DCN 12384

Hatch Act info/guidance

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Travel guidance

April 23, 1995

MEMORANDUM TO COMMISSION STAFF

From: Madelyn Creedon

Subject: Guidelines when seeking other employment.

As all of you are aware, the Commission, by law, will go out of business on December 31, 1995. Understandably, each of you is concerned about future employment and may be actively looking, or preparing to look for your next job. While job hunting is not prohibited, there are certain guidelines which you must follow as a federal employee. Failure to follow these guidelines may be a violation of criminal law. Below are a series of questions and answers which may assist you in complying with ethics regulations as you seek future employment. If you have any questions about the regulations in general or your job search in particular, please contact Elizabeth King at extension 127.

GENERAL RULE:

18 U.S.C. § 208 and 5 C.F.R. § 2637 require that employees disqualify themselves from participating in any particular matter that will have a direct and predictable effect on the financial interest of a person with whom he or she is negotiating or has any arrangement concerning prospective employment. Not all "job hunting" efforts require special disclosure or disqualification.

Q: WHAT IS THE PURPOSE OF RESTRICTIONS ON "SEEKING EMPLOYMENT"?

A: The purpose of these restrictions is to eliminate situations that could put a DBCRC employee in a position where performance or non-performance of his or her official duties with DBCRC could have any affect, either positive or negative, on a prospective employer. Generally, this problem is eliminated by requiring a DBCRC employee to disqualify himself or herself from taking any official action which would involve such a prospective employer.

Q: ARE RESTRICTIONS ON SEEKING EMPLOYMENT JUST INTERNAL ADMINISTRATIVE REGULATIONS?

A: No. These regulations are based on 18 U.S.C. § 208 which apply to all employees of the federal government.

Q: ARE ALL DBCRC EMPLOYEES COVERED BY THE ETHICS REGULATIONS ON "JOB HUNTING"?

A: Yes, with one or two exceptions. If you completed either a public or confidential financial disclosure form (SF 278 or SF 450), then you must observe certain "job hunting" restrictions.

Q: AS A "COVERED EMPLOYEE" MUST I REPORT EVERY ATTEMPT TO SEEK OTHER EMPLOYMENT?

A: No. You must only report attempts to seek employment with firms or individuals which are affected by the performance or non-performance of your official duties at DBCRC. However, you would not need to report attempts to gain employment with any organization which has no interest in your duties as a DBCRC employee.

Usually a federal employee does not have to report an attempt to seek employment with another federal agency. However, in the case of the Commission, DOD and Congress are government entities that may be affected by the performance or non-performance of the official duties of a DBCRC employee. Although it is not required by federal regulations, in order preserve the integrity of the Commission and avoid the appearance of the loss of impartiality, we ask you to contact an ethics official if you begin to seek employment with DOD or Congress prior to the time when the President submits the Commission's report to Congress.

Q: AM I PROHIBITED FROM SEEKING ANY TYPE OF EMPLOYMENT?

A: No. DBCRC employees, regardless of their position or duties, may seek future employment <u>with anyone they choose</u> (including DOD and those doing business with DOD or DBCRC). However, if the employee has official responsibilities which may affect the possible employer, he or she must recuse himself or herself from any further dealing on behalf of DBCRC which involve the prospective employer until the negotiations have ended. Recusals will be honored by DBCRC, provided they are consistent with the needs of the agency.

Q: WHAT ACTUALLY CONSTITUTES "SEEKING EMPLOYMENT"?

A: This is a rather broad term, and may be defined in terms of "beginning" and "ending".

A DBCRC employee <u>begins</u> seeking employment when the employee:

1) makes unsolicited communications to a prospective employer regarding possible employment (such as mailing a resume);

2) engages in discussions for employment with any person; or

3) makes a response other than rejection to an unsolicited communication from a prospective employer regarding possible employment with that person.

A DBCRC employee is no longer seeking employment when:

1) the employee does not hear from the prospective employer for two months from the date a resume was sent (any indication of interest from the prospective employer means the employee is still seeking employment);

2) when they have withdrawn their resume or application;

3) the employee or prospective employer rejects the possibility of employment and all discussions have terminated (a response that simply defers discussions does not constitute a rejection).

Q: ARE THERE ANY OTHER CONCERNS IF I PLACE MY NAME WITH EMPLOYMENT AGENCIES OR WITH "HEAD HUNTERS"?

A: Yes. When an employment agency or head hunter notifies you of the names of prospective employers which they have contacted on your behalf, then you are considered to be seeking employment with those organizations. You have a positive duty to ask that you be so notified so that you can make appropriate recusals.

Q: IF I CALL A FIRM AND ASK THEM FOR A JOB APPLICATION, IS THAT CONSIDERED "SEEKING EMPLOYMENT"?

A: No. You are not considered to be "seeking employment" until you complete and submit the employment application. You may prepare and update your SF 171 or your resume, but once you submit it in response to a job advertisement, you are seeking employment.

Q: HOW IS "DISQUALIFICATION" OR "RECUSAL" ACCOMPLISHED?

A: Recusal may be in writing and given to the agency ethics officials and your supervisor or you can inform them orally. If recusal is appropriate, you must not participate in a matter that to your knowledge would have a direct and predictable effect on the financial interests of a prospective employer with whom you are seeking employment.

Q: WILL THE DBCRC GIVE TIME OFF/ADMINISTRATIVE LEAVE FOR PREPARATION OF RESUME, COMPLETION OF EMPLOYMENT APPLICATIONS AND JOB INTERVIEWS?

A: Yes, but not until after the President has submitted the Commission's report to Congress.

Q: I HAVE RECEIVED A RESPONSE TO A RESUME, AND A POTENTIAL EMPLOYER WANTS TO FLY ME TO THEIR HOME OFFICE FOR A JOB INTERVIEW. CAN I ACCEPT ROUND-TRIP TRAVEL AND LODGING TO INTERVIEW FOR EMPLOYMENT?

A: You may accept round-trip travel and lodging from a prospective employer as follows:

1) If the prospective employer has a business relationship with DBCRC, then you must obtain prior written approval from an agency ethics official before accepting the travel. The ethics official will review the matter based upon any appearance of conflict of interest, and will issue any disqualifcations if deemed appropriate.

2) If the prospective employer has no business relationship with DBCRC, then you may accept the travel, but you must report the travel to an agency ethics official no later than two weeks after completion of the travel.

3) In all cases, travel must be completed on your own time during weekends, annual leave, or special leave scheduled with your supervisor.

Q: IN CLOSING, COULD YOU SUMMARIZE DBCRC'S POLICY ON "SEEKING EMPLOYMENT"?

A: Yes. The prior questions and answers should be used in conjunction with the Standards of Ethical Conduct, a synopsis of which you received during your ethics training. In summary, DBCRC employees may seek employment with anyone, and are under **no obligation** to disclose employment negotiations with any person whose financial interests would **not** be affected by the performance or nonperformance of the employee's official duties. DBCRC employees are also free to seek employment with persons whose financial interests **could be** affected by the performance or non-performance of the employee's official duties; **however, in these instances DBCRC employees, prior to seeking employment, must disqualify themselves from taking official actions which could affect the financial interests of the targeted prospective employer.**

Generally speaking, one must keep their official responsibilities separate from their private interest. If there is no official involvement, there won't be a conflict. If there is official involvement, then the employee must recuse himself or herself from that involvement before he or she pursues employment opportunities.

21 March 1995

MEMORANDUM FOR Division Heads

SUBJECT: E-Mail Use and Record Keeping

1. After reviewing the use of e-mail by the Commission staff, we in legal have determined that the information processed in our e-mail system does not rise to the level of a "record" as defined in the Federal Records Act (44 U.S.C. 3301). This is chiefly because we do not conduct "official business" on the e-mail system, i.e., no final actions are constructed either on, or through the use of, e-mail. Consequently, we have no requirement either to implement a recordkeeping system (as outlined in 36 C.F.R. 1228.188 and 1234.28(a), or an e-mail back-up system (as described in 36 C.F.R. 1234.30).

2. So, your asking what this has to do with you. Well, in order for our opinion to remain valid, we must continue our current practice of using e-mail only for administrative correspondence and in the place of the intra-office intercom/phone (it is OK, however, to download a file from *MS Word* and send it via e-mail). Thus , please monitor the use of e-mail in your area of responsibility to insure that the current practice remains constant. Don't worry, there are currently no problems - this is just a bit of preventive law.

Ralph A. Kaiser

RALPH A. KAISER
Counsel

MEMORANDUM FOR: All Staff
FROM: Madelyn Creedon
SUBJECT: Travel
DATE: March 20, 1995

As travel season is upon us, it is time to review the ethics rules as they apply to official travel.

1. General Provision: Anything a Commission employee receives as a result of official travel belongs to the Federal Government.

2. Frequent Flyer Miles: If earned on official travel, they belong to the government and may be used only on subsequent official travel. If you commingle official and personal frequent flyer miles in the same account, then the entire account becomes property of the Federal Government and may be used only for subsequent official travel. Frequent flyer miles remain the property of the government even after you have left the government.

3. Getting "Bumped": Benefits, such as free tickets, as a result of being *involuntarily* bumped from an overbooked flight on official travel belong to the Federal Government as the traveler remains on government time. However, benefits as a result of *voluntarily* relinquishing a seat on an overbooked flight belong to the traveler and can be used on personal travel. The traveler may not give up the seat if it would interfere with the accomplishment of the government's mission for which the official travel was undertaken or add to the government's costs for the trip. If this would significantly delay your trip, you may be required to take the additional time as annual leave.

4. First-Class Travel: First-class travel is prohibited except in rare circumstances; please see one of the Commission's attorneys for further guidance.

5. Other Travel-Related Benefits: Benefits that cannot be used for official purposes *may* be accepted *if* they fall into an exception to the receipt of gifts by government employees. Examples include on-the-spot upgrades and rebates on personal credit cards (Discover). However, the system should not be manipulated in order to maximize upgrades.

6. Government American Express Card Please remember that the Government American Express Card should be used for official travel purposes.

7. Meals Meals are generally considered gifts when they come from prohibited sources, including communities. When you are visiting communities you must make arrangements to pay for all meals. This includes those situations where the community is holding a dinner, lunch etc. for the Commission. The one exception is miscellaneous food not intended as a meal. A good example of this would be coffee and doughnuts made available during a meeting.

If you have any questions, please ask one of the legal staff for guidance.

15 February 1995

MEMORANDUM FOR All Commission Staff

SUBJECT: Attendance at the South Texas Military Facilities Task Force Reception

1. Many of you have been invited to attend the above-referenced reception this Thursday, 16 February 1995. The Standards of Conduct for Employees of the Executive Branch, 5 C.F.R. §2635, prohibits participation in events that give the appearance of impropriety and thus undermines the integrity of the government, or in this case, the Commission. Therefore, although the hospitality of the South Texas Task Force is appreciated, Commission staff should decline the invitation to this reception.

2. Questions or comments should be addressed to Ralph Kaiser, Counsel, at extension 196.

MADELYN CREEDON
General Counsel

Interoffice Memo

Date: 02/14/95

To: Madelyn Creedon, General Counsel

From: Ralph Kaiser

Subject: Attendance at the South Texas Military Facilities Task Force Reception

1. References.
   a. Standards of Conduct for Employees of the Executive Branch, 5 C.F.R. §2635, Chapter 2.
   b. DOD 5500.7-R, Joint Ethics Regulation (JER), Chapter 2.
2. Background.

   Members of the BRAC staff on board as of 1 February 1995 have been invited to attend a reception/barbecue hosted by the above-referenced group and the south Texas Congressional delegation including Senators Gramm and Hutchison.
3. As you know, the general standard is that no employee shall solicit or accept a gift from a prohibited source or given because of the employee's official position, unless it falls into one of the exceptions listed in §2635.204. 5 C.F.R. §2635.202. Prohibited Source being any person who, among other things: is seeking official action by the employee's agency and/or has interests that may be substantially affected by performance or nonperformance of the employee's official duties. 5 C.F.R. §2635.203.
4. In this case, it appears that the "Gifts of $20 or less" exception would apply. However, the key question is whether using any exception would undermine government integrity or give the appearance of impropriety. Clearly, based upon the language quoted above in paragraph 3., attendance by BRAC personnel would both undermine the Commission's integrity and give the appearance of impropriety. Thus, the limitations on use of exceptions section, §2635.201(c) [the exception to the exceptions], applies. Therefore, I recommend that all personnel be advised that they may not attend the event in question. Attached is a draft memo for your signature.

Attorney-Client Privileged Communication May 17, 1994

M E M O R A N D U M

To: Matt Behrmann, Staff Director
Commission Staff

From: Mary Ann Hook
Designated Agency Ethics Official
Acting General Counsel

Re: Post-Employment Restrictions
Working Behind-the-Scenes for an Entity with Business Before a Government Agency

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A. Introduction

There are numerous statutes and regulations that govern the role government employees may undertake after leaving the government. The restrictions vary according to the level of employee, responsibilities and subject matter of the issue involved. 18 U.S.C. 207 is the primary source of post-employment restrictions applicable to government employees.

The rules were not adopted to prevent an employee from accepting a position or limit behind-the-scenes work. Quoting the Office of Government Ethics, "None of the provisions bar any individual, regardless of rank or position, from accepting employment with any private or public employer after government service. Section 207 only prohibits individuals from engaging in certain activities on behalf of persons or entities other than the United States whether or not done for compensation."[1]

B. Lifetime Restriction

18 U.S.C. section 207 (a)(1) is a lifetime restriction that is to prevent an employee from participating in a matter while in government and later acting on behalf of a person or entity, other than the government, to exert influence on the same matter back to the government. There are no time restrictions for a government employee regarding acceptance of new employment nor his initiation of behind-the-scenes work for that employer.

Below is a quote from the Office of Government Ethics' memorandum interpreting the restriction in regard to a former employee and his ability to accept employment with an entity doing business before

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[1] Summary of Post-Employment Restrictions of 18 U.S.C. 207, Office of Government Ethics, coordinated with the Department of Justice, November [illegible] 1993, page [illegible]

the government, on the same particular matter before the government and being able to perform behind-the-scenes work.

In regard to 18 U.S.C. section 207 (a) (1):

> **A former employee is not prohibited by this restriction from providing "behind-the-scenes" assistance in connection with the representation of another person.** Moreover, the restriction prohibits only those communications (oral or written) and appearances that (formal and informal)[2] are made "with the intent to influence." A communication can be made orally, in writing, or through electronic transmission. An appearance extends to a former employee's mere physical presence at a proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An intent to influence the United States may be found if the communication of appearance is made for the purpose of seeking a discretionary government ruling, benefit, approval or other action or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular government action to be taken. **Accordingly, the prohibition does not apply to an appearance or communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.**[3]

In an opinion of the Office of Government Ethics regarding whether a former government officer of an agency may assume presidential duties of a private company that has business before his former agency:

> The statutory restrictions are focused on representational activities before, as well as communications to, a Department or agency by a former Government employee. Thus, for example, **no limitation would be placed on (the officer's involvement in the internal governance of the Organization's) business, including the internal administration of matters on which representational activities would be forbidden. No limitation would be placed on his capacity to speak to the public or to the Congress on any matter.** Further, the applicable post-employment restrictions would be personal to him and would not

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[2] Office of Government Ethics, Opinion 89 x 20, 1989, page 61.

[3] Summary of Post-Employment Restrictions of 18 U.S.C. 207, Office of Government Ethics, coordinated with the Department of Justice, November 4, 1992, page 3.

be imputed to any other employee of the organization.[4]

C. Two-year Restriction

18 U.S.C. section 207 (a) (2) is a two year restriction that is identical to (a) (1) except that the ban is of a shorter duration, requires only that an individual have had official responsibility for a matter while employed not like (a) (1) where he had participated personally and substantially in that matter.

The restrictions regarding appearances, communications before the government and behind the scene work are the same as outlined above.

D. One-year Restriction

18 U.S.C. section 207 (c) is a one year restriction that is to prevent an employee from knowingly making with the intent to influence, any communication to or appearance (on any matter) before an employee of a department or agency in which he served, for a period of a one-year period after termination of employment from the agency.

> Like the lifetime restriction discussed above, the provision prohibits communications to and appearance before the government and **does not prohibit behind-the-scenes assistance.**[5]

E. Exceptions

18 U.S.C. 207 (j) is an exception that states that a former employee is not restricted by any of the substantive provisions of section 207 from engaging in post-employment activities performed in carrying out official duties on behalf of the United States. This exception also extends to activities undertaken in carrying out official duties as an elected official of a state or local government.

F. Disclaimer

The Office of Government Ethics has not provided clear guidance regarding application of the above post-employment restrictions to Commission employees. The Commission has discretion to interpret

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[4] Office of Government Ethics, Opinion 80 x 9, November 24, 1980, page 71.

[5] Id at 8.

fact patterns to determine if and when the 18 U.S.C. 207 prohibitions apply to a former employee. This memo is not an attempt to determine whether a subject matter or entity could pose a conflict for an individual, rather it is to provide guidance on the ability of a former employee to manifest employment with private company, or entities with business before the Commission and the ability of an employee to perform behind-the-scenes work without violating the post employment restrictions of 18 U.S.C. 207 or the corresponding regulations.

Attorney Client Communication
June 13, 1994

Rules to Note When Leaving Government

While still an employee yet pending termination from government:

1. Do not participate in any matter that your future employer is involved with while you are a government employee - unless you receive a waiver.

2. Do not use your time or government position (including title) to solicit clients for your private sector job.

3. Do not use your official position to gain special inside, nonpublic knowledge in anticipation of using it upon leaving the government. Nonpublic information is information that has not been disseminated to the general public and is not authorized to be made available to the public upon request.

4. Do notify your supervisor and DAEO and seek disqualification if you are seeking employment or have an arrangement concerning prospective employment if your official duties would affect the financial interests of a prospective employee or of a person with whom he has an arrangement concerning prospective employment.

Laws and Regulations

18 U.S.C. 208 An employee is prohibited from participating personally and substantially in a particular matter in which to his knowledge, he, his spouse, child, general partner, or organization in which he is serving as officer, director, trustee, general partner or employee, or person or organization with which he is negotiating for, or has arrangement concerning prospective employment, has a financial interest.

5 CFR 2635.604 Employee shall not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interest of a prospective employer with whom he is seeking employment within the meaning of 2635.603 (b). Disqualification is accomplished by not participating in the particular matter.

5 CFR 2635.606(a) An employee shall be disqualified from taking official action in a particular matter that has a direct and predictable effect on the financial interests of the person with whom he is employed or with whom he has an arrangement concerning future employment, unless authorized by a waiver.

November 4, 1992

SUMMARY OF POST-EMPLOYMENT RESTRICTIONS OF 18 U.S.C. § 207

I. INTRODUCTION

Since its enactment in 1962, 18 U.S.C. § 207 has remained the primary source of post-employment restrictions applicable to officers and employees of the executive branch. Unlike certain other post-employment laws, the provisions of section 207 apply to individuals regardless of the executive department or agency in which they served while employed by the Government and regardless of the particular duties they performed.

Section 207 has been amended several times over the years. Recently, for example, section 207 was substantially revised by the Ethics Reform Act of 1989. As a consequence of these amendments, former employees are subject to varying post-employment restrictions depending upon the date of their termination from Government service or from certain high-level positions.

Individuals who terminated service prior to January 1, 1991, should continue to consult the regulations published at Part 2637 of title 5, Code of Federal Regulations, for guidance concerning applicable provisions of section 207. Individuals terminating service on or after January 1, 1991, should consult this summary pending completion of revised regulatory guidance at 5 C.F.R. Part 2641. As of this date, Part 2641 contains guidance concerning 18 U.S.C. § 207(c) only. (Except where the underlying statutory provision has changed, Part 2637 remains persuasive concerning the interpretation of the newer version of 18 U.S.C. § 207.)

This summary was prepared by the U.S. Office of Government Ethics. While it has been coordinated with the Department of Justice, employees are cautioned that it reflects only a preliminary interpretation of the amendments to 18 U.S.C. § 207 enacted by the Ethics Reform Act of 1989 and thereafter.

II. SUMMARY OF RESTRICTIONS

Effective January 1, 1991, section 207 of title 18 sets forth six substantive prohibitions restricting the activities of individuals who leave Government service or who leave certain high-level positions in the executive branch. Each of these restrictions is discussed separately below, followed by a discussion of several statutory exceptions.

None of the provisions bar any individual, regardless of rank or position, from accepting employment with any private or public employer after Government service. Section 207 only prohibits

individuals from engaging in certain activities on behalf of persons or entities other than the United States, whether or not done for compensation. None of the restrictions bar self-representation.

A. APPLICABILITY

The first three restrictions [§§ 207(a)(1), (a)(2), and (b)] are applicable to former officers or employees of the executive branch. They also apply to former senior or very senior employees as those terms are described below, and to former special Government employees. According to 18 U.S.C. § 202, a "special Government employee" includes an individual who is "retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis ...." (Enlisted personnel of the uniformed services are not "officers" or "employees" for purposes of section 207.)

The fourth restriction [§207(c)] is applicable only to former "senior personnel" (hereinafter referred to as "senior employees"). A senior employee is any employee (other than an individual covered by the fifth restriction) who was employed in a position for which the rate of pay is specified in or fixed according to the Executive Schedule, in a position for which the rate of basic pay is equal to or greater than the rate of basic pay payable for level V of the Executive Schedule, or in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade is 0-7 or above. The term includes those individuals appointed by the President to a position under 3 U.S.C. § 105(a)(2)(B) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(B). An individual is subject to section 207(c) as a result of service as a special Government employee only if the individual served 60 or more days as a special Government employee during the one-year period before terminating service as a senior employee.

The fifth restriction [§ 207(d)] applies only to former "very senior personnel" (hereinafter referred to as "very senior employees"). A very senior employee is any employee who was employed in a position at the rate of pay payable for level I of the Executive Schedule, or in a position in the Executive Office of the President at a rate of pay equal to or greater than the rate of pay payable for level II of the Executive Schedule. The term includes the Vice President and those individuals appointed by the President to a position under 3 U.S.C. § 105(a)(2)(A) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(A).

The sixth restriction [§ 207(f)] applies to individuals who formerly served in either a senior or very senior position.

B. SUBSTANTIVE RESTRICTIONS

1. **Basic Prohibition of 18 U.S.C. § 207(a)(1).** No former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.

Discussion. This is a lifetime restriction that commences upon an employee's termination from Government service. The target of this provision is the former employee who participates in a matter while employed by the Government and who later "switches sides" by representing another person on the same matter before the United States. The restriction is measured by the duration of the matter in which the former employee participated.

The restriction does not apply unless a former employee communicates to or makes an appearance before the United States on behalf of some other person. For these purposes, the "United States" refers to any employee of any department, agency, court, or court-martial of the United States (but not of the District of Columbia). The term does not include the Congress, and therefore communications to or appearances before Members of Congress and legislative staff are not prohibited by this provision. Exception

A former employee is not prohibited by this restriction from providing "behind-the-scenes" assistance in connection with the representation of another person. Moreover, the restriction prohibits only those communications and appearances that are made "with the intent to influence." A "communication" can be made orally, in writing, or through electronic transmission. An "appearance" extends to a former employee's mere physical presence at a proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An "intent to influence" the United States may be found if the communication or appearance is made for the purpose of seeking a discretionary Government ruling, benefit, approval, or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular Government action to be taken. Accordingly, the prohibition does not apply to an appearance or communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.

A communication to or appearance before the United States is not prohibited unless it concerns the same particular matter involving a specific party or parties in which the former employee participated personally and substantially while employed by the

Government. An employee can participate "personally" in a matter even though he merely directs a subordinate's participation. He participates "substantially" if his involvement is of significance to the matter. Thus, while a series of peripheral involvements may be insubstantial, participation in a single critical step may be substantial. The term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. In determining whether two situations are part of the same particular matter, one should consider all relevant factors, including the amount of time elapsed and the extent to which the matters involve the same basic facts or issues and the same or related parties. Even if a post-employment communication or appearance would concern the same particular matter, however, the representational bar will not apply unless the United States is a party or has a direct and substantial interest in that matter at the time of the post-employment representation.

The provision requires that an employee's official participation in a particular matter have taken place at a time when the matter involved a specific party (or parties). It also requires that the matter involve some specific party or parties at the time of the post-employment communication or appearance (although these can be different parties than were involved with the matter at the time of the employee's participation). General rulemakings do not usually involve specific parties. Consequently, it is quite possible that an employee who participated in a rulemaking while employed by the Government will, after leaving Government service, be able to appear before his former agency concerning the application of that rule to his new private sector employer without violating the lifetime restriction. Contracts, on the other hand, are always particular matters involving specific parties. A Government procurement has specific parties identified to it when a bid or proposal is received in response to a solicitation, if not before.

The provision does not prohibit a former employee from representing himself before the United States (as distinguished from a corporation or consulting firm). Moreover, a former employee is not prohibited from acting on behalf of the United States (or the Congress). Thus, even though an individual may once have worked on a matter while employed by the Government, he will not, while subsequently reemployed by the Government, be barred from communicating with any employee of the United States concerning that matter if he does so as part of his official duties. A former employee does not act on behalf of the United States, however, merely because the United States may share the same objective as the person whom the former employee is representing.

Official Responsibility

2. **Basic Prohibition of 18 U.S.C. § 207(a)(2)**. For two years after his Government service terminates, no former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of his employment with the United States.

Discussion. This is a two-year restriction that commences upon an employee's termination from Government service.

This provision is identical to the lifetime restriction discussed above except that it is of shorter duration and requires only that an individual have had official responsibility for a matter while employed by the Government, not that he have participated personally and substantially in that matter. Like the lifetime restriction, it prohibits certain communications and appearances made on behalf of any other person or entity except the United States (or the Congress). The communications and appearances prohibited are those made, with the intent to influence, to or before any employee of a department, agency, court, or court-martial of the United States. The representational bar applies with respect to any particular matter involving a specific party or parties that was actually pending under the former employee's official responsibility at some time during his last year of Government service.

"Official responsibility" is defined in 18 U.S.C. § 202 as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." The scope of an employee's official responsibility is usually determined by those areas assigned by statute, regulation, executive order, or job description. All particular matters under consideration in an agency are under the official responsibility of the agency head, and each is under that of any intermediate supervisor having responsibility for the activities of a subordinate employee who actually participates in the matter. An employee's recusal from or other non-participation in a matter does not remove it from his official responsibility.

A matter was "actually pending" under a former employee's official responsibility if the matter was in fact referred to or under consideration by persons within the employee's area of responsibility. A former employee is not subject to the restriction, however, unless at the time of the proposed representation of another he knows or reasonably should know that

the matter had been under his responsibility during his last year of Government service.

3. **Basic Prohibition of 18 U.S.C. § 207(b)**. For one year after his Government service terminates, no former employee may knowingly represent, aid, or advise on the basis of covered information, any other person (except the United States) concerning any ongoing trade or treaty negotiation in which, during his last year of Government service, he participated personally and substantially as an employee.

Trade negotiation

Discussion. This is a one-year restriction that commences upon an employee's termination from Government service. Extending to certain "behind-the-scenes" assistance, this provision can serve to augment the representational bar provided for in the lifetime restriction discussed above.

The restriction set forth in section 207(b) does not apply unless, during the one-year period before he left Government, an employee participated personally and substantially in an "ongoing" trade or treaty negotiation that is covered by the statute. It is not necessary that a former employee have had actual contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation. An employee is covered by this restriction even though his participation in an ongoing negotiation may have occurred prior to January 1, 1991, the effective date of section 207(b).

Trade negotiations covered by the statute are those that the President determines to undertake pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 2902). Unless there is an earlier public announcement of a determination by the President, a trade negotiation commences to be "ongoing" when, at least 90 days before entering into a trade agreement, the President notifies both the House of Representatives and the Senate of his intention to enter into an agreement. 19 U.S.C. § 2903 (a)(1)(A). Whether an employee participated personally and substantially in an "ongoing" trade negotiation is determined by reviewing an employee's participation after trade negotiations commenced. A treaty is an international agreement made by the President that requires the advice and consent of the Senate. A negotiation on a treaty commences to be "ongoing" at the point when both (1) the determination has been made by a competent authority that the outcome of a negotiation will be a treaty, and (2) discussions with a foreign government have begun on a text. Trade and treaty negotiations both cease to be ongoing when an agreement or treaty enters into force or when all parties to the negotiation cease discussion based on a mutual understanding that the agreement or treaty will not be consummated.

Once he has participated in an ongoing negotiation, section 207(b) prohibits a former employee from representing, aiding, or

advising any other person concerning a trade or treaty negotiation (that is still ongoing) on the basis of certain "covered" information. "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 (e.g., documents that were marked as subject to a national security classification or those otherwise designated in a manner that made it clear they were exempt from release under FOIA), and which concern a negotiation in which the employee participated personally and substantially during his last year of Government service. A former employee is not prohibited from utilizing information from an agency record which, at the time of his post-employment activity, is no longer exempt from disclosure under the Freedom of Information Act.

Only activities that are undertaken on behalf of "any other person" are prohibited by this restriction. Action taken on behalf of the United States (or the Congress) or on behalf of the former employee himself are not prohibited. A former employee "represents" another person when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that person to or before any third party. For this purpose, a third party includes any employee of the executive, legislative, or judicial branch of the Federal Government, including a Member of Congress. A former employee "aids or advises" another person when he assists that person other than by communicating to or appearing before a third party. A former employee represents, aids, or advises another person "on the basis of" covered information if the former employee's representation, aid, or advice either involves a disclosure of covered information to any person, or could not have been made or rendered had the former employee not had actual knowledge of covered information.

It is important to note that although a post-employment activity may not be prohibited by section 207(b), a former employee must still be careful to comply with other statutory restrictions. For example, even though a trade or treaty negotiation may not yet have become "ongoing" at the time of an employee's official participation, the negotiation may nevertheless have had specific parties identified to it, thus triggering the lifetime restriction set forth in section 207(a)(1).

4. **Basic Prohibition of 18 U.S.C. § 207(c)**. For one year after service in a "senior" position terminates, no former "senior" employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of a department or agency in which he served in any capacity during the one-year period prior to termination from "senior" service, if that communication or appearance is made on behalf of any other person (except the United States), in connection with any matter concerning which he seeks official action by that employee.

Discussion. This is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously. The purpose of this one-year "cooling off" period is to allow for a period of adjustment to new roles for the former senior employee and the agency he served, and to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former senior position. As already noted, this provision is applicable to "senior" employees, but not to "very senior" employees.

Like the lifetime restriction discussed above, this provision prohibits communications to and appearances before the Government and does not prohibit "behind-the-scenes" assistance. Unlike the lifetime restriction, however, this one-year restriction applies only to a "senior" employee, does not require that the former employee have ever been in any way involved in the matter that is the subject of the communication or appearance, and only prohibits communications to or appearances before employees of any department or agency in which he formerly served in any capacity during the one-year period prior to his termination from senior service. The representational bar applies with respect to any matter, whether or not involving a specific party, concerning which the former senior employee is seeking official action by a current employee of such department or agency on behalf of any other person except the United States (or the Congress).

As described below, section 207 provides for two methods by which the restrictions of section 207(c) can be narrowed or eliminated. The first is through the designation of separate departmental or agency components and the second is through the exemption of a position or category of positions from coverage. Not all senior employees are eligible to benefit from either or both of these procedures. A former senior employee is ineligible to benefit from these procedures if he is subject to section 207(c) by virtue of having served in a position for which the rate of pay is specified in or fixed according to the Executive Schedule or by virtue of having been appointed by the President to a position under 3 U.S.C. § 105(a)(2)(B) or by the Vice President to a position under 3 U.S.C. § 106(a)(1)(B).

As has been noted, the representational bar usually extends to any department or agency in which the former senior employee served in any capacity during the year prior to his termination from senior service. However, certain senior employees may be permitted to communicate to or appear before components of their former department or agency if those components have been designated as separate agencies or bureaus by OGE. For example, although it may not by statute be a separate component, OGE could designate the Defense Logistics Agency as an agency that exercises functions which are separate and distinct from its "parent" department, the Department of Defense. An individual formerly serving in a parent

department or agency would be barred by section 207(c) from making communications to or appearances before any employee of that parent, but would not be barred as to employees of any designated component of that parent. An individual formerly serving in a designated component of a parent department or agency would be barred from communicating to or making an appearance before any employee of that component, but would not be barred as to any employee of the parent or of any other component. The statute now provides that no agency within the Executive Office of the President may be designated as a separate component.

The restrictions of section 207(c) can be waived altogether as to certain senior employee positions or categories of positions. As a consequence of such exemption, the one-year restriction of section 207(c) will not begin to run upon an employee's termination from such a position. In order to grant an exemption, OGE must receive a request to do so from a department or agency. After review of the request, OGE can grant an exemption or exemptions based upon its determination that as to a particular position or category of positions, the imposition of section 207(c) would create an undue hardship on the department or agency in obtaining qualified personnel and that the granting of the exemption would not create the potential for use of undue influence or advantage.

5. **Basic Prohibition of 18 U.S.C. § 207(d)**. For one year after service in a "very senior" position terminates, no former "very senior" employee may knowingly make, with the intent to influence, any communication to or appearance before any individual appointed to an Executive Schedule position or before any employee of a department or agency in which he served as a "very senior" employee during the one-year period prior to termination from Government service, if that communication or appearance is made on behalf of any other person (except the United States), in connection with any matter concerning which he seeks official action by that individual or employee.

Discussion. This is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a very senior employee, not from the termination of Government service, unless the two occur simultaneously.

This provision, applicable only to "very" senior employees, is very similar to the one-year restriction of section 207(c) discussed above. It too prohibits communications to or appearances before employees of certain governmental departments and agencies, unless on behalf of the United States (or the Congress). A former very senior employee is prohibited by section 207(d) from representing another before any current employee of any department or agency in which he served as a very senior employee during the one-year period prior to his termination from Government service. (Compare section 207(c) which prohibits communications and appearances to current employees of any department or agency in

which a former "senior" employee served in any capacity during the one-year period prior to termination from senior service.) A former very senior employee is also prohibited by section 207(d), however, from representing another person before any individual currently appointed to an Executive Schedule position listed in 5 U.S.C. §§ 5312-5216, whether or not that individual is serving in the very senior employee's former department or agency. The representational bar applies to any matter, whether or not involving a specific party, concerning which the former very senior employee is seeking official action by any current officer or employee of the executive branch.

Section 207 does not authorize OGE to designate separate and distinct components within a department or agency as a means of narrowing the scope of section 207(d). Moreover, no very senior employee's position is eligible for exemption from the application of section 207(d).

6. **Basic Prohibition of 18 U.S.C. § 207(f)**. For one year after his service in a "senior" or "very senior" position terminates, no former "senior" employee or former "very senior" employee may knowingly, with the intent to influence a decision of an employee of a department or agency of the United States in carrying out his official duties, represent a foreign entity before any department or agency of the United States or aid or advise a foreign entity.

Discussion. This is a one-year restriction, except that it lasts for three years as applied to any individual who becomes the United States Trade Representative after October 6, 1992. The restriction is measured from the date when an employee ceases to be a senior employee or a very senior employee, not from the termination of Government service, unless the two occur simultaneously.

The restriction prohibits a former senior or very senior employee from representing, aiding, or advising a foreign entity with the intent to influence certain governmental officials. A "foreign entity" means the "government of a foreign country" as defined in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611), as amended, or a "foreign political party" as defined in section 1(f) of that Act. The government of a foreign country includes --

> any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming

to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.

A foreign political party includes --

any organization or any other combination of individuals in a country other than the United States, or any unit or branch thereof, having for an aim or purpose, or which is engaged in any activity devoted in whole or in part to, the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country or a subdivision thereof, or the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country or a subdivision thereof.

A foreign commercial corporation will not generally be considered a "foreign entity" for purposes of section 207(f) unless it exercises the functions of a sovereign.

A former senior or very senior employee "represents" a foreign entity when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that entity to or before any employee of a department or agency. He "aids or advises" a foreign entity when he assists the entity other than by making such a communication or appearance. Such "behind the scenes" assistance to a foreign entity could, for example, include drafting a proposed communication to an agency, advising on an appearance before a department, or consulting on other strategies designed to persuade departmental or agency decisionmakers to take certain action. A former senior or very senior employee's representation, aid, or advice is only prohibited if made or rendered with the intent to influence an official discretionary decision of a current departmental or agency employee.

C. EXCEPTIONS

Sections 207(j) and (k) set forth several exceptions to the statute's substantive prohibitions. As noted below, some exceptions do not avoid application of all of the six substantive restrictions of 18 U.S.C. § 207.

Performing Official Government Duties. A former employee is not restricted by any of the substantive provisions of section 207 from engaging in post-employment activities performed in carrying out official duties on behalf of the United States. This exception also extends to activities undertaken in carrying out official duties as an elected official of a state or local Government.

Representing Certain Entities. A former senior or very senior employee will not violate section 207(c) or (d) if his

communication or appearance is made in carrying out official duties as an employee of and is made on behalf of (1) an agency or instrumentality of a State or local Government, (2) an accredited degree-granting institution of higher education as defined in section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. § 1141(a)), or (3) a hospital or medical research organization exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. § 501(c)(3)).

Representing or Assisting International Organizations. A former employee is not restricted by any of the substantive provisions of section 207 from representing, aiding, or advising an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interest of the United States.

Imparting Special Knowledge. A former senior or very senior employee will not violate section 207(c) or (d) if he makes a statement that is based on his own special knowledge in the particular area that is the subject of the statement, provided that he receives no compensation for making the statement.

Scientific or Technological Information or Expertise. A former employee will not violate section 207(a)(1), (a)(2), (c), or (d) if he makes a communication solely for the purpose of furnishing scientific or technological information in accordance with procedures acceptable to the agency involved. Alternatively, a former employee may make a communication if the head of the agency concerned publishes a certification in the Federal Register stating that the former employee has outstanding qualifications in a scientific, technological, or other technical discipline, that he is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the former employee's participation.

Testimony. A former employee is not restricted by any of the substantive restrictions of section 207 from giving testimony under oath or from making statements required to be made under penalty of perjury, subject to a special rule with respect to expert opinion testimony. Unless expert opinion testimony is given pursuant to court order, a former employee may not provide such testimony on a matter on behalf of any other person except the United States (or the Congress) if he is subject to the lifetime prohibition contained in section 207(a)(1) relating to that matter.

Employment with Certain Prior Employers. A former employee is not restricted by any of the substantive restrictions of section 207 if granted one of 25 Presidential waivers in connection with his reemployment at a Government-owned, contractor operated entity.

Subpart F -- Seeking Other Employment

§2635.601

Overview.

This subpart contains a disqualification requirement that applies to employees when seeking employment with persons who otherwise would be affected by the performance or nonperformance of the employees' official duties. Specifically, it addresses the requirement of 18 U.S.C. 208(a) that an employee disqualify himself from participation in any particular matter that will have a direct and predictable effect on the financial interests of a person "with whom he is negotiating or has any arrangement concerning prospective employment." Beyond this statutory requirement, it also addresses the issues of lack of impartiality that require disqualification from particular matters affecting the financial interests of a prospective employer when an employee's actions in seeking employment fall short of actual employment negotiations.

§2635.602

Applicability and related considerations.

To ensure that he does not violate 18 U.S.C. 208(a) or the principles of ethical conduct contained in §2635.101(b), an employee who is seeking employment or who has an arrangement concerning prospective employment shall comply with the applicable disqualification requirements of §§2635.604 and 2635.606 if the employee's official duties would affect the financial interests of a prospective employer or of a person with whom he has an arrangement concerning prospective employment. Compliance with this subpart also will ensure that the employee does not violate subpart D or E of this part.

Note: An employee who is seeking employment with a person whose financial interests are not affected by the performance or nonperformance of his official duties has no obligation under this subpart. An employee may, however, be subject to other statutes which impose restrictions on employment contacts or discussions, such as 41 U.S.C. 423(b)(1), applicable to procurement officials, and 10 U.S.C. 2397a, applicable to certain employees of the Department of Defense.

(a) Related employment restrictions-(1) Outside employment while a Federal employee. An employee who is contemplating outside employment to be undertaken concurrently with his Federal employment must abide by any limitations applicable to his outside activities under subparts G and H of this part. He must also comply with any disqualification requirement that may be applicable under subpart D or E of this part as a result of his outside employment activities.

(2) Post-employment restrictions. An employee who is contemplating employment to be undertaken following the termination of his Federal employment should consult an agency ethics official to obtain advice regarding any post-employment restrictions that may be applicable. Regulations implementing the Governmentwide post-employment statute, 18 U.S.C. 207, are contained in parts 2637 and 2641 of this chapter. Employees are cautioned that they may be subject to additional statutory restrictions on their post-employment activities, such as 41 U.S.C. 423(f) applicable to procurement officials, 10 U.S.C. 2397b applicable to certain Department of Defense personnel and special statutes applicable to certain retired officers.

(b) Interview trips and entertainment. Where a prospective employer who is a prohibited source as defined in §2635.203(d) offers to reimburse an employee's travel expenses, or provide other reasonable amenities incident to employment discussions, the employee may accept such amenities in accordance with §2635.204(e)(3).

§2635.603

Definitions.

For purposes of this subpart:

(a) Employment means any form of non-Federal employment or business relationship involving the provision of personal services by the employee, whether to be undertaken at the same time as or subsequent to Federal employment. It includes but is not limited to personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner or trustee.

Example 1: An employee of the Bureau of Indian Affairs who has announced her intention to retire is approached by tribal representatives concerning a possible consulting contract with the tribe. The independent contractual relationship the tribe wishes to negotiate is employment for purposes of this subpart.

Example 2: An employee of the Department of Health and Human Services is invited to a meeting with officials of a nonprofit corporation to discuss the possibility of his serving as a member of the corporation's board of directors. Service, with or without compensation, as a member of the board of directors constitutes employment for purposes of this subpart.

(b) An employee is seeking employment once he has begun seeking employment within the meaning of paragraph (b)(1) of this section and until he is no longer seeking employment within the meaning of paragraph (b)(2) of this section.

(1) An employee has begun seeking employment if he has directly or indirectly:

(i) Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a), the term negotiations means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position;

(ii) Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was:

(A) For the sole purpose of requesting a job application; or

(B) For the purpose of submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other discrete class. The employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions; or

(iii) Made a response other than rejection to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person.

(2) An employee is no longer seeking employment when:

(i) The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

(ii) Two months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, provided the employee has received no indication of interest in employment discussions from the prospective employer.

(3) For purposes of this definition, a response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or resume nor rejection of a prospective employment possibility.

Example 1: An employee of the Health Care Financing Administration is complimented on her work by an official of a State Health Department who asks her to call if she is ever interested in leaving Federal service. The employee explains to the State official that she is very happy with her job at HCFA and is not interested in another job. She thanks him for his compliment regarding her work and adds that she'll remember his interest if she ever decides to leave the Government. The employee has rejected the unsolicited employment overture and has not begun seeking employment.

Example 2: The employee in the preceding example responds by stating that she cannot discuss future employment while she is working on a project affecting the State's health care funding but would like to discuss employment with the State when the project is completed. Because the employee has merely deferred employment discussions until the foreseeable future, she has begun seeking employment with the State Health Department.

Example 3: An employee of the Defense Contract Audit Agency is auditing the overhead accounts of an Army contractor. While at the contractor's headquarters, the head of the contractor's accounting division tells the employee that his division is thinking about hiring another accountant and asks whether the employee might be interested in leaving DCAA. The DCAA employee says he is interested in knowing what kind of work would be involved. They discuss the duties of the position the accounting division would like to fill and the DCAA employee's qualifications for the position. They do not discuss salary. The head of the division explains that he has not yet received authorization to fill the particular position and will get back to the employee when he obtains the necessary approval for additional staffing. The employee and the contractor's official have engaged in negotiations regarding possible employment. The employee has begun seeking employment with the Army contractor.

Example 4: An employee of the Occupational Safety and Health Administration helping to draft safety standards applicable to the textile industry has mailed his resume to 25 textile manufacturers. He has not begun seeking employment with any of the twenty-five. If he receives a response from one of the resume recipients indicating an interest in employment discussions, the employee will have begun seeking employment with the respondent at that time.

Example 5: A special Government employee of the Federal Deposit Insurance Corporation is serving on an advisory committee formed for the purpose of reviewing rules applicable to all member banks. She mails an unsolicited letter to a member bank offering her services as a contract consultant. She has not begun seeking employment with the bank until she receives some response indicating an interest in discussing her employment proposal. A letter merely acknowledging receipt of the proposal is not an indication of interest in employment discussions.

Example 6: A geologist employed by the U.S. Geological Survey has been working as a member of a team preparing the Government's case in an action brought by the Government against six oil companies. The geologist sends her resume to an oil company that is a named defendant in the action. The geologist has begun seeking employment with that oil company and will be seeking employment for two months from the date the resume was mailed. However, if she withdraws her application or is notified within the two-month period that her resume has been rejected, she will no longer be seeking employment with the oil company as of the date she makes such withdrawal or receives such notification.

(c) Prospective employer means any person with whom the employee is seeking employment. Where contacts that constitute seeking employment are made by or with an agent or other intermediary, the term prospective employer includes:

(1) A person who uses that agent or other intermediary for the purpose of seeking to establish an employment relationship with the employee if the agent identifies the prospective employer to the employee; and

(2) A person contacted by the employee's agent or other intermediary for the purpose of seeking to establish an employment relationship if the agent identifies the prospective employer to the employee.

Example 1: An employee of the Federal Aviation Administration has overall responsibility for airport safety inspections in a three-state area. She has retained an employment search firm to help her find another job. The search firm has just reported to the FAA employee that it has given her resume to and had promising discussions with two airport authorities within her jurisdiction. Even though the employee has not personally had employment discussions with either, each airport authority is her prospective employer. She began seeking employment with each upon learning its identity and that it has been given her resume.

(d) Direct and predictable effect and particular matter have the respective meanings set forth in §2635.402(b) (1) and (3).

§2635.604

Disqualification while seeking employment.

(a) Obligation to disqualify. Unless the employee's participation is authorized in accordance with §2635.605, the employee shall not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he is seeking employment within the meaning of §2635.603(b). Disqualification is accomplished by not participating in the particular matter.

(b) Notification. An employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

(c) Documentation. An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

Example 1: An employee of the Department of Veterans Affairs is participating in the audit of a contract for laboratory support services. Before sending his resume to a lab which is a subcontractor under the VA contract, the employee should disqualify himself from participation in the audit. Since he cannot withdraw from participation in the contract audit without the approval of his supervisor, he should disclose his intentions to his supervisor in order that appropriate adjustments in his work assignments can be made.

Example 2: An employee of the Food and Drug Administration is contacted in writing by a pharmaceutical company concerning possible employment with the company. The employee is involved in testing a drug for which the company is seeking FDA approval. Before making a response that is not a rejection, the employee should disqualify himself from further participation in the testing. Where he has authority to ask his colleague to assume his testing responsibilities, he may accomplish his disqualification by transferring the work to that coworker. However, to ensure that his colleague and others with whom he had been working on the recommendations do not seek his advice regarding testing or otherwise involve him in the matter, it may be necessary for him to advise those individuals of his disqualification.

Example 3: The General Counsel of a regulatory agency wishes to engage in discussions regarding possible employment as corporate counsel of a regulated entity. Matters directly affecting the financial interests of the regulated entity are pending within the Office of General Counsel, but the General Counsel will not be called upon to act in any such matter because signature authority for that particular class of matters has been delegated to an Assistant General Counsel. Because the General Counsel is responsible for assigning work within the Office of General Counsel, he can in fact accomplish his disqualification by simply avoiding any involvement in matters affecting the regulated entity. However, because it is likely to be assumed by others that the General Counsel is involved in all matters within the cognizance of the Office of General Counsel, he would be wise to file a written disqualification statement with the Commissioners of the regulatory agency and provide his subordinates with written notification of his disqualification, or he may be specifically asked by an agency ethics official or the Commissioners to file a written disqualification statement.

Example 4: A scientist is employed by the National Science Foundation as a special Government employee to serve on a panel that reviews grant applications to fund research relating to deterioration of the ozone layer. She is discussing possible employment as a member of the faculty of a university that several years earlier received an NSF grant to study the effect of fluorocarbons, but has no grant application pending. As long as the university does not submit a new application for the panel's review, the employee would not have to take any action to effect disqualification.

(d) Agency determination of substantial conflict. Where the agency determines that the employee's action in seeking employment with a particular person will require his disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired, the agency may allow the employee to take annual leave or leave without pay while seeking employment, or may take other appropriate administrative action.

§2635.605

Waiver or authorization permitting participation while seeking employment.

(a) Waiver. Where, as defined in §2635.603(b)(1)(i), an employee is engaged in discussions that constitute employment negotiations for purposes of 18 U.S.C. 208(a), the employee may participate in a particular matter that has a direct and predictable effect on the financial interests of a prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (b)(3). These waivers are described in §2635.402(d).

Example 1: An employee of the Department of Agriculture has had two telephone conversations with an orange grower regarding possible employment. They have discussed the employee's qualifications for a particular position with the grower, but have not yet discussed salary or other specific terms of employment. The employee is negotiating for employment within the meaning of 18 U.S.C. 208(a) and §2635.603(b)(1)(i). In the absence of a written waiver issued under 18 U.S.C. 208(b)(1), she may not take official action on a complaint filed by a competitor alleging that the grower has shipped oranges in violation of applicable quotas.

(b) Authorization by agency designee. Where an employee is seeking employment within the meaning of §2635.603(b)(1) (ii) or (iii), a reasonable person would be likely to question his impartiality if he were to participate in a particular matter that has a direct and predictable effect on the financial interests of any such prospective employer. The employee may participate in such matters only where the agency designee has authorized his participation in accordance with the standards set forth in §2635.502(d).

Example 1: Within the past month, an employee of the Education Department mailed her resume to a university. She is thus seeking employment with the university within the meaning of §2635.603(b)(1)(ii) even though she has received no reply. In the absence of specific authorization by the agency designee in accordance with §2635.502(d), she may not participate in an assignment to review a grant application submitted by the university.

§2635.606

Disqualification based on an arrangement concerning prospective employment or otherwise after negotiations.

(a) Employment or arrangement concerning employment. An employee shall be disqualified from taking official action in a particular matter that has a direct and predictable effect on the financial interests of the person by whom he is employed or with whom he has an arrangement concerning future employment, unless authorized to participate in the matter by a written waiver issued under the authority of 18 U.S.C. 208 (b)(1) or (b)(3). These waivers are described in §2635.402(d).

Example 1: A military officer has accepted a job with a defense contractor to begin in six months, after his retirement from military service. During the period that he remains with the Government, the officer may not participate in the administration of a contract with that particular defense contractor unless he has received a written waiver under the authority of 18 U.S.C. 208(b)(1).

Example 2: An accountant has just been offered a job with the Comptroller of the Currency which involves a two-year limited appointment. Her private employer, a large corporation, believes the job will enhance her skills and has agreed to give her a two-year unpaid leave of absence at the end of which she has agreed to return to work for the corporation. During the two-year period she is to be a COC employee, the accountant will have an arrangement concerning future employment with the corporation that will require her disqualification from participation in any particular matter that will have a direct and predictable effect on the corporation's financial interests.

(b) Offer rejected or not made. The agency designee for the purpose of §2635.502(c) may, in an appropriate case, determine that an employee not covered by the preceding paragraph who has sought but is no longer seeking employment nevertheless shall be subject to a period of disqualification upon the conclusion of employment negotiations. Any such determination shall be based on a consideration of all the relevant factors, including those listed in §2635.502(d), and a determination that the concern that a reasonable person may question the integrity of the agency's decisionmaking process outweighs the Government's interest in the employee's participation in the particular matter.

PAS
Non-career SES
schedule C
Career Competitive Employees
Excepted Service

Guidelines For Federal Employees
Covered Under the New Hatch Act Amendments

The following list contains examples of both permissible and prohibited activities for covered employees.[1] The Office of Special Counsel is responsible for investigating reports or complaints concerning Hatch Act violations. The new amendments took effect February 3, 1994.

OPM Regs - have not been issued -

1-800-85-HATCH (854-2824)

free to campaign -

- o **May** be candidates for public office in nonpartisan elections
- o **May** register and vote as they choose
- o **May** assist in voter registration drives
- o **May** express opinions about candidates and issues
- o **May** contribute money to political organizations
- o **May** attend political fundraising functions
- o **May** attend and be active at political rallies and meetings
- o **May** join and be an active member of a political party or club
- o **May** sign nominating petitions
- o **May** campaign for or against referendum questions, constitutional amendments, municipal ordinances
- o **May** campaign for or against candidates in partisan elections
- o **May** make campaign speeches for candidates in partisan elections
- o **May** distribute campaign literature in partisan elections
- o **May** hold office in political clubs or parties

- o **May not** use their official authority or influence to interfere with an election
- o **May not** solicit, accept or receive political contributions unless both individuals are members of the same federal labor organization or employee organization and the one solicited is not a subordinate employee
- o **May not** knowingly solicit or discourage the political activity of any person who has business before the agency
- o **May not** engage in political activity while on duty
- o **May not** engage in political activity in any government office
- o **May not** engage in political activity while wearing an official uniform
- o **May not** engage in political activity while using a government vehicle
- o **May not** be candidates for public office in partisan elections
- o **May not** wear political buttons on duty

Can work POLLS if take a day of leave.
Can't wear political button on duty.

[1] Employees of the following agencies or divisions within an agency continue to be covered under the old law: Federal Elections Commission, Federal Bureau of Investigation, Secret Service, Central Intelligence Agency, National Security Council, National Security Agency, Defense Intelligence Agency, Merit Systems Protection Board, Office of Special Counsel, Office of Criminal Investigation of the IRS, Office of Investigative Programs of the Customs Service, Office of Law Enforcement of BATFA, Criminal Division of DOJ, career members of the senior executive service, Administrative Law Judges, and contract appeals board members. Contact OSC at the number above for further information.

To: All Commission Staff
From: Mary Ann Hook, General Counsel
Re: Hatch Act

As the political season approaches, here is a CRS analysis of the Hatch Act, which limits political activity of government employees. Please read and call me if you have any questions.

POLITICAL ACTIVITIES: 103D CONGRESS AMENDMENTS TO THE HATCH ACT

INTRODUCTION

On October 6, 1993, President William Jefferson Clinton signed into law H.R. 20, The Hatch Act Reform Amendments of 1993.[1] This law, Public Law 103-94, expands the rights of Federal employees to participate in voluntary political activities that had previously been prohibited under "An Act To prevent pernicious political activities" and its subsequent amendments, popularly known as the Hatch Act.[2] Federal employees may now generally participate in partisan political activities on their own time and away from the office, as long as those efforts do not include running for office in a partisan election or soliciting campaign funds from the general public.

Selected law enforcement and national security personnel as well as members of the career Senior Executive Service, Administrative Law Judges, and contract appeals board members continue to be prohibited from taking an active part in political management or political campaigns.

The law states that it is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation. It aims to protect these employees from improper political solicitations, broaden their rights to participate in political activities, tighten the restrictions on political coercion, and strengthen the procedures for punishment of those who violate the prohibitions.

PUBLIC LAW 103-94, THE HATCH ACT REFORM AMENDMENTS OF 1993[3]

The Federal Employees Political Activities Act of 1993, H.R. 20, passed the House of Representatives, amended, by a roll call (No. 52) vote of 333 to 86 on March 3, 1993.[4] The legislation was introduced by Representatives William Clay and John Myers on January 5, 1993, and, as introduced, was identical except for

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[1] P.L. 103-94; 107 Stat. 1001-1011; 5 U.S.C. 7321-7326. Further information on the Hatch Act amendment issue can be found in U.S. Library of Congress. Congressional Research Service. *Hatch Act Amendments: Political Activity and the Civil Service*. Issue Brief No. 87153, by Barbara L. Schwemle, Oct. 8, 1993 (continually updated). Washington, 1993.

[2] The Hatch Act was named after its sponsor, Senator Carl Hatch (Democrat, New Mexico).

[3] The law amends the Hatch Act by providing substitute language to expand upon existing language or adding new language to Subchapter III, Chapter 73 of Title 5, *United States Code*.

[4] Debate in the House of Representatives prior to passage of H.R. 20 appears in the *Congressional Record*, daily edition, v. 139, Mar. 3, 1993. pp. H985-H997.

a few word changes to H.R. 20, 102d Congress.[5] In the Senate, the text of S. 185, the Hatch Act Reform Amendments of 1993, as amended, was substituted for H.R. 20. The Senate then passed H.R. 20, amended, by a vote of 68 to 31 on July 20, 1993.[6] S. 185 had been introduced by Senator John Glenn and 10 cosponsors on January 26, 1993, and, as introduced, was identical to S. 914, 102d Congress.[7] On September 21, 1993, the House of Representatives agreed to the Senate version of H.R. 20, by a roll call (No. 437) vote of 339 to 85.[8]

Public Law 103-94 provides the following.

Coverage[9]

The law covers:

- employees or office holders in Federal executive agencies or in positions within the competitive service which are not in executive agencies.
- U.S. Postal Service and Postal Rate Commission employees.

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[5] Clay, William (Bill). Remarks in the House. Clay Introduces Legislation to Reform the Hatch Act. *Congressional Record*, daily edition, v. 139, Jan. 5, 1993. pp. E31-E32. The bill was referred to the House Committee on Post Office and Civil Service, ordered to be reported from the Committee on January 27, 1993 and reported to the House of Representatives on February 22, 1993. See U.S. Congress. House. Committee on Post Office and Civil Service. *Federal Employees Political Activities Act of 1993*. Report to Accompany H.R. 20. House Report No. 103-16, 103d Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1993. 42p.

[6] Debate in the Senate on H.R. 20 appears in the *Congressional Record*, daily editions, v. 139, July 13, 1993 (pp. S8601-S8616); July 14, 1993 (pp. S8670-S8689, S8692-S8699, and S8702-S8705); July 15, 1993 (pp. S8751-S8752, S8759-S8771, S8779-S8780, S8782-S8790, S8792-S8793, S8795-S8796, and S8805-S8812); and July 20, 1993 (pp. S8919-S8952, S8954-S8955, S9053-S9054, and S9056).

[7] Glenn, John. Remarks in the Senate. *Congressional Record*, daily edition, v. 139, Jan. 26, 1993. pp. S697-S699. The bill was referred to the Senate Committee on Governmental Affairs and was ordered to be reported favorably, with an amendment in the nature of a substitute, on May 13, 1993, by a roll call vote of 6 to 1, with 3 Committee members voting yes by proxy and 2 members voting no by proxy. One member did not vote. S. 185 was reported to the Senate on June 16, 1993. See U.S. Congress. Senate. Committee on Governmental Affairs. *Hatch Act Reform Amendments of 1993*. Report to accompany S. 185. Senate Report No. 103-57, 103d Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1993. 57p. (Hereafter referred to as *S. 185 Report*.)

[8] Debate in the House of Representatives prior to House agreement to the Senate amendment to H.R. 20 appears in the *Congressional Record*, daily edition, v. 139, Sept. 21, 1993. pp. H6813-H6827.

[9] The Hatch Act, enacted in 1939 and subsequently amended, covered the political activity of competitive and excepted service employees in Federal executive agencies, the U.S. Postal Service, the Postal Rate Commission, and civilians in the Department of Defense. District of Columbia government employees were deemed to be Federal executive branch employees for purposes of the Hatch Act.

- District of Columbia government employees or office holders, other than the Mayor or a member of the City Council or the Recorder of Deeds.

It repeals 42 U.S.C. 9904(e), which provided that employees of any nonprofit private organization receiving assistance under the Community Services Block Grant Program and having responsibility for planning, developing, and coordinating community antipoverty programs were covered by the Hatch Act covering State and local government employees.[10]

Political Activities

The law provides that "an employee may take an active part in political management or in political campaigns", except as prohibited.[11]

Employees Exempted

Employees (except those appointed by the President, by and with the advice and consent of the Senate) of the

- Federal Election Commission,
- Federal Bureau of Investigation,
- Secret Service,
- Central Intelligence Agency,
- National Security Council,
- National Security Agency,
- Defense Intelligence Agency,
- Merit Systems Protection Board,

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[10] The Hatch Act provisions had been extended to State or local officeholders and employees in 1940 when Congress passed Public Law No. 753 (54 Stat. 767-772). Amendments to that statute in 1966 and 1974 removed all but three of the political activity prohibitions on these individuals. (Public Law 89-554, September 6, 1966, 80 Stat. 404; Public Law 93-443, October 15, 1974, 88 Stat. 1290). A State or local officer or employee still may not (5 U.S.C. 1502): use their official authority or influence to interfere with or affect the result of an election or a nomination for office; directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; be a candidate for elective office in a partisan election.

[11] 5 U.S.C. 7323(a); 107 Stat. 1002.

- Office of Special Counsel,
- Office of Criminal Investigation of the Internal Revenue Service,
- Office of Investigative Programs of the U.S. Customs Service,
- Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms, or
- the Criminal Division at the Department of Justice; or
- members of the career Senior Executive Service,
- Administrative Law Judges, or
- contract appeals board members.

may not take an active part in political management or political campaigns. "Active part in political management or in a political campaign" means those acts of political management or political campaigning which were prohibited for employees of the competitive service before July 19, 1940, by determination of the Civil Service Commission under the rules prescribed by the President.

The law permits political activity by employees residing in certain municipalities.

Public Law 103-94 also provides that "an employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates."[12]

Candidacy for Partisan Political Office Prohibited

The law prohibits Federal employees from running for nomination or as a candidate for election to a partisan political office. Partisan political office is defined as any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected. The definition excludes any office or position within a political party or affiliated organization.

Political Activities on Duty Prohibited

Federal employees may not engage in political activity (1) while on duty; (2) in any room or building occupied in the discharge of official duties by an employee or officeholder of the United States Government or any agency or instrumentality thereof; (3) while wearing a uniform or official insignia identifying their office or position; or (4) using any vehicle owned or leased by

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[12] 5 U.S.C. 7323(c); 107 Stat. 1003.

the U.S. Government or any agency or instrumentality thereof. The Senate Committee on Governmental Affairs report accompanying the legislation states that "politics on the job, including the wearing of political buttons, is prohibited."[13]

Employees described below may engage in political activities on duty if the costs associated with that political activity are not paid for by money from the U.S. Treasury. This provision applies to employees

- (A) the duties and responsibilities of whose positions continue outside normal duty hours and while away from the normal duty post; and

- (B) who are paid from an appropriation for the Executive Office of the President; or appointed by the President, by and with the advice and consent of the Senate, whose positions are located within the United States, who determine policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws.

Use of Official Influence or Official Information Prohibited

The law prohibits employees from using their official authority or influence to interfere with or affect the result of an election. The Senate Committee on Governmental Affairs report accompanying the legislation states that "the prohibition on coercion includes pressuring employees to attend political functions."[14]

Solicitation/Contributions

Employees may not:

- Knowingly solicit, accept, or receive a political contribution from any person, unless that person is:

  -- a member of the same Federal labor organization or a Federal employee organization which, as of the enactment date of this Act, had a multicandidate political committee;

  -- not a subordinate employee; and

  -- the solicitation is for a contribution to that Federal labor organization's or Federal employee organization's multicandidate political committee.

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[13] *S. 185 Report*, p. 14.

[14] *Ibid.*

- Knowingly solicit or discourage the participation in any political activity of any person who:

  -- has an application for any compensation, grant, contract, ruling, license, permit, or certificate pending before the employing office of the employee; or

  -- is the subject of, or a participant in, an ongoing audit, investigation, or enforcement action being carried out by that office.

"Political contribution" means any gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose. This includes any contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose; any payment by any person, other than a candidate or a political party or affiliated organization, of compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and the provision of personal services for any political purpose.

Under the law, Federal Election Commission employees (except those appointed by the President, by and with the advice and consent of the Senate), may not request or receive from, or give to, an employee, a Member of Congress, or an officer of a uniformed service a political contribution.

Penalties

An employee or individual who violates 5 U.S.C. 7323 or 7324 shall be removed from his position, and funds appropriated for that position thereafter may not be used to pay the employee or individual. However, if the Merit Systems Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board. The law also amends 5 U.S.C. 1216(c) to provide that if the Special Counsel receives an allegation concerning matters relating to prohibited political activities withholding of information political intrusion into personnel decisionmaking and discrimination[15] the Special Counsel may investigate and seek corrective action under 5 U.S.C. 1214 and disciplinary action under 5 U.S.C. 1215 in the same way as if a prohibited personnel practice were involved. This action may consist of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.

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[15] 5 U.S.C. 1216(a).

Regulatory Authority for the Political Activities Provisions

The Office of Personnel Management is authorized under the law (5 U.S.C. 7325) to prescribe regulations regarding political activity permitted of employees residing in certain municipalities. It specifies that this authority takes effect upon enactment of the Act (October 6, 1993). The law does not, however, provide specific authority to the Office of Personnel Management, the Office of Special Counsel, or any other agency to prescribe regulations related to any of the other sections of Chapter 73, Subchapter III of Title 5, *United States Code*.

The law amends 5 U.S.C. 3302(2) that authorizes the President to prescribe rules providing necessary exceptions from various provisions of Title 5, *United States Code* by deleting references to section 7321 (relating to political contributions and services) and section 7322 (relating to the prohibition on political use of authority or influence) of Subchapter III, Chapter 73 of Title 5, *United States Code*.

Amendments to Title 18 United States Code

The law also amends sections of Title 18, United States Code relating to the solicitation of and making of political contributions. Section 602 is amended to prohibit a candidate for Congress; a Senator, Representative, Delegate, or Resident Commissioner; a Federal employee or officeholder; or a person receiving any salary or compensation for services from monies from the U.S. Treasury from knowingly soliciting any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 from any other such officer, employee, or person. Individuals who violate this section will be fined under the 18 U.S.C. provisions or imprisoned not more than three years, or both. Any activity of employees covered by the Hatch Act is excluded unless that activity is prohibited under 5 U.S.C. 7323 or 7324, relating to prohibitions on the use of official influence or official information and solicitation. Section 603 is amended to exclude any activity of employees covered by the Hatch Act from the prohibition in subsection (a) of Section 603 unless that activity is prohibited under 5 U.S.C. 7323 or 7324.

A new provision to 18 U.S.C. Chapter 29 covering the coercion of political activity provides that it shall be unlawful for any person to or attempt to intimidate, threaten, command, or coerce, any employee to engage in, or not to engage in, any political activity, including, but not limited to, voting or refusing to vote for any candidate or measure in any election, making or refusing to make any political contribution, or working or refusing to work on behalf of any candidate. Any person who violates this section will be fined not more than $5,000 or imprisoned not more than three years, or both.

Political Recommendations

Public Law 103-94 amends 5 U.S.C. 3303 pertaining to political recommendations related to civil service employment. The following definitions apply to this section.

- "Agency" means an Executive agency and an agency in the legislative branch with positions in the competitive service.

- "Applicant" means an individual who has applied for appointment to be an employee.

- "Employee" means an employee of an agency who is in the competitive service; a career appointee in the Senior Executive Service or an employee under a similar appointment in a similar executive service; or in the excepted service other than an employee who is appointed by the President; or an employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character.

- "Personnel action" means any action described under clauses (i) through (x) of 5 U.S.C. 2302(a)(2)(A). These actions are an appointment; a promotion; an action under 5 U.S.C. Chapter 75 or other disciplinary or corrective action; a detail, transfer, or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation under 5 U.S.C. Chapter 43; a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in subparagraph (a)(2)(A) of 5 U.S.C. 2302; and any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.

An agency, or any authorized officer or employee of an agency, may solicit, accept, and consider, and any other individual or organization may furnish or transmit to the agency or such authorized officer or employee, any statement with respect to an employee or applicant who requests or is under consideration for a personnel action if the statement:

- Is furnished pursuant to a request or requirement of the agency and consists solely of an evaluation of the work performance, ability, aptitude, and general qualifications of the employee or applicant;

- Relates solely to the character and residence of the employee or applicant;

- Is furnished pursuant to a request made by an authorized representative of the United States Government solely in order to

determine whether the employee or applicant meets suitability or security standards;

- Is furnished by a former employer of the employee or applicant pursuant to a request of an agency, and consists solely of an evaluation of the work performance, ability, aptitude, and general qualifications of such employee or applicant during employment with such former employer; or

- Is furnished pursuant to a provision of law or regulation authorizing consideration of such statement with respect to a specific position or category of positions.

Otherwise, each personnel action with respect to an employee or applicant shall be taken without regard to any recommendation or statement, oral or written, with respect to any employee or applicant who requests or is under consideration for such personnel action, made by:

- Any Member of Congress or congressional employee;

- Any elected official of the government of any State (including the District of Columbia and the Commonwealth of Puerto Rico), county, city, or other subdivision thereof;

- Any official of a political party; or

- Any other individual or organization making such recommendation or statement on the basis of the party affiliation of the employee or applicant.

The above named are prohibited from making or transmitting to any officer or employee of an agency, any recommendation or statement, oral or written, with respect to any employee or applicant who requests or is under consideration for any personnel action in such agency. Likewise, an employee or applicant who requests or is under consideration for a personnel action in an agency is prohibited from requesting or soliciting a recommendation or statement from any of the above named.

The agency, or any officer or employee of the agency (1) shall not solicit, request, consider, or accept any such recommendation or statement; and (2) shall return any such written recommendation or statement, appropriately marked as in violation of this section, to the person or organization transmitting the same.

An agency shall take any action it determines necessary and proper under Subchapters I or II of Chapter 75 that cover adverse actions to enforce the provisions of this section. These actions are suspension for 14 days or less,

removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less.

The provisions of this section shall not affect the right of any employee, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof.[16]

These provisions are similar to language at 39 U.S.C. 1002, covering political recommendations for Postal Service employees.

The law also amends 5 U.S.C. 2302(b)(2) relating to prohibited personnel practices to provide that any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority - "(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action except as provided under 5 U.S.C. 3303(f)" (as added by P.L. 103-94).

Regulatory Authority for the Political Recommendations Provisions

The Office of Personnel Management is authorized to prescribe regulations. The head of each agency is to ensure that employees and applicants are given notice of the provisions on political recommendations.

Effective Date

Public Law 103-94 takes effect 120 days after its enactment (February 3, 1994).

BACKGROUND

The Hatch Act was enacted in 1939 (53 Stat. 1147-1149) and subsequently amended.[17] Prior to its enactment, the Civil Service Commission had made some 3,000 administrative decisions about permissible and prohibited political activity by competitive service employees. These decisions were published in the *Political Activity Reporter*. They were incorporated into the Hatch Act at 5 U.S.C. 7324(a) by reference.

The Office of Special Counsel (OSC) investigates and prosecutes violations of the Hatch Act and issues advisory opinions about the Hatch Act in response

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[16] This right is provided in 5 U.S.C. 7211.

[17] Previous 5 U.S.C. 7321-7328.

to individual inquiries.[18] These advisory opinions are kept in an internal chronological file at the OSC. When the OSC prosecutes a Hatch Act violation case through the Merit Systems Protection Board, the decision in that case is published in the *Merit Systems Protection Reporter*.

Section 7321 of the 1939 Hatch Act provided that, "Employees are not obliged by reason of their employment, to contribute to a political fund or to render political service. Employees may not be removed or otherwise prejudiced for refusal to do so."[19] Section 7322 of that same Act provided that, "Employees may not use their official authority or influence to coerce the political action of a person or body."[20]

The President was granted authority by the 1939 Hatch Act to prescribe rules for sections 7321 and 7322. This authority was delegated to the Office of Personnel Management (OPM) in 1978.[21] Using that authority OPM prescribed regulations and published them in the *Code of Federal Regulations*.[22]

These regulations are listed immediately below as background. Public Law 103-94 at 5 U.S.C. 7325 authorizes OPM to prescribe regulations only with regard to political activity permitted of employees residing in certain municipalities. The law specifies that this authority takes effect upon enactment of the Act (October 6, 1993). The law does not, however, provide specific authority to OPM, OSC, or any other agency to prescribe regulations related to any of the other sections of Chapter 73, Subchapter III of Title 5, *United States Code*.

The OPM regulations to implement the 1939 Hatch Act, as amended, stated that each employee retained the right to:

- Register and vote in any election;

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[18] The Civil Service Commission had primary responsibility to enforce the Hatch Act statute prior to 1979. With the enactment of the Civil Service Reform Act of 1978, the Office of Special Counsel (OSC) was created as an independent office of the Merit Systems Protection Board and empowered with the investigative and prosecutorial authority of the Hatch Act. In 1989 the OSC was established as an independent agency with passage of the Whistleblower Protection Act of 1989 (P.L. 101-12).

[19] Previous 5 U.S.C. 7321.

[20] Previous 5 U.S.C. 7322.

[21] Reorganization Plan No. 2 of 1978, 3 CFR 1978 Comp. p. 323; and E.O. 12107, 3 CFR 1978 Comp. p. 264.

[22] 5 CFR 733.101 - 733.301.

- Express his [or her] opinion as an individual privately and publicly on political subjects and candidates;[23]
- Display a political picture, sticker, badge, or button.[24]
- Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;
- Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;
- Attend a political convention, rally, fund-raising function; or other political gathering;
- Sign a political petition as an individual;
- Make a financial contribution to a political party or organization;
- Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by 5 CFR 733.124 which covers political activity permitted of employees residing in certain municipalities;
- Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;
- Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;
- Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and
- Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his [or her]

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[23] U.S. Office of Special Counsel. *Political Activity and the Federal Employee.* Washington, 1992. p. 6 states that employees may write a letter to the editor of a local newspaper expressing an opinion on a partisan issue but may not write letters in connection with political parties or partisan groups or candidates. *Political Activity and the Federal Employee* is a booklet which summarizes the laws, regulations, and policies governing the political activities of Federal and District of Columbia Government employees. (Hereafter cited as *Special Counsel Booklet.*)

[24] *Special Counsel Booklet*, pp. 4 and 6 states that employees may wear or display political badges, buttons, or stickers. A Federal employee may place a sign on his or her automobile, or in his or her yard, which supports or opposes a political candidate so long as this activity is an expression of personal opinion. The size of any such sign is irrelevant.

efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his [or her] agency.[25]

Presumably, these activities would still be permitted under Public Law 103-94, but off the job only.

The OPM regulations to implement the 1939 Hatch Act covered prohibited activities as well. These prohibited activities have been grouped into three categories to take into account the passage of Public Law 103-94: those activities probably now permitted; those activities still prohibited; and those activities probably requiring guidance to be issued.

Probably Now Permitted (off the job)

- Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;
- Serving as a delegate, alternate, or proxy to a political party convention;
- Organizing or reorganizing a political party organization or political club;
- Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or a candidate in a partisan election;
- Driving voters to the polls on behalf of a political party or a candidate in a partisan election;[26]
- Endorsing or opposing a candidate for public office in a partisan election or a candidate for political party office in a political advertisement, a broadcast, campaign, literature, or similar material;
- Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office;[27]

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[25] 5 CFR 733.111. *Special Counsel Booklet*, p. 7 states that, in addition to the permissible activities stated above, employees may participate in nonpartisan voter registration drives but they may not attempt to influence voters to register for a particular party.

[26] *Special Counsel Booklet*, p. 7 states that employees may assist voters to the polls as a gesture of goodwill or as part of an effort by a nonpolitical organization.

[27] *Special Counsel Booklet*, p. 6 states that employees may not participate in the rallies by carrying banners or placards.

- Initiating or circulating a partisan nominating petition;

- Soliciting votes in support of or in opposition to a candidate for public office in a partisan election or a candidate for political party office;

Still Prohibited

- Becoming a candidate for, or campaigning for, an elective public office in a partisan election;

Clarification Probably Required (to take into account politics off the job requirement and limited solicitation permitted by Public Law 103-94)

- Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

- Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a candidate in a partisan election or of a political party, or political club;

- Taking an active part in managing the political campaign of a candidate for public office in a partisan election or a candidate for political party office;

- Soliciting, collecting, or receiving a contribution at or in the Federal workplace from any employee for any political party, political fund, or other partisan recipient;

- Paying a contribution at or in the Federal workplace to any employee who is the employer or employing authority of the person making the contribution for any political party, political fund, or other partisan recipient. 'Employer or employing authority' means the immediate employing agency head, agency principals, or an employee's supervisor.

- Soliciting, paying, collecting, or receiving a contribution at or in the Federal workplace from any employee for any political party, political fund, or other partisan recipient.[28]

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[28] 5 CFR 733.121 and 5 CFR 733.122. According to the Special Counsel, in addition to the prohibited activities stated above, employees may not distribute campaign material in partisan elections; do clerical work at campaign headquarters, write campaign speeches or canvass voters for the purpose of promoting support for candidates or political parties; address and stuff envelopes even when the activity is conducted in the employee's own home; organize or manage political rallies or meetings; or work to register voters for one party only. If however, employees have a part-time profession or business, they may be allowed to provide services to political parties or to the candidates under certain circumstances. If employees regularly provide such services and the services do not require the employees to perform duties which directly involve their creative talents in functions normally associated with campaigning, the services may be rendered

For the purposes of the regulations implementing the 1939 Hatch Act, as amended, the following definitions applied:

- "Political party" meant a National political party, a State political party, and an affiliated organization;
- "Election" included a primary, special, and general election;
- "Partisan" when used as an adjective referred to a political party;
- "Contribution" meant any gift, subscription, loan, advance, deposit of money, allotment of money, or anything of value given or transferred by one person to another, including in cash, by check, by draft, through a payroll deduction or allotment plan, by pledge or promise, whether or not enforceable, or otherwise;
- "Federal workplace" meant any place, site, installation, building, room, or facility in which any Executive department or agency conducts official business, including, but not limited to, office buildings, forts, arsenals, navy yards, post offices, vehicles, ships, and aircraft.[29]

COMPARISON OF PROVISIONS

This report presents a side-by-side analysis. The first column contains the previous statutory language and regulations for the Hatch Act and related statutes as published in the *United States Code* (U.S.C.) and the *Code of Federal Regulations* (CFR). The regulations are cited where applicable to expand upon the statutory language. "Regulations are not the work of the legislature and do not have the effect of law in theory. In practice, however, because of the intricacies of judicial review of administrative action, regulations can have an important effect in determining the outcome of cases involving regulatory activity."[30]

The provisions of H.R. 20 as passed by the House of Representatives appear in column two.[31] The provisions of Public Law 103-94, The Hatch Act Reform

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to the parties or candidates. *Special Counsel Booklet*, pp. 4 and 7.

[29] 5 CFR 733.101(c), (d), (f), (h), and (i).

[30] Black, Henry C. *Black's Law Dictionary*. Fifth Edition. St. Paul, Minnesota, West Publishing Company, 1979. p. 1156.

[31] Sections 2(b)(2)(A) and (B) of H.R. 20, as passed by the House of Representatives, are not included in this report. They contain technical and conforming amendments to 5 U.S.C. 8332(k)(1), 8706(c), 8906(e)(2), and 8411(e) which cover provisions of Civil Service Retirement, Life Insurance, Health Insurance, and the Federal Employees' Retirement System.

Amendments of 1993, appear in column three.[32] The italicized citations refer to *United States Code* language. A Section Analysis for Subchapter III, Chapter 73 of Title 5 *United States Code* begins the side-by-side and appears on page 17.

Definitions are included at the end of the applicable sections.

[32] Section 9 covering Garnishment of Federal employees' pay (including a technical and conforming amendment) and Section 11, a Sense of the Senate resolution Relating to assistance to Nicaragua are not included in this report.

MEMORANDUM

To: Commission Staff

From: Mary Ann Hook, General Counsel

Date: October 11, 1994

Re: Privacy Act

The Privacy Act of 1974 protects individuals against unwarranted invasions of privacy stemming from federal agencies' collection, maintenance, use and disclosure of information about them. The Act applies to the Commission. However, due to our payment and personnel arrangements with DoD, we fall under the DoD's regulations.

We are liable for the release of material protected under the Act. Substantial fines are assessed to those who violate the Act by revealing private information about, not only government employees, but any person who has contact with the Commission, i.e. a mayor who testifies before the Commission.

We do not have to publish our own regulations to implement the Privacy Act unless we create and maintain a system of records that are retrievable by name or another personnel information. Therefore, the following must be the practice of the Commission:

1- Our personnel records may be kept by name since DoD is maintaining the official and original documents. Any changes must be done on DoD's official forms -- and replicated on our documents in our "custodian" files.

2- The Commission's personnel files - both here and at DoD - should consist of more than one file for each person. Subjects should be grouped separately. For example, a person's SF 171 form should not be filed with his performance reviews. There should be separate files for different information. It should be organized into logical files so if a person wants to look for one point of fact, the entire file will not be revealed.

3- When anyone internally wants to use the file - the official ones are regarded as accurate. We technically are holding only copies.

a. On that note, access to the files should be limited to Administration personnel and the Staff Director and the General Counsel - for a limited and specific purpose.

4- Any requests for information that are of a personal nature, where someone's name is used as part of the request, may fall under the Privacy Act and should be directed to General Counsel's office.

5- For maintaining all other files, the Commission, including but not limited to the Executive Secretariat, should not keep files organized by peoples' names, social security numbers or other similar identifiers. For example, the testimony provided to the Commission is located by reading the transcripts or by looking through base specific material - not by looking at a list of names of those who testified. Rolodexes are exempt - as is the computer card file. The card files should be limited to names, addresses and telephone numbers. Records should be kept by date, base or subject matter. Any other system of records that has names as a way of indexing information is not acceptable. All staff should be made aware of these restrictions now and for the 1995 cycle.

If you have any questions, please feel free to ask.

21 March 1995

MEMORANDUM FOR Division Heads

SUBJECT: E-Mail Use and Record Keeping

1. After reviewing the use of e-mail by the Commission staff, we in legal have determined that the information processed in our e-mail system does not rise to the level of a "record" as defined in the Federal Records Act (44 U.S.C. 3301). This is chiefly because we do not conduct "official business" on the e-mail system, i.e., no final actions are constructed either on, or through the use of, e-mail. Consequently, we have no requirement either to implement a recordkeeping system (as outlined in 36 C.F.R. 1228.188 and 1234.28(a), or an e-mail back-up system (as described in 36 C.F.R. 1234.30).

2. So, your asking what this has to do with you. Well, in order for our opinion to remain valid, we must continue our current practice of using e-mail only for administrative correspondence and in the place of the intra-office intercom/phone (it is OK, however, to download a file from *MS Word* and send it via e-mail). Thus , please monitor the use of e-mail in your area of responsibility to insure that the current practice remains constant. Don't worry, there are currently no problems - this is just a bit of preventive law.

Ralph A. Kaiser

RALPH A. KAISER
Counsel

MEMORANDUM FOR: All Staff
FROM: Madelyn Creedon
SUBJECT: Travel
DATE: March 20, 1995

As travel season is upon us, it is time to review the ethics rules as they apply to official travel.

1. General Provision: Anything a Commission employee receives as a result of official travel belongs to the Federal Government.

2. Frequent Flyer Miles: If earned on official travel, they belong to the government and may be used only on subsequent official travel. If you commingle official and personal frequent flyer miles in the same account, then the entire account becomes property of the Federal Government and may be used only for subsequent official travel. Frequent flyer miles remain the property of the government even after you have left the government.

3. Getting "Bumped": Benefits, such as free tickets, as a result of being *involuntarily* bumped from an overbooked flight on official travel belong to the Federal Government as the traveler remains on government time. However, benefits as a result of *voluntarily* relinquishing a seat on an overbooked flight belong to the traveler and can be used on personal travel. The traveler may not give up the seat if it would interfere with the accomplishment of the government's mission for which the official travel was undertaken or add to the government's costs for the trip. If this would significantly delay your trip, you may be required to take the additional time as annual leave.

4. First-Class Travel: First-class travel is prohibited except in rare circumstances; please see one of the Commission's attorneys for further guidance.

5. Other Travel-Related Benefits: Benefits that cannot be used for official purposes *may* be accepted *if* they fall into an exception to the receipt of gifts by government employees. Examples include on-the-spot upgrades and rebates on personal credit cards (Discover). However, the system should not be manipulated in order to maximize upgrades.

6. Government American Express Card Please remember that the Government American Express Card should be used for official travel purposes.

7. Meals Meals are generally considered gifts when they come from prohibited sources, including communities. When you are visiting communities you must make arrangements to pay for all meals. This includes those situations where the community is holding a dinner, lunch etc. for the Commission. The one exception is miscellaneous food not intended as a meal. A good example of this would be coffee and doughnuts made available during a meeting.

If you have any questions, please ask one of the legal staff for guidance.