibitions restricting the activities of individuals who terminate Government service or who leave certain high-level positions on or after that date. While certain of the restrictions of revised 18 U.S.C. 207 apply to Members of Congress and other officials in the legislative branch, this part 2641 is intended to provide guidance concerning the provisions of 18 U.S.C. 207 only as they apply to Federal employees in the executive branch, including independent agencies. The Office of Government Ethics has interpretive rulemaking authority with respect to 18 U.S.C. 207 pursuant to Executive Order 12674, as modified by Executive Order 12731.

Pending the completion of a comprehensive part 2641 that will provide guidance concerning all substantive prohibitions of revised 18 U.S.C. 207, interim rule will permit the immediate exercise of the Director's authority in relation to the scope of section 207(c). Agencies should continue to consult 5 CFR part 2637 for guidance concerning the previous version of 18 U.S.C. 207, which will continue to apply to employees terminating Government service prior to January 1, 1991. The Office of Government Ethics is adding an

editorial note to part 2637 to explain the purpose of that part's continued publication. The authority citation is also being revised to indicate that part 2637 reflects the version of 18 U.S.C. 207 in effect prior to January 1, 1991.

Under the one-year "cooling-off" restriction of 18 U.S.C. 207(c), former senior employees are prohibited for one year from contacting their former departments or agencies for the purpose of influencing official action. The prohibition is applicable only to "senior" employees of the executive branch. The definition of "senior employee" in section 2641.101 of this rule reflects the recent amendment of 18 U.S.C. 207(c)(2)(A)(ii) by section 101(b)(8)(A) of the Federal Employees Pay Comparability Act of 1990, Public Law No. 101-509, 104 Stat. 1389.

In addition to the general exceptions set forth in section 207(j), revised 18 U.S.C. 207 provides for two methods by which the restrictions of section 207(c) can be narrowed or eliminated in the case of certain former senior employees. Both of these methods require action by the Director of the Office of Government Ethics. Accordingly, 2641.201(d) of this interim rule establishes a procedure by which the Director may waive the application of section 207(c) to is reserved for a listing of any positions exempted from the restrictions of section 207(c) under this procedure. The interim rule also sets forth at section 2641.201(e) the procedure by which the Director may designate separate departmental and agency components, thereby limiting the scope of the prohibition of section 207(c). Appendix B to this part lists initial separate departmental or agency component designations.

Pursuant to 18 U.S.C. 207(c)(2)(C), section 207(c) is not applicable to any former senior employee whose Government position has been exempted from the prohibition by the Director. As explained in section 2641.201(d)(1) of the interim rule, the granting of an exemption for a particular senior employee position means that the one-year restriction of 18 U.S.C. 207(c) will not apply upon any employee's termination from the position. Section 2641.201(d)(3) of the rule sets forth procedures by which a designated agency ethics official may request, on behalf of his agency, that the Director exempt a particular position or positions from the coverage of 18 U.S.C. 207(c). As described in section 2641.201(d)(5) of the rule, the Director may exempt a position or category of positions from section 207(c) if he determines that (1) granting the exemption would not create the potential for use of undue influence of unfair

advantage based on past Government service, and (2) imposition of the restrictions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions. In making the latter determination, the Director may consider, for example, the fact that the incumbent of the position receives a special rate of pay pursuant to specific statutory authority or is required to have outstanding qualifications in a scientific, technological, or other technical discipline. Section 2641.201(d)(2) of the rule specifies senior employee positions that are not eligible for exemption from 18 U.S.C. 207(c).

The impact of 18 U.S.C. 207(c) can be narrowed through designation, by the Director, of separate departmental or agency components. The representational bar of section 207(c) will ordinarily extend to the whole of the department or agency in which a former senior employee served in any capacity during the year prior to termination from senior service. The terms "department" and "agency" are defined in section 2641.101 of the interim rule. However, as explained in section 2641.201(e)(1) of the rule, certain former senior employees may engage in representational activities before a component of their former department or agency if that component has been designated by the Director of the Office of Government Ethics pursuant to 18 U.S.C. 207(h) as a distinct and separate agency or bureau within that department or agency. As described in section 2641.201(e)(2) of the rule, certain categories of senior employees are ineligible to benefit from the narrowing effect of component designations. Unless ineligible, a senior employee who formerly served in a parent organization will be permitted to contact current employees of designated components during the one-year cooling-off period notwithstanding the fact that his official responsibilities may have included the exercise of general supervision over the component.

In general, revised 18 U.S.C. 207(h) combines authorities previously set forth in 18 U.S.C. 207 (e) and (d)(1)(C) as in effect prior to January 1, 1991. Section 207(e) previously gave the Director of the Office of Government Ethics authority to designate separate statutory components, while section 207(d)(1)(C) authorized the designation of separate administratively created components. Appendix B to this part sets forth initial component designations effective as of January 1, 1991. These initial designations reflect a combined listing of the statutory and nonstatutory components as last designated under authority of prior sections 207 (e) and (d)(1)(C). 55 FR 4308 (Feb. 7, 1990), as supplemented by 55 FR 24855 (June 19, 1990). In addition, the 21 Offices of the U.S. Trustee have been designated as separate components of the Department of Justice is

response to a request from that department's alternate designated agency ethics official that was received subsequent to June 19, 1990. All initial designations are consistent with the criteria set forth in 18 U.S.C. 207(h), as implemented in section 2641.201(e)(6) of this rule, requiring that the Director finding that (1) there exists no potential for use of undue influence or unfair advantage based on past Government service, and (2) the component is an agency or bureau, within a department or agency, that exercises functions which are distinct and separate from the functions of the parent department or agency and from the functions of other components of that parent. The distinct and separate character of a component can be demonstrated, for example, by the fact that it has a separate statutory basis or by the fact that it exercises distinct and separate subject matter of geographical jurisdiction. Section 2641.201(e)(3) of the rule provides for the future addition and revocation of designations. The Director can consider requests from designated agency ethics officials for additional designations or revocation of current designations at any time after January 1, 1991.

## **B. Matters of Regulatory Procedure**

### **Administrative Procedure Act**

Pursuant to section 553 of title 5 of the United States Code, the Director of the Office of Government Ethics finds that good cause exists for waiving the general notice of proposed rulemaking and 30-day delayed effective date, and for making this interim rule retroactively effective to January 1, 1991. These requirements are being waived because the revised post-employment restrictions of 18 U.S.C. 207, as amended by Public Laws 101-194, 101-280, and 101-509, are effective as of January 1, 1991. Section 207, as amended, authorizes administrative actions that can narrow the coverage and scope of certain of the revised statute's substantive restrictions. The Director of the Office of Government Ethics has authority to take action to exempt certain Government positions from the coverage of section 207(c) and to designate certain departmental or agency components in order that the scope of that provision's representational bar may be limited to less than the whole of a department or agency. The interim rule lists the Director's initial designations of departmental and agency components and prescribes interim procedures for the modification of these initial designations. The rule also covers coverage of section 207(c). Consequently, it is essential to the workings of executive branch ethics programs that this implementing rule go into effect as soon as possible. However, this is an interim rule with provision for a 30-day comment period. The Office of

Government Ethics will review all comments received and consider any modifications to this rule which appear warranted.

**E.O. 12291, Federal Regulation.**

As Director of the Office of Government Ethics, I have determined that this is not a major rule as defined under section 1(b) of Executive Order 12291.

**Regulatory Flexibility Act**

As Director of the Office of Government Ethics, I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only affects current and former Federal employees.

**Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this rule does not contain an information collection requirement that requires the approval of the Office of Management and Budget.

**List of Subjects in 5 CFR Parts 2637 and 2641**

Conflict of interests, Government employees.

Approved: January 7, 1991

**Stephen D. Potts,**  
**Director, Office of Government Ethics.**