

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION  
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**Chairman:** The Honorable Anthony J. Principi  
**Commissioners:** The Honorable James H. Bilbray • The Honorable Philip E. Coyle III • Admirable Harold W. Gehman, Jr., USN (Ret.) • The Honorable James V. Hansen  
General James T. Hill, USA (Ret.) • General Lloyd W. Newton, USAF (Ret.) • The Honorable Samuel K. Skinner • Brigadier General Sue Ellen Turner, USAF (Ret.)  
**Executive Director:** Charles Battaglia

May 23, 2005

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MEMORANDUM

**TO:** Chairman and Commissioners  
**FROM:** Rumu Sarkar, Associate General Counsel   
**SUBJECT:** Ethics Guidance Materials

As the Ethics Official for the BRAC Commission, I am providing you with certain ethics materials for your review and use. First, a letter of conflict of interest determination issued by David C. Hague, General Counsel to the BRAC Commission, and an accompanying Ethics Conflict of Interest Analysis Sheet that provides waivers and/or recusals, as appropriate, have been sent to each of you individually. Secondly, a short memorandum entitled, "Ethics Rules for BRAC Commissioners," a document entitled, "Post-Employment Rules for BRAC Commissioners," and an Office of Government Ethics (OGE) publication, "The Revolving Door," have also been included. The last three items provide guidance on post-employment issues, and electronic copies of them have been attached to this message. Hard copies of all these materials are being sent to you via U.S. mail.

Please be advised that all travel will be scheduled by the BRAC Commission's travel office, and you will be issued a government credit card to facilitate your travel needs. Further, Section 1116 of the National Defense Authorization Act for Fiscal Year 2002 (P.L. 107-107), permits a federal traveler who receives a promotional item such as frequent flyer miles, upgrades, or access to carrier clubs or facilities received as a result of using travel or transportation services obtained at federal government expense, or accepted under section 1353 of title 31, United States Code, to retain the promotional item for personal use, if the promotional item is obtained under the same terms as those offered to the general public and at no additional cost to the federal government. This includes all benefits earned, including those earned before enactment of the Act. These mileage points may be used to obtain upgrades (including to first class) at your

discretion. Please note, however, that first-class upgrades for uniformed personnel is not permitted.

Please feel free to contact me at the office at (703) 699-2973, or at my blackberry number of (703) 901-7843 if you have any ethics questions.

***ETHICS RULES FOR BRAC COMMISSIONERS***  
***OFFICE OF THE GENERAL COUNSEL***  
***BRAC COMMISSION***  
***MAY 23, 2005***

## Table of Contents

<u>Topic</u>	<u>Page</u>
Introduction	3
Definition of a Special Government Employee (SGE)	3
Financial Disclosure Reporting Requirements	3
I. Criminal Conflicts of Interest Statutes	4
• 18 U.S. C. Section 201	4
• 18 U.S.C. Section 203	4
• 18 U.S.C. Section 205	4
• 18 U.S.C. Section 207	5
• 18 U.S.C. Section 208	5
II. Standards of Ethical Conduct	6
Teaching, Speaking and Writing in a Personal Capacity (Other Than as a Government Employee)	6
III. Gifts	7
IV. Impartiality	7
V. Misuse of Position	8
VI. Employment by or Gifts from Foreign Governments	8
VII. Lobbying Activities	8
VIII. Political Activities	9

# ***ETHICS RULES FOR BRAC COMMISSIONERS***

## Introduction

This summary has been prepared for members appointed to serve on the 2005 Base Realignment and Closure (BRAC) Commission. If you have questions on any of the topics covered in this guidance, attorneys in the General Counsel's Office are always available to answer them.

## Definition of a Special Government Employee (SGE)

As a Commissioner, you have been appointed as an SGE. An SGE is an officer or employee in the executive branch of the Federal Government who is appointed to perform temporary duties, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days. 18 U.S.C. 202(a).

Even if you exceed the 130 days, you will still be considered to be an SGE for the remainder of that 365-day period. All days you work (whether paid or unpaid), and even if you do not work the entire day, counts towards the 130 day limit. The 365-day period begins the day you start working (not the day you were appointed to the BRAC Commission). The SGE status is important because the ethics rules for SGEs are somewhat less restrictive than the rules for other Federal employees and officials.

## Financial Disclosure Reporting Requirements

All BRAC Commissioners have been appointed as SGEs and are required under the Ethics in Government Act, as amended by the Ethics Reform Act of 1989, and 5 C.F.R. Part 2634, to file a financial disclosure report (SF-278 form) when first appointed.

The information reported is used to determine the matters for which a Commissioner must be disqualified under the criminal financial conflict of interest statute, 18 U.S.C. 208(a), and the matters for which a Commissioner may be granted a waiver under 18 U.S.C. 208(b). Complete reporting is essential to protect the Commissioner from inadvertently violating any of the criminal conflict of interest statutes, and to assure the public that the advice provided by the BRAC Commission is free from any real, or perceived, conflicts of interest.

The information reported by Commissioners is confidential. However, once you have worked for 60 days or more for the BRAC Commission in any period of 365 consecutive days, this SF-278 form may be released upon an appropriate request. However, the SF-278 form may not be released under Freedom of Information (FOIA) requests.

I. Criminal Conflict of Interest Statutes

The following criminal conflict of interest statutes (18 U.S.C. 201-216) apply to SGEs:

- **18 U.S.C. 201.** Section 201, commonly known as the "bribery and illegal gratuities" statute, prohibits Federal employees, including SGEs, from seeking, accepting, or agreeing to receive anything of value in return for being influenced in the performance of an official act.
- **18 U.S.C. 203.** Section 203 prohibits an SGE from receiving compensation for representational services rendered by the employee or another person before the BRAC Commission or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party (i) in which the SGE has participated personally and substantially as a Government employee, or (ii) which is pending in the Government agency in which the SGE is serving if the SGE has served for 60 days or more during the immediately preceding 365 days.

Exempted from this rule are representations required in the proper discharge of official duties. Also exempted are representations required in the performance of work under a grant, contract or other agreement with or for the benefit of the Government.

A particular matter involving specific parties is a matter that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Particular matters may include, but are not limited to, reviews of grant proposals or contract applications, other funding decisions, studies or approvals of scientific studies or projects, and other actions that involve deliberation, decision, or action.

Representational services include communications (written or oral) and appearances made on behalf of someone else, generally with the intent to influence or persuade the Government.

An inquiry as to the status of a pending matter is not necessarily a representation, although depending upon the context of the inquiry, it could give rise to the appearance of a prohibited representation.

To avoid appearance problems, during the period in which a the BRAC Commission is in session, Commissioners are advised not to contact BRAC staff concerning any matters pending before the BRAC Commission, or as to which the Commission has an interest.

- **18 U.S.C. 205.** Section 205 prohibits an SGE from representing a party, with or without compensation, before the BRAC Commission or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party in which the United States is a party or has a direct and substantial interest: (i) that the SGE participated in personally and substantially as a Government employee;

or (ii) which is pending in the agency in which the SGE is serving, if the SGE has served for 60 days or more during the immediately preceding 365 days.

- **18 U.S.C. 207.** Section 207, the "post-employment" statute, imposes a lifetime ban on a former SGE from representing another person or entity to the BRAC Commission or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party in which the former SGE participated personally and substantially while serving in the Government. In addition, for two years after terminating Federal employment, an SGE may not make such representational communications to the Government regarding specific party matters that were pending under his or her official responsibility during the last year of Government service.

Moreover, "senior employees" who are paid at an annual rate equivalent to 86.5% of Level II of the Executive Service or \$140,216.50, are subject to a one-year "cooling-off" period which precludes any contacts with their former agency on any matter for which official action is sought, even if the former employee had no involvement with the matter while in Government service. For SGEs, this one-year "cooling-off" period does not apply if the SGE served less than 60 days in the one-year period prior to termination of senior employee status.

- **18 U.S.C. 208.** Section 208(a), the main conflict of interest statute, prohibits an SGE from participating personally and substantially in any particular matter that could affect the financial interests of the SGE, the SGE's spouse, minor child, general partner, an organization in which the SGE serves as an officer, director, trustee, general partner, or employee, or an organization with which the SGE is negotiating or with which the SGE has an arrangement for prospective employment.

A *waiver* for Commissioners may be granted under 18 U.S.C. 208(b)(3). Section 208(b)(3) authorizes issuance of a waiver to an SGE who serves on a commission subject to the Federal Advisory Committee Act if the official responsible for the individual's appointment, as delegated to the General Counsel, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the particular financial interest involved.

The waiver granted is considered a "general" waiver, in that it allows participation in matters that affect all institutions, or types of institutions, similarly. Even with a general waiver, however, SGEs must disqualify themselves from participation in all matters that specifically and uniquely affect their financial interests. The Ethics Official or the Designated Federal Official are available to further explain the procedures for disqualification.

In addition, under regulations issued by the Office of Government Ethics, a regulatory (i.e., automatic) waiver of the disqualification requirement of 18 U.S.C. 208 is available under certain circumstances, including instances involving the following classes of financial interests:

- interests held in broadly diversified investment funds;
- publicly traded securities of \$5,000 or less;
- publicly traded securities of \$25,000 or less if the matter is a general policy matter and the total value of all investments in the affected industry sector is no more than \$50,000;

In addition, there is an automatic exemption which allows SGEs serving on Federal advisory commissions to participate in matters of general applicability where the otherwise-disqualifying financial interest arises solely from the Commissioner's federal employment or prospective employment, provided that the matter will not have a special or distinct effect on the employee or employer other than as part of a class.

## II. Standards of Ethical Conduct

The following are some of the major Standards of Ethical Conduct regulations (5 C.F.R. Part 2635) that may pertain to BRAC Commissioners during the term of their appointment:

### 1. Teaching, Speaking and Writing in a Personal Capacity (Other Than as a Government Employee)

Generally, during their term of appointment, BRAC Commissioners may continue to receive fees, honoraria, and other compensation for teaching, speaking and writing undertaken in their personal or non-Governmental capacities. However, there are some limitations:

- (1) An SGE is prohibited from receiving compensation for teaching, speaking, and writing that "relates to the employee's official duties." 5 C.F.R. 2635.807. The "relatedness" test is met for an SGE if:
  - (1) the activity is undertaken as an official Government duty;
  - (2) the circumstances indicate that the invitation to engage in the activity was extended to the SGE primarily because of the employee's position in the Government rather than the employee's expertise on the particular subject matter;
  - (3) the invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by the performance or nonperformance of the employee's official duties; or
  - (4) the information conveyed through the activity draws substantially on ideas or official data that are confidential or not publicly-available.

- (2) Additionally, if a Commissioner serves for 60 days or less during a one-year period, the SGE may not accept compensation for teaching, speaking, and writing if the subject matter of the teaching, speaking or writing concerns a particular matter, involving specific parties, in which the SGE participated or is participating personally and substantially as a Government employee.
- (3) If a Commissioner serves for more than 60 days, the SGE is additionally prohibited from receiving compensation for teaching, speaking, and writing if the subject of the activity deals in significant part with any matter to which the SGE is presently assigned or was assigned during the previous one-year period.

#### EXCEPTIONS:

1. This rule does not preclude a Commissioner from receiving compensation for teaching, speaking, or writing on a subject within the Commissioner's discipline or inherent area of expertise based on the SGE's educational background or experience. The outside activity must not be about or distinctly related to the work the SGE is providing to the Government.
2. These restrictions also do not apply to teaching a course requiring multiple presentations that is part of the regularly established curriculum of an institution of higher education, an elementary or secondary school, or a program of education or training sponsored and funded by the Federal, State, or local government.

#### III. Gifts

Any gift given to a Commissioner because of the member's service on the BRAC Commission will raise concerns. The Ethics Official or the Designated Federal Official should be consulted should this situation arise. Gifts given to a Commissioner because of their position or achievements in the private (non-Government) sector may be permitted, depending on the circumstances. (Under the Foreign Gifts and Decorations Act, 5 U.S.C. Sec. 7342, gifts from foreign governments of a minimal value of \$305.00 or less may be accepted, but please consult the Ethics Official concerning this.)

#### IV. Impartiality

Although Commissioners are prohibited under 18 U.S.C. 208(a) from participating in matters in which they have a financial interest, there may be other circumstances in which a Commissioner's participation in a particular matter involving specific parties would raise a question regarding the Commissioner's impartiality in the matter. For example, a Commissioner's impartiality may be questioned if he or she has business ties to a contractor near a base scheduled for closure or realignment, or has a close personal or professional relationship with such a business concern. In such circumstances, the Commissioner should discuss the relationship with the Ethics Official or the Designated Federal Official so that a determination

may be made as to whether the Commissioner in question should be disqualified from participation in the matter, or should be granted an "authorization" to permit the Commissioner to participate in the matter. 5 C.F.R 2635.502.

#### V. Misuse of Position

Commissioners are also subject to a number of prohibitions intended to address the use, or appearance of use, of "public office for private gain." 5 C.F.R. Part 2635, Subpart G. These prohibitions include:

- (1) Using their BRAC or DoD titles or referring to their Government positions for their own private gain, the private gain of friends, relatives, or anyone with whom they are affiliated in a non-Governmental capacity (including nonprofit organizations which they serve as officers, members, employees, or in any other business relationship), or for the endorsement of any product, service, or enterprise.
- (2) Using their official titles or Government positions to coerce or induce another person to provide any benefit to themselves or another person.
- (3) Using non-public Government information in a financial transaction to further their private interests or those of another, or disclosing confidential or non-public information without authorization.
- (4) Using Government property for unauthorized purposes.

#### VI. Employment by, or Gifts from, Foreign Governments

There are Constitutional limitations on a Commissioner's employment by a foreign government, including political subdivisions of a foreign government. For SGEs, this provision has particular relevance to positions with foreign universities that are government-operated rather than private institutions. United States Constitution, art. I 9, cl. 8. There are also statutory provisions restricting acceptance of gifts from foreign governments. 5 U.S.C. 7342. Commissioners should consult with the Ethics Official or the Designated Federal Official for details about these restrictions.

#### VII. Lobbying Activities

In their official capacities or as a group, Commissioners are prohibited from engaging in any activity which directly or indirectly encourages or directs any person or organization to lobby one or more members of Congress. 18 U.S.C. 1913. When authorized, Commissioners may appear before any individual or group for the purpose of informing or educating the public about a particular policy or legislative proposal.

Commissioners also may communicate to Members of Congress at the request of any Representative or Senator. Communications to Members of Congress initiated by individual Commissioners, in their official capacity as members of the BRAC Commission, should be coordinated through the Office of the Chairman.

As private citizens, Commissioners may express their personal views (but not the views of the BRAC Commission) by stating their affiliation with the Commission, by factually stating the Commissioner's official position on the matter (to the extent that non-public information is not used). However, Commissioners may not take new positions and represent those views as the BRAC's position on the matter. Moreover, in expressing their private views, as with all other personal (non-Governmental) activities, Commissioners are not permitted to use Government computers, copiers, telephones, letterhead, staff resources, or other appropriated funds. All personal activities must occur "off duty time."

In addition, Commissioners are prohibited in their personal capacities from making representations on behalf of others, to the Government, on particular matters involving specific parties in which they were involved as Government employees. (See discussion above under 18 U.S.C. 203 & 205.)

#### VIII. Political Activities

The Hatch Act (5 U.S.C. 7321-7328) prescribes the restrictions on certain political activities of Federal employees. Unlike the criminal statutes and most of the other ethics rules which are fully applicable to an SGE throughout the SGE's entire term of appointment, the Hatch Act restrictions apply only during the period of any day in which the SGE actually is performing Government business. For example, if an SGE attends a BRAC Commission meeting from 8:00 am - 1:00 pm, at 3:00 pm, the SGE could attend a political fund raiser and even solicit political contributions from the attendees. Please note that there are also criminal political statutes that apply at all times and prohibit coercion and intimidation regarding political activities.

If you are considering engaging in political activities, please contact the Ethics Official or the Designated Federal Official for guidance before agreeing to or accepting any participation in political activities.

## ***POST-EMPLOYMENT RULES FOR BRAC COMMISSIONERS***

This summary has been prepared for Commissioners appointed to serve on the 2005 Base Closure and Realignment (BRAC) Commission. If you have questions on any of the topics covered in this guidance, you should consult with an attorney in the Office of the General Counsel.

### **Part 1: Personal Lifetime Ban**

1.1 **SIMPLIFIED RULE:** After you leave Government service, you may not represent someone else to the Government regarding particular matters that you worked on while in Government service.

### **Official Responsibility: 2 Year Ban**

1.2 **SIMPLIFIED RULE:** For 2 years after leaving Government service, you may not represent someone else to the Government regarding particular matters that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

### **Trade or Treaty: 1 Year Ban**

1.3 **SIMPLIFIED RULE:** For 1 year after leaving Government service, you may not aid, advise, or represent someone else regarding trade or treaty negotiations that you worked on during your last year of Government service.

### **Part 2: Compensation Ban on Representation by Others**

2.1 **RULE: COMPENSATION FOR REPRESENTATION TO THE GOVERNMENT BY OTHERS:** After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service ( e.g., lobbying, consulting, and law firms).

### **Part 3: Additional Restrictions for Retired Military Personnel and Reservists**

3.1 **SIMPLIFIED RULE: FOREIGN EMPLOYMENT:** Unless you receive prior authorization from your Service Secretary, you may forfeit your military pay during the time you perform compensated services for a foreign government.

### **Part 4: Administrative Reminder**

4.1 **USE OF NONPUBLIC INFORMATION:** After leaving Government service, you still may not use nonpublic information to further your own private interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.

## Understanding the Revolving Door:

### How Ethics Rules Apply to Job Seeking and Post-Government Employment Activities

If you are planning to leave the current Presidential Administration and return to private employment, you need to know how the Federal ethics laws may affect you, both while you are looking for a job and after you leave the Government. This pamphlet describes the relevant restrictions that apply in these situations. The rules in this area are very complex, so you should consult your agency's ethics official for additional guidance.

### Looking for a Job

This section identifies several issues that can arise when you are looking for employment outside the Government while you are still working in the executive branch. A criminal conflict of interest law (18 U.S.C. § 208) generally prohibits you from working in your Government job on a matter that would affect the financial interests of someone with whom you are discussing possible employment. The Standards of Ethical Conduct for Executive Branch Employees (5 C.F.R. part 2635) have a similar rule that applies even before employment discussions begin, and may apply even when you have just sent a resume. If you participate in certain procurement matters, you may be subject to additional rules, including the duty to report employment contacts made by you or a bidder or offeror.

During your job search, you must be careful not to misuse Government resources (such as official time, the services of other employees, equipment, supplies, and restricted information). As you look for a job, you also will want to keep the restrictions that will apply after you leave the Government (discussed below) in mind.

Finally, after you have accepted a job outside the Government, you must continue to refrain from working on matters in your Government job that would affect the financial interests of your prospective employer.

### Restrictions on Employment after Government Service

This section briefly highlights the restrictions on your employment activities after you leave executive branch service. Your agency's ethics official is available to provide more specific advice on these "post-employment" restrictions, both before and after you terminate Government employment.

#### 18 U.S.C. § 207

This criminal law does not bar employment with any particular employer. Rather, its restrictions address certain activities that involve, or may appear to involve, the unfair use of prior Government employment.

Some of the restrictions apply to all former executive branch employees, whereas others apply only to former senior officials or those with specified duties.

◆ As an executive branch employee, you are barred permanently from trying to influence

any Federal agency or court, by communications or appearances on behalf of someone other than yourself or the United States (i.e., "representational contacts"), on a matter that has parties (such as a contract, grant, or lawsuit), if you have worked on that matter as a Government employee. If the matter was under your official responsibility during your last year of Government service, even if you did not personally participate in it, you are barred from making representational contacts about that matter for two years.

◆ If you have served as a "senior employee" during your last year of Government service, you are restricted for one year from making any representational contacts to your former agency on any matter, regardless of whether the matter involves parties. Senior employees include people serving at Levels II-V of the Executive Schedule, those whose rate of basic pay equals or exceeds 86.5 percent of the rate of basic pay for Level II of the Executive Schedule (and, for two years after November 24, 2003, those who, on November 23, 2003, were paid at a rate of basic pay at least equal to the rate of basic pay for level 5 of the SES), military officers at O-7 and above, some White House appointees, and private sector participants in the Information Technology Exchange Program. Unless your agency has separate components for post-employment purposes, this restriction on representational contacts generally extends to your entire former agency.

◆ If you have served as a "very senior employee," you are covered by a similar one-year cooling off period with respect to your former agency and also a one-year ban on making representational contacts with any

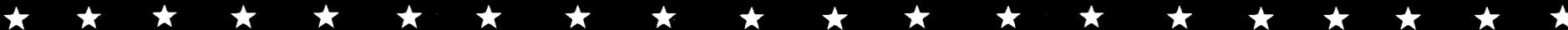
Executive Schedule employee serving in any agency. Very senior employees include people paid at a rate payable for Level I of the Executive Schedule, those serving in the Executive Office of the President and paid at a rate payable for Level II of the Executive Schedule, and certain other White House appointees.

◆ Former senior and very senior employees are restricted for one year after leaving Government service from representing, aiding or advising a foreign government or foreign political party, with an intent to influence any officer or employee of a Department or agency. You may also be prohibited from representing a foreign entity before Congress.

◆ If you worked on certain trade or treaty negotiations during your final year of Government service and have had access to certain restricted information, you are barred for one year from aiding or advising anyone other than the United States concerning those negotiations.

◆ If you were assigned to an agency from the private sector as a participant in the Information Technology Exchange Program, you may not aid, counsel, or assist in representing anyone other than the United States concerning any contract with that agency for one year after the end of that assignment.

There are several exceptions to some of these restrictions. For example, one exception permits former employees to engage in post-employment activities performed in carrying out official duties on behalf of the



United States. Another exception, which often is of interest to former political appointees, in some cases allows former senior and very senior employees to make representational contacts on behalf of a candidate for Federal or state office, or on behalf of national and campaign committees or a political party. Your agency's ethics official can help determine whether an exception applies to your situation.

### Additional Restrictions

Depending on your current duties and your future employment, other restrictions may apply. If you will be working for a firm that has represented clients before either the executive branch or any court where the United States had an interest, another criminal law (18 U.S.C. § 203) prohibits you from sharing in the profits earned by the firm for those matters. The restriction applies if the firm's work before the Government occurred while you were employed by the Government.

If you were involved in certain large procurements or in the administration of contracts, you may not be able to accept compensation from certain contractors for one year.

Some agencies also have special laws and regulations with post-employment provisions that may apply to you.

If you are an attorney or other licensed professional, you should consult your local bar rules or similar professional code for any special restrictions on employment following Government service.

### Summary for Avoiding Trouble

Understanding the Federal ethics laws that govern your conduct while you are looking for a job and after you terminate Government service can be challenging. If you have any questions, you should seek help from your agency's ethics official. Remembering a few key issues is critical to passing successfully through the revolving door.

### Recap on Seeking Employment

◆ You generally cannot work on a matter that will affect the financial interests of someone with whom you are seeking employment. This means that you may need to be disqualified from working on such a matter during your job search, as well as after you accept a job outside Government.

◆ "Seeking employment" is defined broadly. You may be considered to be seeking employment before you are engaged in actual negotiations. For example, you may be seeking employment if either you or a prospective employer has made a contact about possible employment.

◆ Working on certain procurement matters may trigger additional requirements.

◆ Remember not to misuse Government resources while job-hunting.

### Recap on Post-Government Employment

◆ If you worked on a matter that had parties (e.g., a contract or lawsuit), you may be permanently barred from representing anyone back to any Federal agency or court on that

matter. If such a matter was only under your official responsibility, a two-year bar may apply.

◆ If you are a senior employee, you are subject to a one-year bar on representational contacts with your former agency.

◆ Very senior employees are also subject to a similar one-year bar, as well as a bar on making representational contacts with any high level executive branch officials.

◆ Senior and very senior employees are subject to a one-year restriction regarding foreign governments or foreign political parties.

◆ Employees who worked on certain trade or treaty negotiations may be subject to another one-year bar.

◆ Employees who worked on certain procurements or contracts may be subject to additional restrictions.

◆ Remember to consult bar rules, other professional codes, and your agency for other potential restrictions.

### Conclusion

This pamphlet is only a starting point. You should obtain specific guidance from your agency's ethics official as to how these job-seeking and post-employment rules may apply to you.

Prepared by  
U.S. Office of Government Ethics  
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United States  
Office of  
Government  
Ethics



## Understanding the Revolving Door:

### How Ethics Rules Apply to Job Seeking and Post-Government Employment Activities

