

Office of Government Ethics

§ 2641.204

have official responsibility for review of the drug. The division director also would have retained official responsibility for the matter had he either asked his supervisor or another division director to oversee the matter.

Example 9 to paragraph (j): The Deputy Secretary of a department terminates Government service to stay home with her newborn daughter. Four months later, she returns to the department to serve on an advisory committee as a special Government employee (SGE). After three months, she terminates Government service once again in order to accept a part-time position with a public relations firm. The 18 U.S.C. 207(a)(2) bar commences when she resigns as Deputy Secretary and continues to run for two years. (Any action taken in carrying out official duties as a member of the advisory committee would be undertaken on behalf of the United States and would, therefore, not be restricted by 18 U.S.C. 207(a)(2). See § 2641.301(a).) A second two-year restriction commences when she terminates from her second period of Government service but it applies only with respect to any particular matter actually pending under her official responsibility during her three-month term as an SGE.

§ 2641.203 One-year restriction on any former employee's representations, aid, or advice concerning ongoing trade or treaty negotiation.

(a) *Basic prohibition of 18 U.S.C. 207(b).* For one year after his Government service terminates, no former employee shall, on the basis of "covered information," knowingly represent, aid, or advise any other person concerning an ongoing trade or treaty negotiation in which, during his last year of Government service, he participated personally and substantially as an employee. "Covered information" refers to agency records which were accessible to the employee which he knew or should have known were designated as exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552).

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(b) does not apply to a former employee who is:

- (1) Acting on behalf of the United States. See § 2641.301(a).
- (2) Acting as an elected State or local government official. See § 2641.301(b).
- (3) Testifying under oath. See § 2641.301(f).
- (4) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).

(5) Acting as an employee at a Government-owned, contractor-operated entity pursuant to a waiver. See § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(b) commences upon an employee's termination from Government service. The restriction lasts for one year or until the termination of the negotiation, whichever occurs first.

(d) *Represent, aid, or advise.* [Reserved]

(e) *Any other person.* [Reserved]

(f) *On the basis of.* [Reserved]

(g) *Covered information.* [Reserved]

(h) *Ongoing trade or treaty negotiation.* [Reserved]

(i) *Participated personally and substantially.* [Reserved]

§ 2641.204 One-year restriction on any former senior employee's representations to former agency concerning any matter, regardless of prior involvement.

(a) *Basic prohibition of 18 U.S.C. 207(c).* For one year after his service in a senior position terminates, no former senior employee may knowingly, with the intent to influence, make any communication to or appearance before an employee of an agency in which he served in any capacity within the one-year period prior to his termination from a senior position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former senior employee seeks official action by any employee of such agency. An individual who served in a "very senior employee" position is subject to the broader two-year restriction set forth in 18 U.S.C. 207(d) in lieu of that set forth in section 207(c). See § 2641.205.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(c) does not apply to a former senior employee who is:

- (1) Acting on behalf of the United States. See § 2641.301(a).
- (2) Acting as an elected State or local government official. See § 2641.301(b).
- (3) Acting on behalf of specified entities. See § 2641.301(c).
- (4) Making uncompensated statements based on special knowledge. See § 2641.301(d).

§ 2641.204

(5) Communicating scientific or technological information pursuant to procedures or certification. *See* § 2641.301(e).

(6) Testifying under oath. *See* § 2641.301(f).

(7) Acting on behalf of a candidate or political party. *See* § 2641.301(g).

(8) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(9) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. *See* § 2641.301(i).

(10) Subject to a waiver issued for certain positions. *See* § 2641.301(j).

(c) *Applicability to special Government employees and Intergovernmental Personnel Act appointees or detailees*—(1) *Special Government employees.* (i) 18 U.S.C. 207(c) applies to an individual as a result of service as a special Government employee (SGE) who:

(A) Served in a senior employee position while serving as an SGE; and

(B) Served 60 or more days as an SGE during the one-year period before terminating service as a senior employee.

(ii) Any day on which work is performed shall count toward the 60-day threshold without regard to the number of hours worked that day or whether the day falls on a weekend or holiday. For purposes of determining whether an SGE's rate of basic pay is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule, within the meaning of the definition of senior employee in § 2641.104, the employee's hourly rate of pay (or daily rate divided by eight) shall be multiplied by 2087, the number of Federal working hours in one year. (In the case of a Reserve officer of the Armed Forces or an officer of the National Guard who is an SGE serving in a senior employee position, 18 U.S.C. 207(c) applies if the officer served 60 or more days as an SGE within the one-year period prior to his termination from a period of active duty or active duty for training.)

(2) *Intergovernmental Personnel Act appointees or detailees.* 18 U.S.C. 207(c) applies to an individual serving as a senior employee pursuant to an appointment or detail under the Intergovernmental Personnel Act, 5 U.S.C. 3371-

5 CFR Ch. XVI (1-1-13 Edition)

3376. An individual is a senior employee if he received total pay from Federal or non-Federal sources equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule (exclusive of any reimbursement for a non-Federal employer's share of benefits not paid to the employee as salary), and:

(i) The individual served in a Federal position ordinarily compensated at a rate equal to or greater than 86.5 percent of level II of the Executive Schedule, regardless of what portion of the pay is derived from Federal expenditures or expenditures by the individual's non-Federal employer;

(ii) The individual received a direct Federal payment, pursuant to 5 U.S.C. 3374(c)(1), that supplemented the salary that he received from his non-Federal employer; or

(iii) The individual's non-Federal employer received Federal reimbursement equal to or greater than 86.5 percent of level II of the Executive Schedule.

Example 1 to paragraph (c): An employee of a private research institution serves on an advisory committee that convenes periodically to discuss United States policy on foreign arms sales. The expert is compensated at a daily rate which is the equivalent of 86.5 percent of the rate of basic pay for a full-time employee at level II of the Executive Schedule. The individual serves two hours per day for 65 days before resigning from the advisory committee nine months later. The individual becomes subject to 18 U.S.C. 207(c) when she resigns from the advisory committee since she served 60 or more days as a special Government employee during the one-year period before terminating service as a senior employee.

Example 2 to paragraph (c): An individual is detailed from a university to a Federal department under the Intergovernmental Personnel Act to do work that had previously been performed by a GS-15 employee. While on detail, the individual continues to receive pay from the university in an amount \$5,000 less than 86.5 percent of the rate of basic pay for level II of the Executive Schedule. In addition, the department pays a \$25,000 supplement directly to the individual, as authorized by 5 U.S.C. 3374(c)(1). Since the employee's total pay is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule, and a portion of that compensation is paid directly to the individual by the department, he becomes subject to 18 U.S.C. 207(c) when his detail ends.

(d) *Commencement and length of restriction.* 18 U.S.C. 207(c) is a one-year restriction. The one-year period is measured from the date when the employee ceases to serve in a senior employee position, not from the termination of Government service, unless the two events occur simultaneously. (In the case of a Reserve officer of the Armed Forces or an officer of the National Guard who is a special Government employee serving in a senior employee position, section 207(c) is measured from the date when the officer terminates a period of active duty or active duty for training.)

Example 1 to paragraph (d): An employee at the Department of Labor (DOL) serves in a senior employee position. He then accepts a GS-15 position at the Federal Labor Relations Authority (FLRA) but terminates Government service six months later to accept a job with private industry. 18 U.S.C. 207(c) commences when he ceases to be a senior employee at DOL, even though he does not terminate Government service at that time. (Any action taken in carrying out official duties on behalf of FLRA while still employed by that agency would be undertaken on behalf of the United States and would, therefore, not be restricted by section 207(c). See § 2641.301(a).)

Example 2 to paragraph (d): In the previous example, the DOL employee accepts a senior employee position at FLRA rather than a GS-15 position. The bar of section 207(c) commences when, six months later, he terminates service in the second senior employee position to accept a job with private industry. (The bar will apply with respect to both the DOL and FLRA. See paragraph (g) of § 2641.204 and examples 2 and 3 to that paragraph.)

(e) *Communication or appearance.* See § 2641.201(d).

(f) *With the intent to influence.* See § 2641.201(e).

(g) *To or before employee of former agency—(1) Employee.* For purposes of this paragraph, a former senior employee may not contact:

(i) Any current Federal employee of the former senior employee's "former agency" as defined in paragraph (g)(2) of this section;

(ii) An individual detailed under the Intergovernmental Personnel Act (5 U.S.C. 3371-3376) to the former senior employee's former agency;

(iii) An individual detailed to the former senior employee's former agen-

cy from another department, agency or other entity, including agencies and entities within the legislative or judicial branches;

(iv) An individual serving with the former senior employee's former agency as a collateral duty pursuant to statute or Executive order; and

(v) In the case of a communication or appearance made by a former senior employee who is barred by 18 U.S.C. 207(c) from communicating to or appearing before the Executive Office of the President, the President and Vice President.

(2) *Former agency.* The term "agency" is defined in § 2641.104. Unless eligible to benefit from the designation of distinct and separate agency components as described in § 2641.302, a former senior employee's former agency will ordinarily be considered to be the whole of any larger agency of which his former agency was a part on the date he terminated senior service.

(i) *One-year period before termination.* 18 U.S.C. 207(c) applies with respect to agencies in which the former senior employee served within the one-year period prior to his termination from a senior employee position.

(ii) *Served in any capacity.* Once the restriction commences, 18 U.S.C. 207(c) applies with respect to any agency in which the former senior employee served in any capacity during the one-year period, regardless of his position, rate of basic pay, or pay grade.

(iii) *Multiple assignments.* An employee can simultaneously serve in more than one agency. A former senior employee will be considered to have served in his own employing entity and in any entity to which he was detailed for any length of time or with which he was required to serve as a collateral duty pursuant to statute or Executive order.

(iv) *Effect of organizational changes.* If a former senior employee's former agency has been significantly altered by organizational changes after his termination from senior service, it may be necessary to determine whether a successor entity is the same agency as the former senior employee's former agency. The appropriate designated agency ethics official, in consultation with the Office of Government Ethics, shall

identify the entity that is the individual's former agency. Whether a successor entity is the same as the former agency depends upon whether it has substantially the same organizational mission, the extent of the termination or dispersion of the agency's functions, and other factors as may be appropriate.

(A) *Agency abolished or substantially changed.* If a successor entity is not identifiable as substantially the same agency from which the former senior employee terminated, the 18 U.S.C. 207(c) prohibition will not bar communications or appearances by the former senior employee to that successor entity.

(B) *Agency substantially the same.* If a successor entity remains identifiable as substantially the same entity from which the former senior employee terminated, the 18 U.S.C. 207(c) bar will extend to the whole of the successor entity.

(C) *Employing entity is made separate.* If an employing entity is made separate from an agency of which it was a part, but it remains identifiable as substantially the same entity from which the former senior employee terminated senior service before the entity was made separate, the 18 U.S.C. 207(c) bar will apply to a former senior employee of that entity only with respect to the new separate entity.

(D) *Component designations.* If a former senior employee's former agency was a designated "component" within the meaning of § 2641.302 on the date of his termination as senior employee, see § 2641.302(g).

(3) *To or before.* Except as provided in paragraph (g)(4) of this section, a communication "to" or appearance "before" an employee of a former senior employee's former agency is one:

(i) Directed to and received by the former senior employee's former agency, even though not addressed to a particular employee; or

(ii) Directed to and received by an employee of a former senior employee's former agency in his official capacity, including in his capacity as an employee serving in the agency on detail or, if pursuant to statute or Executive order, as a collateral duty. A former senior employee does not direct his

communication or appearance to a bystander who merely happens to overhear the communication or witness the appearance.

(4) *Public commentary.* (i) A former senior employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to make a prohibited communication or appearance if the forum:

(A) Is not sponsored or co-sponsored by the former senior employee's former agency;

(B) Is attended by a large number of people; and

(C) A significant proportion of those attending are not employees of the former senior employee's former agency.

(ii) In the circumstances described in paragraph (g)(4)(i) of this section, a former senior employee may engage in exchanges with any other speaker or with any member of the audience.

(iii) A former senior employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely-available publication.

Example 1 to paragraph (g): Two months after retiring from a senior employee position at the United States Department of Agriculture (USDA), the former senior employee is asked to represent a poultry producer in a compliance matter involving the producer's storage practices. The former senior employee may not represent the poultry producer before a USDA employee in connection with the compliance matter or any other matter in which official action is sought from the USDA. He has ten months remaining of the one-year bar which commenced upon his termination as a senior employee with the USDA.

Example 2 to paragraph (g): An individual serves for several years at the Commodity Futures Trading Commission (CFTC) as a GS-15. With no break in service, she then accepts a senior employee position at the Export-Import Bank of the United States (Ex-Im Bank) where she remains for nine months until she leaves Government service in order to accept a position in the private sector. Since the individual served in both the CFTC and the Ex-Im Bank within her last year of senior service, she is barred by 18 U.S.C. 207(c) as to both agencies for one year commencing from her termination from the senior employee position at the Ex-Im Bank.

Example 3 to paragraph (g): An individual serves for several years at the Securities and Exchange Commission (SEC) in a senior employee position. He terminates Government service in order to care for his parent who is recovering from heart surgery. Two months later, he accepts a senior employee position at the Overseas Private Investment Corporation (OPIC) where he remains for nine months until he leaves Government service in order to accept a position in the private sector. The 18 U.S.C. 207(c) bar commences when he resigns from the SEC and continues to run for one year. (Any action taken in carrying out official duties as an employee of OPIC would be undertaken on behalf of the United States and would, therefore, not be restricted by section 207(c). See § 2641.301(a).) A second one-year restriction commences when he resigns from OPIC. The second restriction will apply with respect to OPIC only. Upon his termination from the OPIC position, he will have one remaining month of the section 207(c) restriction arising from his termination of his SEC position. This remaining month of restriction will run concurrently with the first month of the one-year OPIC restriction.

Example 4 to paragraph (g): An architect serves in a senior employee position in the Agency for Affordable Housing. Subsequent to her termination from the position, the agency is abolished and its functions are distributed among three other agencies within three departments, the Department of Housing and Urban Development, the Department of the Interior, and the Department of Justice. None of these successor entities is identifiable as substantially the same entity as the Agency for Affordable Housing, and, accordingly, the 18 U.S.C. 207(c) bar will not apply to the architect.

Example 5 to paragraph (g): A chemist serves in a senior employee position in the Agency for Clean Rivers. Subsequent to his termination from the position, the mission of the Agency for Clean Rivers is expanded and it is renamed the Agency for Clean Water. A number of employees from the Agency for Marine Life are transferred to the reorganized agency. If it is determined that the Agency for Clean Water is substantially the same entity from which the chemist terminated, the section 207(c) bar will apply with respect to the chemist's contacts with all of the employees of the Agency for Clean Water, including those employees who recently transferred from the Agency for Marine Life. He would not be barred from contacting an employee serving in one of the positions that had been transferred from the Agency for Clean Rivers to the Agency for Clean Land.

(h) *On behalf of any other person.* See § 2641.201(g).

(i) *Matter on which former senior employee seeks official action—(1) Seeks official action.* A former senior employee seeks official action when the circumstances establish that he is making his communication or appearance for the purpose of inducing a current employee, as defined in paragraph (g) of this section, to make a decision or to otherwise act in his official capacity.

(2) *Matter.* The prohibition on seeking official action applies with respect to any matter, including:

(i) Any "particular matter involving a specific party or parties" as defined in § 2641.201(h);

(ii) The consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons;

(iii) A new matter that was not previously pending at or of interest to the former senior employee's former agency; and

(iv) A matter pending at any other agency in the executive branch, an independent agency, the legislative branch, or the judicial branch.

Example 1 to paragraph (i): A former senior employee at the National Capital Planning Commission (NCPC) wishes to contact a friend who still works at the NCPC to solicit a donation for a local charitable organization. The former senior employee may do so since the circumstances establish that he would not be making the communication for the purpose of inducing the NCPC employee to make a decision in his official capacity about the donation.

Example 2 to paragraph (i): A former senior employee at the Department of Defense wishes to contact the Secretary of Defense to ask him if he would be interested in attending a cocktail party. At the party, the former senior employee would introduce the Secretary to several of the former senior employee's current business clients who have sought the introduction. The former senior employee and the Secretary do not have a history of socializing outside the office, the Secretary is in a position to affect the interests of the business clients, and all expenses associated with the party will be paid by the former senior employee's consulting firm. The former senior employee should not contact the Secretary. The circumstances do not establish that the communication would be made other than for the purpose of inducing the Secretary to make a decision in his official capacity about the invitation.

§ 2641.205

5 CFR Ch. XVI (1–13 Edition)

Example 3 to paragraph (i): A former senior employee at the National Science Foundation (NSF) accepts a position as vice president of a company that was hurt by recent cuts in the defense budget. She contacts the NSF's Director of Legislative and Public Affairs to ask the Director to contact a White House official in order to press the need for a new science policy to benefit her company. The former senior employee made a communication for the purpose of inducing the NSF employee to make a decision in his official capacity about contacting the White House.

§ 2641.205 Two-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement.

(a) *Basic prohibition of 18 U.S.C. 207(d).* For two years after his service in a very senior employee position terminates, no former very senior employee shall knowingly, with the intent to influence, make any communication to or appearance before any official appointed to an Executive Schedule position listed in 5 U.S.C. 5312–5316 or before any employee of an agency in which he served as a very senior employee within the one-year period prior to his termination from a very senior employee position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former very senior employee seeks official action by any official or employee.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(d) does not apply to a former very senior employee who is:

(1) Acting on behalf of the United States. *See* § 2641.301(a).

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

(3) Acting on behalf of specified entities. *See* § 2641.301(c).

(4) Making uncompensated statements based on special knowledge. *See* § 2641.301(d).

(5) Communicating scientific or technological information pursuant to procedures or certification. *See* § 2641.301(e).

(6) Testifying under oath. *See* § 2641.301(f).

(7) Acting on behalf of a candidate or political party. *See* § 2641.301(g).

(8) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(9) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. *See* § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(d) is a two-year restriction. The two-year period is measured from the date when the employee ceases to serve in a very senior employee position, not from the termination of Government service, unless the two events occur simultaneously. *See* examples 1 and 2 to paragraph (d) of § 2641.204.

(d) *Communication or appearance.* *See* § 2641.201(d).

(e) *With the intent to influence.* *See* § 2641.201(e).

(f) *To or before employee of former agency.* *See* § 2641.204(g), except that this section covers only former very senior employees and applies only with respect to the agency or agencies in which a former very senior employee served as a very senior employee, and very senior employees do not benefit from the designation of distinct and separate agency components as referenced in § 2641.204(g)(2).

(g) *To or before an official appointed to an Executive Schedule position.* *See* § 2641.204(g)(3) for “to or before,” except that this section covers only former very senior employees and also extends to a communication or appearance before any official currently appointed to a position that is listed in sections 5 U.S.C. 5312–5316.

NOTE TO PARAGRAPH (g): A communication made to an official described in 5 U.S.C. 5312–5316 can include a communication to a subordinate of such official with the intent that the information be conveyed directly to the official and attributed to the former very senior employee.

(h) *On behalf of any other person.* *See* § 2641.201(g).

(i) *Matter on which former very senior employee seeks official action.* *See* § 2641.204(i), except that this section only covers former very senior employees.

Example 1 to § 2641.205: The former Attorney General may not contact the Assistant Attorney General of the Antitrust Division on