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ONE HUNDRED ELEVENTH CONGRESS

U.S. House of Representatives

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December 22, 2010

**MEMORANDUM TO ALL HOUSE MEMBERS, OFFICERS, AND EMPLOYEES**

**FROM:** **Committee on Standards of Official Conduct**
Zoe Lofgren, Chair
Jo Bonner, Ranking Republican Member

**SUBJECT:** Negotiations for Future Employment and Restrictions on Post-Employment for House Members and Officers

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The purpose of this memorandum is to remind you about issues of concern to House Members[1] and officers[2] who are negotiating for future employment or departing from employment with the House of Representatives.[3] The matters discussed here include negotiations for future employment, post-employment restrictions, financial disclosure requirements (termination reports), and outside employment and earned income restrictions.[4] Although this memorandum will be of particular interest to departing Members, current Members should also familiarize themselves with these restrictions, especially the criminal restrictions on post-employment contact that have been the subject of recent attention by the United States Department of Justice.

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[1] This Memorandum uses the term "Member" to refer to House Members, Delegates, and the Resident Commissioner.

[2] The elected officers of the House are the Clerk, Sergeant-at-Arms, Chaplain, and Chief Administrative Officer. *See* House Rule 2, cl. 1.

[3] The restrictions discussed herein apply uniformly to House Members, Delegates, the Resident Commissioner, and officers, except where noted with regard to the elected House officers.

[4] The Committee has issued a separate memorandum addressing a similar range of issues for departing employees of the House and certain other legislative offices. Employees who are seeking future employment or departing House employment should consult that memorandum, entitled "Negotiations for Future Employment and Restrictions on Post-Employment for House Staff," rather than this memorandum, for guidance.

## NEGOTIATING FOR FUTURE EMPLOYMENT

In the past, the Committee's general guidance on job negotiations has been that House Members and employees are free to pursue future employment while still employed by the House, subject to certain ethical constraints. This memorandum provides more detailed guidance on the issues presented by such negotiations, as well as mandatory disclosure obligations such negotiations may trigger.

The general guidance applicable to any Member who wishes to engage in negotiations for future employment is as follows. First and foremost, it would be improper for a Member to permit the prospect of future employment to influence the official actions of the Member.[5] Some Members may determine to use an agent (*e.g.*, a "headhunter") to solicit job offers on their behalf in order to avoid any appearance of improper activity. Regardless of whether job negotiations are undertaken personally or through an agent, the following generally-applicable principles must be observed.

The term "negotiation" is not defined in the applicable legislation or House rule. In its past guidance, the Committee has given deference to court decisions interpreting a related federal criminal statute that bars Executive Branch employees from participating in matters affecting the financial interests of an entity with which the employee is "negotiating or has any arrangement" concerning future employment.[6] Those decisions found that the term "negotiation" should be construed broadly.[7] However, the Committee makes a distinction between "negotiations," which trigger the rule, and "[p]reliminary or exploratory talks," which do not.[8] The term "negotiations" connotes "a communication between two parties with a view toward reaching an agreement" and in which there is "active interest on both sides."[9] Thus, merely sending a copy of one's résumé to a private entity is not considered "negotiating" for future employment.

Other, more general, ethical rules also bear on the subject of employment negotiations. The House Code of Official Conduct prohibits House Members, officers, and employees from receiving compensation "by virtue of influence improperly exerted" from a congressional position.[10] The Code of Ethics for Government Service forbids anyone in government service from accepting "favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance" of governmental duties.[11] Federal criminal law

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[5] *See* House Rule 23, cl. 3; Code of Ethics for Government Service ¶¶ 5, 6, *reprinted in 2008 House Ethics Manual* at 355.

[6] 18 U.S.C. § 208.

[7] *See, e.g., United States v. Schaltenbrand*, 930 F.2d 1554, 1559 (11th Cir. 1991); *United States v. Conlon*, 628 F.2d 150, 155 (D.C. Cir. 1980).

[8] *Schaltenbrand*, 930 F.2d at 1558-59.

[9] *United States v. Hedges*, 912 F.2d 1397, 1403 n.2 (11th Cir. 1990) (quoting jury instruction); *see also Schaltenbrand*, 930 F.2d at 1558, 1559 n.2.

[10] House Rule 23, cl. 3.

[11] Code of Ethics for Government Service ¶ 5, *reprinted in 2008 House Ethics Manual* at 355.

prohibits a federal official from soliciting or accepting a "bribe"– *i.e.*, anything of value given in exchange for being influenced in an official act.[12] Although bribery necessarily entails a *quid pro quo* arrangement, the same statute also bans seeking or accepting "illegal gratuities"–*i.e.*, anything given because of, or in reward for, a future or past official act, whether or not the official action would be, or would have been, taken absent the reward.[13]

In light of these restrictions, Members should be particularly careful in negotiating for future employment, especially when negotiating with anyone who could be substantially affected by the Member's performance of official duties.[14] It may be prudent for the Member to have an exchange of correspondence with any serious negotiating partner, stipulating that the prospective employer will receive no official favors in connection with the job negotiations. Because Members will be subject to the post-employment restrictions, which are addressed later in this memorandum, they may also wish to establish in correspondence with any prospective employer that the future employer understands that (1) it will receive no official favors as a result of the job negotiations, and (2) the Member is subject to post-employment restrictions, which should be briefly outlined.[15] Departing Members who are lawyers should consult their local bar association concerning the application of rules governing their involvement in matters in which they participated personally and substantially during their time with the House.[16] In addition, as addressed in the next section of this memorandum, Members must disclose the employment negotiations in writing to the Standards Committee.

Provided that Members conduct themselves in accordance with the considerations discussed above, they may engage in negotiations for employment in the same manner as any other job applicant. Discussions may specifically address salary, duties, benefits, and other terms.

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[12] 18 U.S.C. § 201(b)(2)(A).

[13] *Id.* § 201(c)(1)(B).

[14] *See* Code of Ethics for Government Service ¶ 5, *reprinted in 2008 House Ethics Manual* at 355.

[15] *See* 18 U.S.C. § 207. These restrictions are explained in detail later in this memorandum. Briefly, House Members may not contact any Member, officer, or employee of the House or Senate on official business for one year after leaving office, nor may they assist any foreign government in securing official action from any federal official during that year. House officers may neither contact the individual's former congressional office on official business for one year after leaving House employment, nor assist any foreign government in securing official action from any federal official during that year.

[16] A former Member who joins a law firm should also be aware that a separate statutory provision, 18 U.S.C. § 203, has been interpreted to prohibit a former federal official who joins a firm from sharing in fees attributable to representational services in federally related matters when those services were provided by the firm while the individual was still employed by the government. U.S. Office of Gov't Ethics (OGE) Advisory Opinion 99 x 24 (Dec. 14, 1999) (available on the OGE Web site, www.usoge.gov).

## DISCLOSURE OF EMPLOYMENT NEGOTIATIONS AND RECUSAL REQUIREMENTS

Members must notify the Committee within three (3) business days after they commence any negotiation or agreement for future employment or compensation with a ***private*** entity.[17] As stated above, the term "negotiation" is not defined in the legislation. Thus, the Committee views negotiations using the standard discussed earlier in this memorandum, namely that there has been "a communication between two parties with a view toward reaching an agreement" and in which there is "active interest on both sides."[18]

In addition, Members must recuse themselves from "any matter in which there is a conflict of interest or an appearance of a conflict" with the private entity with which they are negotiating or have an agreement for future employment or compensation, and they must notify the Standards Committee in writing of such recusal.[19] Members who recuse themselves also must, at that time, file their negotiation notification with the Clerk in the Legislative Resource Center (B-106 Cannon House Office Building) for public disclosure.[20]

The Committee has issued forms to be used for these notification requirements. When notifying the Committee of negotiations or agreements for future employment or compensation, Members and officers should complete and sign an employment negotiation form, formally titled the "Notification of Negotiations or Agreement for Future Employment." The original, completed form must be submitted to the Committee, but all filers should keep a copy of their submission, as explained below.

There is a separate form for notifying the Committee of recusal, entitled the "Statement of Recusal." All Members and officers who recuse themselves from official matters pursuant to Rule 27 must complete and submit the recusal form to the Committee.[21] At that time, Members must *also* submit to the Clerk a copy of the completed employment negotiation form regarding that private entity, which they had previously submitted to the Committee.[22] The Clerk will make that form available for public disclosure.[23] As noted above, the requirement to make a simultaneous filing with the Clerk of the corresponding job negotiation form applies only to Members and not to House officers or employees. Copies of both forms are available on the Standards Committee Web site (ethics.house.gov).

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[17] House Rule 27, cl. 1.

[18] *See Hedges*, 912 F.2d at 1403 n.2.

[19] House Rule 27, cl. 4.

[20] *Id.* House Rule 27 does not require House employees to file their notice of negotiation with the Clerk.

[21] *Id.*

[22] *Id.*

[23] *Id.*

The terms "conflict" and "appearance of conflict" are not defined in the rule. The Committee has stated that a "conflict of interest becomes problematic when a Member uses his position to enhance his personal financial interests or his personal financial interests impair his judgment in conducting his public duties."[24] Members also should avoid situations that might be viewed as presenting even a risk that the Member might be improperly influenced by personal financial interests.[25]

Among the "official matters" covered by the recusal provision discussed above is abstention from voting, or affirmatively taking official actions, on matters that would affect an outside party with whom the Member is negotiating, or from whom the Member has accepted employment. This inquiry has traditionally been governed solely by House Rule 3, which states that abstention from voting on the House floor is not warranted unless the Member has "a direct personal or pecuniary interest in" the matter.[26] Longstanding House precedent interpreted this rule to mean that Members may vote on any matter that affects them merely as part of a large class of individuals or entities rather than with particularity.[27] Thus, for example, Members who were veterans were permitted to vote on military pay and pensions, which affected them only as members of class of thousands of individuals who held or had held similar positions.[28] Historical practice has established that, with regard to House Rule 3, there is no authority to force a House Member to abstain from voting, and the decision on whether abstention from voting was necessary has been left for individual Members to determine for themselves under the circumstances.[29]

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[24] House Comm. on Standards of Official Conduct, *In the Matter of Representative Sam Graves*, H.R. Rep. No. 111-320, 111th Cong., 1st Sess. 16 (2009); *see also* House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101st Cong., 1st Sess. (Comm. Print, Comm. on Rules 1989), *reprinted in* 135 Cong. Rec. H9253 at H9259 (daily ed. Nov. 21, 1989) ("A conflict of interest is generally defined as a situation in which an official's private financial interests conflict or appear to conflict with the public interest."); House Rule 23, cl. 3 ("A Member . . . may not receive compensation and may not permit compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress.").

[25] *See Federal Conflict of Interest Legislation*, Staff Report to Subcomm. No. 5 of the Comm. on the Judiciary, 85th Cong., 2d Sess. 1 (Comm. Print 1958) ("Within reasonable limits, also, the importance of public confidence in the integrity of the Federal service justifies the requirement that the Federal employee shall avoid the appearance of evil, as well as evil itself."); Code of Ethics for Government Service ¶ 5, *reprinted in 2008 House Ethics Manual* at 355 ("Any person in government service should . . . never accept for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties."); *see also* House Rule 23, cl. 2 ("A Member . . . shall adhere to the spirit and letter of the Rules of the House . . . . ").

[26] House Rule 3, cl. 1.

[27] *See* 5 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* § 5952 at 503-04 (1907) (hereinafter *Hinds' Precedents*); *see also* John V. Sullivan, Parliamentarian, *Constitution, Jefferson's Manual, and Rules of the House of Representatives, One Hundred Eleventh Congress*, H. Doc. 110-162, 110th Cong., 2d Sess. (2009), § 673 (hereinafter *House Rules and Manual*).

[28] *See Hinds' Precedents* § 5952, at 503-04; *see also 2008 House Ethics Manual* at 234-35.

[29] *See Hinds' Precedents* §§ 5950, 5952 at 502, 503-04; *see also House Rules and Manual* § 672.

However, as described above, a House rule now also imposes a requirement that Members who are negotiating for future employment "shall recuse" themselves "from any matter in which there is a conflict of interest or an appearance of a conflict for that Member."[30] At a minimum, Members faced with a vote on a matter that directly impacts a private entity with which they are negotiating would have difficulty balancing the duty they owe to their constituents with the recusal provisions of Rule 27. Members are strongly encouraged to abstain from voting on legislation that provides a benefit targeted to any entity with which the Member is negotiating or from which the Member has accepted future employment. Members likewise are discouraged from sponsoring legislation or earmarks for such an entity. In addition, a House Rule now requires that Members who request an earmark certify to the chairman and ranking member of the committee of jurisdiction that the Member and the Member's spouse have "no financial interest" in the earmark.[31] Any earmark benefitting a entity with which a Member is negotiating or has accepted future employment could be deemed to provide a financial interest to the Member under this provision.

## BENEFITS OFFERED BY PROSPECTIVE EMPLOYERS DURING JOB NEGOTIATIONS

Members may accept "[f]ood, refreshments, lodging, transportation, and other benefits . . . customarily provided by a prospective employer in connection with bona fide employment discussions."[32] Thus, subject to the limitations set out in the rule, a Member may accept travel expenses from an entity with which the Member is interviewing for a position and to meet prospective colleagues. Such travel is *not* subject to the requirement for prior, written approval from the Committee that applies to privately-funded travel undertaken as part of one's House duties. However, travel expenses that exceed $335 from any one source must be disclosed on Schedule VII of the termination financial disclosure statement required of departing Members.[33] In addition, any agreement for future employment also must be disclosed on Schedule IX of that statement.[34]

## POST-EMPLOYMENT RESTRICTIONS

Since 1989, legislative branch officials, including certain employees, have been subject to restrictions on their post-House employment under the Ethics Reform Act.[35] These limitations are part of the federal criminal code, and they apply to Members and officers of the House,[36] as

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[30] House Rule 27, cl. 4.

[31] House Rule 23, cl. 17.

[32] House Rule 25, cl. 5(a)(3)(G)(ii).

[33] 5 U.S.C. app. 4 § 102(a)(2)(B).

[34] *Id.* § 109(a)(7)(A).

[35] 18 U.S.C. § 207.

[36] *Id.* § 207(e)(1).

well as to employees of House Member, committee, and leadership offices who are paid at least 75% of a Member's salary.[37] For these covered individuals, the law establishes a one-year "cooling-off period" measured from the date of the individual's departure from the House payroll.[38] For Members who are not re-elected to the House, this date will be January 3 of the year following the election (not the date of adjournment *sine die*),[39] unless the Member resigns prior to that date.

Set out below is a detailed description of prohibited and permitted post-employment activities of former Members under the statute. This explanation is followed by a table that briefly summarizes the statutory restrictions. Please note that the statute, as part of the criminal code, is enforced by the Justice Department, rather than by the Standards Committee, and Committee interpretations of the statute are not binding on the Justice Department.

### Prohibited Activity

Under the statute, former Members may **not**, for a period of **one year** after leaving office:

- ✕ Knowingly **communicate with or appear before any Member, officer, or employee of the House or the Senate,**[40] or current employees of any other legislative office,[41] with the intent to influence, on behalf of any other person, the official actions or decisions of such Member, officer, or employee.[42] The statute excepts certain representations made on behalf of specific types of entities. These exceptions are described below in the context of "permissible activity."

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[37] *Id.* §§ 207(e)(2)–(e)(7).

[38] *Id.* § 207(e).

[39] *See* U.S. Const. amend. XX, § 2 (establishing the start of the congressional session at noon on January 3).

[40] Unlike former Members, former elected officers of the House are unrestricted in their post-employment interactions with all Senate personnel and may similarly interact with employees of "other legislative offices." *See* 18 U.S.C. § 207(e)(1)(B)(iii). Put another way, during the statutory "cooling-off" period, a former House officer is restricted from contacting only Members, officers, and employees *of the House*.

[41] "[O]ther legislative offices" include employees of the Architect of the Capitol, United States Botanic Garden, Government Accountability Office, Government Printing Office, Library of Congress, Office of Technology Assessment, Congressional Budget Office, and Capitol Police. The term also includes any other House legislative branch office not covered by the other provisions of the statute, such as the Clerk, Parliamentarian, Office of Legal Counsel, and Chief Administrative Officer. *See* 18 U.S.C. § 207(e)(9)(G).

[42] 18 U.S.C. § 207(e)(1).

- ✕ Knowingly **represent a foreign government or foreign political party** before any federal official (including any Member of Congress) with the intent to influence a decision of such official in carrying out his or her official duties.[43]

- ✕ Knowingly **aid or advise a foreign government or foreign political party** with the intent to influence a decision of any federal official (including any Member of Congress) in carrying out his or her official duties.[44]

- ✕ **Use confidential information obtained by means of personal and substantial participation in trade or treaty negotiations** within one year preceding their departure from office, in the course of representing, aiding, or advising anyone other than the United States regarding those negotiations.[45]

As to the prohibition against making any "communication to or appearance before" anyone in the legislative branch, former Members should be aware of the broad manner in which the Department of Justice (DOJ) has defined those terms.[46] A DOJ opinion defines "communication" as "the act of imparting or transmitting information with the intent that the information be attributed to the former official."[47] Such DOJ guidance is binding on the Standards Committee.

Further, an advisory memorandum issued by the U.S. Office of Government Ethics (OGE) for Executive Branch employees states, "[a]n '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."[48] The provision is broad enough that

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[43] *Id.* §§ 207(f)(1)(A) and (i)(1)(B). Section § 207 uses the same definitions of the terms "foreign government" and "foreign political party" as the Foreign Agents Registration Act (22 U.S.C. § 611(e), (f)). *See id.* § 207(f)(3). These restrictions also apply with regard to any foreign commercial corporation that "exercises the functions of a sovereign." *See* U.S. OGE, *Summary of Post-Employment Restrictions of 18 U.S.C. § 207* at 11 (July 29, 2004) (available on the OGE Web site, www.usoge.gov, under the link for DAEOgrams). Also pertinent to these provisions of the statute is a U.S. Office of Legal Counsel (OLC) opinion of June 22, 2004, the text of which is available under the same link on the OGE Web site (DAEOgram of Oct. 5, 2004), which concludes that 18 U.S.C. § 207(f) covers representational contacts with Members of Congress.

[44] 18 U.S.C. § 207(f)(1)(B).

[45] *Id.* § 207(b).

[46] 18 U.S.C. § 207. The provisions of 18 U.S.C. § 207 should not be confused with those of the Lobbying Disclosure Act (2 U.S.C. § 1601 *et seq.*) (LDA). In other words, merely because a particular activity does not constitute "lobbying" for purposes of that Act does **not** mean that the activity is permissible under 18 U.S.C. § 207.

[47] U.S. OLC, *"Communications" under 18 U.S.C. § 207* at 3 (Jan. 19, 2001) (available on the OLC Web site, www.usdoj.gov/olc, under the link for memoranda/opinions). In that opinion, the OLC provides the following illustrative examples: "A high-ranking official who aggressively publicizes the fact that he is leaving an agency to start a one-man consulting firm, then submits a report to the agency shortly thereafter under the name of that firm, almost certainly intends that the report will be attributed to him. Similarly, a former official who is not introduced by name, but participates on a conference call with his former agency colleagues, almost certainly intends this his colleagues will recognize his voice." *Id.*

[48] *Summary of Post-Employment Restrictions of 18 U.S.C. § 207*, *supra* note 43, at 3.

it precludes a former Member even from, for example, requesting or scheduling, for or on behalf of any other person, a meeting with any current Member, officer, or employee on official business.[49] While OGE guidance is merely persuasive, rather than binding, on Committee interpretations of the statute, this Committee endeavors when possible to interpret the statute in a manner consistent with OGE practice.

In addition to the one-year "cooling-off period" restrictions set out above, Members should further be aware of a permanent federal statutory restriction that prohibits any U.S. citizen acting without authority of the United States from:

✗ Directly or indirectly **commencing or carrying on any correspondence or intercourse with any foreign government**, or any officer or agent thereof, with the intent to influence the measures or conduct of any foreign government or of any officer or agent thereof in relation to any disputes or controversies with the United States, or to defeat the measures of the United States.[50]

**Permissible Activity**

Under federal statutory law, former Members **may, immediately** upon leaving office:

✓ **Aid or advise clients** (other than foreign governments or foreign political parties) **concerning how to lobby Congress**, provided the former Member makes no appearance before or communication to Members or employees of Congress. Such a "background role" would not pose the contemplated risk of improper influence since the current officials would not be aware of the former official's participation.[51] However, any such participation must remain behind-the-scenes; during the one-year

[49] Committee interpretations of the statute contained in this memorandum are based on analysis of the statutory terms and purposes, and opinions and guidance, issued by the Justice Department and OGE. However, as noted above, 18 U.S.C. § 207 is a criminal statute, and Committee interpretations of it are not binding on the Justice Department (*but see* note 74, below).

[50] 18 U.S.C. § 953 (the Logan Act). An eighteenth century law, the Logan Act restricts private correspondence with foreign governments. This statute, which appears to have been a reaction to the attempts of one citizen to engage in private diplomacy, has never been the basis of a prosecution, and this Committee has publicly questioned its constitutionality. House Comm. on Standards of Official Conduct, *Manual of Offenses and Procedures, Korean Influence Investigation*, 95th Cong., 1st Sess. 18-19 (Comm. Print 1977). Members should be aware, however, that the law remains part of the criminal code.

[51] Former Members who are lawyers may have additional restrictions, as explained in note 16, *supra*.

"cooling-off" period, former Members must not permit their name to be openly associated with contacts made by other persons.[52]

✓ **Contact Executive Branch** officials with the intent to influence official action so long as not representing a foreign government or foreign political party.[53]

✓ **Contact state government officials** with the intent to influence state government actions or decisions. Former Members should comply with any state laws governing such contacts.

✓ **Contact one foreign government on behalf of another** foreign government.[54]

✓ **Contact Members, officers and employees of the House and Senate and other Legislative Branch officials** under any of the following circumstances:

- The former Member is carrying out official duties on behalf of the **federal government** or the District of Columbia;[55]
- The former Member is acting as an **elected official of a state or local government;**[56]
- The former Member is an **employee** (not a private consultant or other independent contractor) of a **state or local government,** or an agency or instrumentality thereof, acting on its behalf;[57]

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[52] As noted above, the major restrictions set forth in 18 U.S.C. § 207(e) focus on communications and appearances. By contrast, if a former Member plays a background role, and does not appear in person or convey his or her name on any communications, the law does not appear to prohibit that person from advising those who seek official action from the Congress. This construction is consistent with regulations promulgated by the U.S. OGE, interpreting a comparable prohibition that applies to Executive Branch personnel. *See* 5 C.F.R. § 2637.201(b)(3), (6). This matter is also addressed in the 2001 U.S. OLC opinion that is cited in note 47 above, including with regard to activities that do not constitute permissible "behind-the-scenes" activities.

[53] Former Members who are representing a tribal government as an employee of the tribe or as an officer or employee of the United States assigned to a tribe have an additional restriction on contacts with the Executive Branch and certain other entities. Such individuals must first notify the head of the department, agency, court, or commission being contacted of "any personal and substantial involvement" they had in the matter while a Member. *See* 25 U.S.C. § 450i(j); 18 U.S.C. § 207(j)(1)(B).

[54] No federal statute expressly permits such contacts, but so far as the Committee is aware, no federal statute prohibits such contacts. Thus, it appears that such contacts are permissible under federal law. Members who intend to undertake such activity, however, should carefully review the Foreign Agents Registration Act (22 U.S.C. §§ 611 *et seq.*) (FARA) to ensure compliance with its requirements. Briefly stated, FARA provides that anyone who acts within the United States under the direction or control of a foreign principal to influence official decisions, official policies, or public opinion on behalf of a foreign principal must register with the Justice Department. *See generally* 22 U.S.C. §§ 611 *et seq.*; U.S. Dep't of Justice (DOJ), "FARA FAQ" (available on the DOJ Web site, www.justice.gov/criminal/fara/).

[55] 18 U.S.C. § 207(j)(1)(A).

[56] *Id.*

- The former Member is an **employee** of an accredited, degree-granting **institution of higher education** and is acting on behalf of such institution;[58] or

- The former Member is an **employee** of a **charitable hospital or medical research organization** and is acting on behalf of such hospital or organization.[59]

✓ **Represent or give aid or advice to international organizations** of which the United States is a member **if** the Secretary of State certifies in advance that such activities are in the interest of the United States.[60] Otherwise, former Members must wait one year before engaging in such activities.

✓ Make statements or communications as an **employee of a candidate, authorized campaign committee, national or state party, or political committee**, if acting on behalf of that committee or party.[61] However, if the former Member is employed by a person or entity who represents, aids, or advises only such persons or entities, the communications would prohibited.[62]

✓ **Make statements based upon the "special knowledge"** of the former Member concerning the particular area that is the subject of the statement, if no compensation is received in connection therewith.[63]

✓ **Give testimony under oath**, or make statements required to be made under penalty of perjury.[64]

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[57] *Id.* § 207(j)(2)(A).

[58] *Id.* § 207(j)(2)(B). The statute uses the definition of "institution of higher education" contained in § 101 of the Higher Education Act of 1965 (20 U.S.C. § 1001 *et seq.*). As a general matter, the definition includes only nonprofit, degree-granting educational institutions located in the United States or its territories. *See* 20 U.S.C. § 1001(a)-(b).

[59] 18 U.S.C. § 207(j)(2)(B). For this exception to apply, the hospital or medical research organization must be exempted under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)). *Id.*

[60] *Id.* § 207(j)(3).

[61] *Id.* § 207(j)(7)(A).

[62] *Id.* § 207(j)(7)(B)(ii)(II).

[63] *Id.* § 207(j)(4). "Special knowledge" is not defined in the statute. The Federal Register, which provides rules on the application of the statute to employees in the Executive Branch, states that a "former employee has special knowledge concerning a subject area if he is familiar with the subject area as a result of education, interaction with experts, or other unique or particularized experience." 5 C.F.R. § 2641.301(d)(1). In addition, in the proposed rulemaking for this provision, the OGE emphasized that it regarded its interpretation of this exception as being "relatively narrow." *See* 73 Fed. Reg. 36183 (June 25, 2008). While these definitions are not binding on the Standards Committee, they provide guidance as to how the term should be interpreted.

[64] 18 U.S.C. § 207(j)(6).

- ✓ **Contact staff of the Clerk of the House** regarding the Member's compliance with the disclosure requirements under the Lobbying Disclosure Act.[65]

- ✓ **Make political contributions** to, and **sponsor or attend political fundraisers** for, current Members of Congress, *provided that* no appearances or communications are made with the intent to influence, on behalf of any other person, the official actions or decisions of current Members or staff.[66]

- ✓ **Interact socially with current Members of Congress and staff** *provided that* no appearances or communications are made with the intent to influence, on behalf of any other person, the official actions or decisions of current Members or staff.[67]

*Example 1.* Member *A* retires to accept an appointed position in an Executive Branch agency. *A* may immediately contact Congress on behalf of the agency.

*Example 2.* Member *B* retires to become governor of his state. *B* may immediately lobby Congress on behalf of his state.

*Example 3.* Member *C* retires to become the president of a private university. *C* may immediately lobby Congress on behalf of the school.

*Example 4.* Member *D* retires and moves back to her home state. *D* may immediately lobby state government officials on behalf of any clients.

*Example 5.* Member *E* retires to become a lobbyist. During her first year out of office, *E* lobbies only Executive Branch personnel, *E* never contacts Members or employees of Congress on behalf of clients, and *E* has no foreign clients. *E* is complying with the law.

*Example 6.* During his one-year "cooling-off" period, former Member F wishes to call a current Member to request that she meet with representatives of one of his clients to discuss legislation of interest to the client. F would not be present at the meeting. F would violate the statute by requesting the meeting, in that the request would be a communication intended to influence official action.

*Example 7.* During his first year out of office, former Member *G* wishes to contact a current Member to urge him to support federal funding for a non-profit organization operated by a friend of *G*. The non-profit organization is not a client of *G*, and *G* would receive no compensation for making the contact. *G* would violate the statute by doing so, in that the statute bars such contacts regardless of whether the former official would be compensated for them.

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[65] *Id.* § 207(e)(8).

[66] *See id.* § 207.

[67] *See id.*

*Example 8.* During her one-year "cooling-off" period, former Member *H*, who has become a lobbyist, is asked by a current Member about the views of one of her clients on a pending piece of legislation. *H* would violate the statute if she were to state her client's views to the current Member, in that there is no exception in the statute for covered communications that are solicited by a current Member or staff person. However, it may be permissible for *H* to refer the Member to one of her colleagues who is not subject to post-employment restrictions.

## *Entity Contacted by Former Member*

*Entity Represented by Former Member*

| | Congress | Executive Branch | Foreign Governments | State Governments |
|---|---|---|---|---|
| **Private Entity** | Must wait 1 year before contacting Congress directly. May advise entity behind scenes immediately | May contact immediately | May contact immediately | May contact immediately |
| **Federal, State, or Local Government** | May contact Congress immediately if elected official or employee of the federal, state, or local government | May contact immediately | May contact immediately | May contact immediately |
| **Tribal Government** | Must wait 1 year before contacting Congress directly. May advise entity behind scenes immediately | May contact immediately if employed by tribe or U.S.; must inform head of agency or department of any personal and substantial involvement in matter while a Member | May contact immediately | May contact immediately |
| **Foreign Government** | Must wait 1 year before contacting Congress or advising foreign government behind scenes. Must register with Justice Department if acting as a foreign agent in the U.S. | Must wait 1 year before contacting Executive Branch or advising foreign government behind scenes. Must register with Justice Department if acting as a foreign agent in the U.S. | May contact immediately | May contact immediately. Must register with the Justice Department if acting as a foreign agent in the U.S. |
| **International Org. of which U.S. is a Member** | If Secretary of State approves as in national interests may immediately advise international organization and contact Congress directly; otherwise, must wait 1 year to do either | If Secretary of State approves as in national interests may immediately advise international organization and contact executive branch directly; otherwise, must wait 1 year to do either | May contact immediately | May contact immediately |
| **Accredited U.S. College or University** | May contact immediately if an employee of the college or university | May contact immediately | May contact immediately | May contact immediately |
| **Charitable Hospital or Medical Research Organization** | May contact immediately if an employee of the hospital or organization | May contact immediately | May contact immediately | May contact immediately |
| **Candidate, Political Campaign, or Party** | May make communications immediately as employee of candidate, authorized campaign committee, or federal or state party or committee, unless employed by entity that advises only such entities | May contact immediately | May contact immediately | May contact immediately |

## Penalties

Each violation of the post-employment restrictions set forth in the statute is a felony punishable by imprisonment up to one year (or up to five years for willful violations) and a fine of up to $50,000 for each violation or the value of the compensation received for the act that violated the restrictions, whichever is greater.[68] The statute further authorizes the Attorney General to seek an injunction prohibiting a person from engaging in conduct that violates the act.[69]

By its terms, 18 U.S.C. § 207 governs the conduct of **former** Members, officers, and employees, and does not apply to the conduct of **current** Members, officers, and employees. However, the post-employment restrictions have been the subject of recent close attention by the United States Department of Justice, as reflected in the guilty pleas by former House staff and others to criminal violations of the statute.[70] Therefore, current Members and staff who receive or otherwise participate in improper contacts by a covered former employee should be aware that, depending on the circumstances, they may be subject to criminal or House disciplinary action. The recent examples involving § 207 violations indicate that a Member who aids and abets a covered former employee in the violation may be prosecuted for conspiracy to violate the post-employment restrictions.[71]

Furthermore, in a Standards Committee disciplinary case that was completed in the 106th Congress, a Member admitted to engaging in several forms of conduct that violated House Rules requiring that each Member and staff person "conduct himself at all times in a manner that shall reflect creditably on the House."[72] One of those violations was his engaging in a pattern and practice of knowingly allowing his former chief of staff to appear before and communicate with him in his official capacity during the one-year period following her resignation, "in a manner that created the appearance that his official decisions might have been improperly affected."[73]

A Member (or former Member) who has any concerns about the applicability of the post-employment restrictions to his or her proposed conduct should write to the Standards Committee to request a written advisory opinion. While, as noted above,

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[68] 18 U.S.C. § 216.

[69] *Id.* § 216(c).

[70] *See, e.g., United States v. Jack A. Abramoff*, Docket No. 06-CR-001 (D.D.C.) ("*Abramoff* action"). In addition, on September 15, 2006, the Department of Justice filed a plea agreement in which former Representative Robert W. Ney pleaded guilty to conspiracy to violate, *inter alia*, the post-employment restrictions for former covered employees ("*Ney* action").

[71] *See, e.g., Abramoff* and *Ney* actions, *supra* note 70.

[72] House Rule 23, cl. 1; *see also* House Comm. on Standards of Official Conduct, *In the Matter of Representative E.G. "Bud" Shuster*, H. Rep. 106-979, 106th Cong., 2d Sess. vol. I (July 19, 2002) ("Shuster Report").

[73] House Comm. on Standards of Official Conduct, *Summary of Activities, One Hundred Sixth Congress*, H. Rep. 106-1044, 106th Cong., 2d Sess. at 10, 13, 16 (2000); *see also* Shuster Report, *supra* note 72, vol. I.

Standards Committee interpretations of 18 U.S.C. § 207 are not binding on the Justice Department, those interpretations are based on the Committee's analysis of the terms and purposes of the statute, as well as any applicable opinions or guidance of the Justice Department or the U.S. OGE of which the Committee is aware.[74]

## FLOOR PRIVILEGES OF A FORMER MEMBER

The type of work that a Member does after leaving office may limit the Member's future floor privileges. While former Members generally are entitled to admission to the Hall of the House, this privilege is not extended to those who: (1) are registered lobbyists or agents of a foreign principal; (2) have any direct personal or pecuniary interest in any pending legislation; ***or*** (3) work for or represent anyone "for the purpose of influencing, directly or indirectly, the passage, defeat, or amendment of any legislative proposal."[75] In short, a Member may not take advantage of his or her status as a former Member to lobby current Members on the House floor (that is, those areas restricted to the public). Unlike the post-employment restrictions, this rule has no time limit.[76]

In addition, a resolution adopted at the start of the 111th Congress provides that former Member and officers, as well as their spouses, who are registered federal lobbyists or agents of a foreign principal are also prohibited from access "to any exercise facility which is made available exclusively to Members and former Members, officers and former officers" during the 111th Congress.[77]

## FINANCIAL DISCLOSURE REQUIREMENTS FOLLOWING DEPARTURE FROM HOUSE EMPLOYMENT

A departing Member of Congress must file a final Financial Disclosure Statement, called a "termination report," within 30 days of leaving office.[78] Extensions of up to 90 days are available upon written request to the Committee when made prior to the original due date.[79]

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[74] It should be noted that one court held that it is a complete defense to a prosecution for conduct assertedly in violation of a related federal criminal strict-liability statute (18 U.S.C. § 208) that the conduct was undertaken in good faith reliance upon erroneous legal advice received from the official's supervising ethics office. *Hedges*, 912 F.2d at 1404-06.

[75] House Rule 4, cl. 4(a).

[76] Departing Members may also wish to review a memorandum issued by the Congressional Research Service, *Selected Privileges and Courtesies Extended to Former Members of Congress,* Report No. R41121.

[77] H. Res. 5 § 3(c)(1) (adopted Jan. 6, 2009).

[78] 5 U.S.C. app. 4 § 101(e).

[79] *Id.* § 101(g); Comm. on Standards of Official Conduct, *Instruction Guide for Completing Calendar Year 2009 Financial Disclosure Statement Form A* (*2009 Form A FD Instructions*) at 3.

The termination report, filed on the same form as the annual report, covers all financial activity through the end of the Member's term.[80] Schedule IX of the report requires disclosure of any agreement entered into by the filer, oral or written, with respect to future employment.[81] Thus, if a Member accepts a future position while still on the House payroll, the Member will have to disclose the agreement on the Member's public termination filing. The date of the agreement, the future employer, the position or title and the starting date must be disclosed, but the amount of the compensation need not be reported.[82] The Member will also have to disclose, on Schedule VII of the report, any travel reimbursements exceeding $335 received from any source in connection with job-search activity.[83]

However, a departing Member who, prior to thirty days after leaving office, has accepted another federal position requiring the filing of a *public* financial disclosure statement need not file a Termination Report.[84] Any departing Member who is not require to file a termination report for this reason must notify the Clerk *in writing* of that fact.[85]

## USE OF EXCESS CAMPAIGN FUNDS

Members are prohibited by House rules from converting campaign funds to personal use.[86] Federal election law, as implemented by a set of regulations issued by the Federal Election Commission (FEC), bans the use of excess campaign funds for personal purposes by anyone, incumbents and non-incumbents alike.[87] All campaign resources (including equipment, furniture, and vehicles) are subject to the same restrictions.[88] A Member may not keep campaign property upon retirement from Congress unless he or she pays the campaign fair market value.[89] In valuing the property, the Member may take into account the fact that it has been used.[90]

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[80] *Id.* § 101(e). For Members who serve out their full term, this date will be January 3; Members who retire earlier than the end of the term will have different end date.

[81] *Id.* § 102(a)(7).

[82] *See id.*; *see also 2009 Form A FD Instructions, supra* note 79, at 23.

[83] 5 U.S.C. app. 4 § 102(a)(2)(B). Such travel must be disclosed on the Member's Financial Disclosure Statement even if the Member ultimately remains in Congress rather than accepting private employment.

[84] *Id.* § 101(e).

[85] *See 2009 Form A FD Instructions, supra* note 79, at 2.

[86] House Rule 23, cl. 8.

[87] 2 U.S.C. § 439a(b)(1); 11 C.F.R. § 113.2(e).

[88] *See generally* 2 U.S.C. § 439a(b)(1); 11 C.F.R. § 113.1.

[89] 11 C.F.R. §§ 113.1(g)(3) and 113.2(e).

[90] 11 C.F.R. § 113.1(g)(3).

*Example 9.* Member *J* would like to keep the car owned by his campaign when he retires. If he pays the campaign the car's fair market value, *J* may do so.

As to excess campaign funds, among the permissible uses under statutory law are donation to charities described in § 170(c) of the Internal Revenue Code,[91] and contribution to any national, state, or local committee of a political party.[92] A former Member may use campaign funds to defray the costs of winding down his or her congressional office for a period of up to six months after leaving office.[93] In addition, both the FEC and the Standards Committee have ruled that a retiring Member may use campaign funds to pay the expenses of moving both congressional office furnishings and personal household furnishings and effects back to the Member's home state.[94] A retiring Member should consult with FEC staff on the specifics of statutory law and FEC rules on the use or disposition of excess campaign funds, including with regard to maintaining those funds for use in a future campaign, or making donations to other candidates.

## OUTSIDE EMPLOYMENT AND EARNED INCOME RESTRICTIONS

All departing Members remain subject to all House rules, including the gift rule and the limitations on outside employment and earned income,[95] even after adjournment *sine die*, until the end of their term, unless they elect to resign earlier. These rules are particularly important to bear in mind for a departing Member whose prospective employer suggests that the Member start work prior to leaving office. In calendar year 2010, a Member may not receive outside earned income (including, for example, a signing bonus) in excess of $26,550, and **no** earned income may be received for: (1) providing professional services involving a fiduciary relationship, including the practice of law, or any consulting or advising; (2) being employed by an entity that provides such services; or (3) serving as a board member or officer of any organization.[96] Regardless of whether compensation is received, a Member may not allow his or her name to be used by an organization that provides fiduciary services. In addition, a Member may not receive any honoraria (*i.e.*, a payment for a speech, article or appearance),[97] although he or she may receive compensation for teaching, if the Member first secures specific prior permission from this Committee.[98]

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[91] 2 U.S.C. § 439a(a)(3); 11 C.F.R. § 113.2(b); *see also* 11 C.F.R. § 113.1(g)(2).

[92] 2 U.S.C. § 439a(a)(4) ; 11 C.F.R. § 113.2(c).

[93] 11 C.F.R. § 113.2(a)(2).

[94] FEC Advisory Opinion 1996-14 (available on the FEC Web site, www.fec.gov); *2008 House Ethics Manual* at 162.

[95] House Rule 25, cl. 1-5. The outside employment and earned income limitations are also codified at 5 U.S.C. app. 4 §§ 501-502.

[96] House Rule 25, cl. 1-4; *see also* 5 U.S.C. app. 4 §§ 501-502.

[97] House Rule 23, cl. 5; House Rule 25, cl. 1(a)(2).

[98] House Rule 25, cl. 2(e).

*Example 10.* Member *K* plans to join a law firm when she leaves office. Since this is a firm providing professional services of a fiduciary nature, *K* may not commence employment with the firm until the new Congress is sworn in, unless she resigns early.

## TRAVEL

Several rules may affect a departing Member's travel decisions. House rules prohibit the use of committee funds and local currencies owned by the United States to pay for travel by a Member: (1) after the date of a general election in which he or she was not elected to the succeeding Congress; or (2) in the case of a Member who is not a candidate in a general election, after the **earlier** of the date of the general election or adjournment *sine die* of Congress.[99]

With regard to privately funded travel that is factfinding in nature, because the gift rule requires that such travel be related to official duties,[100] it is questionable whether a Member may accept an invitation for a such travel that would take place after the adjournment *sine die* of the House. As of that time, the official responsibilities that may justify acceptance of travel expenses for such a purpose will practically have come to an end. However, this consideration does not limit the ability of a departing Member to accept travel expenses from a private source for the purpose of enabling the Member to participate substantially in an officially-related event, such as to give a speech.

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***Any questions on these matters should be directed to the Committee's Office of Advice and Education at (202) 225-7103.***

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[99] House Rule 24, cl. 10.

[100] House Rule 25, cl. 5(b)(1)(A); *see also* House Rule 25, cl. 5(b)(3)(G).