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ONE HUNDRED SIXTEENTH CONGRESS

U.S. House of Representatives

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MEMORANDUM TO ALL HOUSE MEMBERS, OFFICERS, AND EMPLOYEES

FROM: Committee on Ethics
Theodore E. Deutch, Chairman
Kenny Marchant, Ranking Member

SUBJECT: Negotiations for Future Employment and Restrictions on Post-Employment
for House Staff

The purpose of this memorandum is to remind you about issues of concern to staff members¹ who are negotiating for future employment or departing from employment with the House of Representatives or one of the legislative branch offices.² The matters discussed here include negotiations for future employment, post-employment restrictions, financial disclosure requirements (Termination Reports), and outside employment and earned income restrictions. Although this memorandum will be of particular interest to departing staff, current staff and their employing Members should also familiarize themselves with these restrictions, particularly the criminal restrictions on post-employment communications.³ Current Members and staff are reminded that they may not assist in the violation of these restrictions.

In addition, the Committee would like to take this opportunity to note one statutory provision that applies to **all House Members and staff**. House Members and staff may not use confidential information obtained by means of personal and substantial participation in ongoing trade or treaty negotiations for one year prior to leaving House employment in the course of

¹ The terms “staff” and “employee” are used interchangeably throughout this memorandum to refer to persons who are employed by a Member, committee, leadership office, or other legislative offices (*see* note 2, below). Relevant distinctions among these categories of employees are noted as necessary.

² “[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. It also includes any other House legislative branch office not covered by the other provisions, such as the Clerk, Parliamentarian, Office of General Counsel, and Chief Administrative Officer. *See* 18 U.S.C. § 207(e)(9)(G).

³ This guidance, as well as some additional requirements and restrictions, also applies to House Members and officers, and is addressed in a separate memorandum entitled “Negotiations for Future Employment and Restrictions on Post-Employment for House Members and Officers.” This staff memorandum will not specifically mention the requirements for Members and officers, or how they differ from those pertaining to House staff. Members and officers seeking guidance should consult the companion memorandum referenced above.

representing, aiding, or advising anyone other than the United States regarding those ongoing negotiations.⁴ As with other provisions of this statute, this prohibition lasts for one year after departure from the House payroll.⁵

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 House employee, regardless of salary level, who wishes to engage in negotiations for future employment, is as follows. First and foremost, it would be improper for a House employee to permit the prospect of future employment to influence the official actions of the employee, or the employing office of the employee.⁶ Some employees 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 relevant statute 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.⁷ Those decisions found that the term “negotiation” should be construed broadly.⁸ However, these decisions make a distinction between “negotiations,” which trigger the rule, and “[p]reliminary or exploratory talks,” which do not.⁹ 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.”¹⁰ Thus, merely sending a copy of one’s résumé to a private entity is not considered “negotiating” for future employment.

⁴ 18 U.S.C. § 207(b). For purposes of this provision, the term “trade negotiation” means “negotiations which the President determines to undertake to enter into a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988, and does not include any action taken before that determination is made” and the term “treaty” means “an international agreement made by the President that requires the advice and consent of the Senate.” *Id.* at § 207(b)(2).

⁵ *Id.*

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

⁷ 18 U.S.C. § 208.

⁸ 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).

⁹ See *Schaltenbrand*, 930 F.2d at 1558-59.

¹⁰ *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.

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.¹¹ The Code of Ethics for Government Service forbids anyone in government service from accepting “favours or benefits under circumstances which might be construed by reasonable persons as influencing the performance” of governmental duties.¹² Federal criminal law 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.¹³ 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.¹⁴

In light of these restrictions, all House employees should be particularly careful in negotiating for future employment, especially when negotiating with anyone who could be substantially affected by the performance of the employee’s official duties.¹⁵ It may be prudent for the employee 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. Those employees who will be subject to the post-employment restrictions, which are addressed later in this memorandum, 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 employee is subject to post-employment restrictions, which should be briefly outlined.¹⁶ Departing employees who are lawyers should consult their local bar associations concerning the application of rules governing their involvement in matters in which they participated personally and substantially during their time with the House.¹⁷ In addition, as addressed in the next section of this memorandum, those employees subject to the post-employment restrictions must disclose employment negotiations in writing to the Ethics Committee.

¹¹ House Rule 23, cl. 3.

¹² Code of Ethics for Government Service ¶ 5, *reprinted in 2008 House Ethics Manual* at 355.

¹³ 18 U.S.C. § 201(b)(2)(A).

¹⁴ *Id.* § 201(c)(1)(B).

¹⁵ *See* Code of Ethics for Government Service ¶ 5, *reprinted in 2008 House Ethics Manual* at 355.

¹⁶ *See* 18 U.S.C. § 207. These restrictions are explained in detail later in this memorandum. Briefly, covered House employees may not contact their former employing Member or Members on official business for one year after leaving office, nor may they assist any foreign entity, i.e., a foreign government or foreign political party, in seeking to influence a decision of any federal official during that year.

¹⁷ A former employee 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 where those services were provided by the firm while the individual was still employed by the government. (OGE website at <https://www.oge.gov>).

Please note that 18 U.S.C. § 203 is a federal criminal statute within the jurisdiction of the U.S. Department of Justice; therefore, staff may wish to seek guidance from outside counsel prior to accepting fees that may implicate 18 U.S.C. § 203.

Provided that employees 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.

DISCLOSURE OF EMPLOYMENT NEGOTIATIONS AND RECUSAL REQUIREMENTS

Certain House staff 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.¹⁸ Staff subject to this disclosure requirement are those employees of the House who are paid at or above an annual rate of \$130,500 (\$10,875 per month) for any two months in a calendar year, including any federal civil service or military annuities.¹⁹ This rate is referred to as the post-employment rate.

The term “negotiation” is not defined in the relevant statute or House rule. 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 to reaching an agreement” and in which there is “discussion and active interest on both sides.”²⁰ In addition, staff paid at or above the post-employment rate 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 Ethics Committee in writing of such recusal.²¹

The terms “conflict” and “appearance of conflict” also are not defined in the rule. The Committee has stated that a “conflict of interest becomes problematic when [an employee] uses his position to enhance his personal financial interests or his personal financial interests impair his

¹⁸ House Rule 27, cl. 2; Stop Trading on Congressional Knowledge Act, Pub. L. No. 112-105 (Apr. 4, 2012) (hereinafter STOCK Act) § 17. House Rule 27, clause 1, which imposes a similar restriction on House Members, limits the disclosure requirement for Members to negotiations with *private* employers. While the express language of clause 2, which covers employees, does not limit its terms to negotiations with private employers, the Committee has read the two clauses consistently as excluding from the disclosure requirement any job negotiations with government entities for both Members and employees.

¹⁹ House Rule 27, clause 2, imposes the disclosure requirement on any “employee of the House earning in excess of 75 percent of the salary paid to a Member.” In 2020, that rate is \$130,500 per year for most House employees; *see also* Section 7 of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94 Dec. 20, 2019), prohibiting a scheduled cost-of-living pay raise for Members. As a result, Member pay will remain at \$174,000 for 2020.

²⁰ *See Hedges*, 921 F.2d at 1403 n.2.

²¹ House Rule 27, cl. 4.

judgment in conducting his public duties.”²² Employees should also avoid situations that might be viewed as presenting even a risk that the individual might be improperly influenced by personal financial interests.”²³

The Committee has issued forms, available on the Committee website (<https://www.ethics.house.gov>), to be used for these notification requirements. When notifying the Committee of negotiations or agreements for future employment or compensation, required staff should complete and sign an employment negotiation form, formally titled the “Notification of Negotiations or Agreement for Future Employment.”²⁴ The completed form must be submitted to the Committee. All filers should keep a copy of their submission for their records. There is a separate form for notifying the Committee of recusal, titled the “Statement of Recusal.” Staff subject to the post-employment restrictions who recuse themselves from official matters pursuant to House Rule 27 and/or the STOCK Act must complete and submit the recusal form to the Committee.²⁵

Forms may be sent by email to EthicsCommittee@mail.house.gov.

BENEFITS OFFERED BY PROSPECTIVE EMPLOYERS DURING JOB NEGOTIATIONS

House employees may accept “[f]ood, refreshments, lodging, transportation, and other benefits . . . customarily provided by a prospective employer in connection with bona fide employment discussions.”²⁶ Thus, subject to the limitations set out in the rule, a House employee may accept travel expenses from an entity with which the individual 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 \$415 from any one source must be disclosed

²² House Comm. on Standards of Official Conduct, *In the Matter of Representative Sam Graves*, H. 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.”).

²³ *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 (“[An] . . . employee of the House shall adhere to the spirit and letter of the Rules of the House . . .”).

²⁴ House Rule 27, cls. 1-3.

²⁵ *Id.*, cl. 4. Clause 4 does not require staff to file their notice of negotiation with the Clerk, as is required of House Members.

²⁶ House Rule 25, cl. 5(a)(3)(G)(ii).

on Schedule H (“Travel Payments and Reimbursements”) of the Termination Report required of departing senior employees.²⁷ Such travel must be disclosed on the employee’s Financial Disclosure Statement even if the individual ultimately remains employed by the House rather than accepting private employment.²⁸ In addition, any agreement for future employment also must be disclosed on Schedule F (“Agreements”) of that statement, if the agreement was entered into prior to the employee’s last date on House payroll.²⁹

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.³⁰ These limitations are part of the federal criminal code, and they apply to Members and officers of the House, as well as to employees of House Member, committee, and leadership offices who are paid at least 75% of a Member’s salary, inclusive of any federal civil service or military annuity.³¹ The basic rate of pay for Members in calendar year 2020 is \$174,000, and thus the post-employment threshold for individuals who terminate their employment with a Member, committee, or leadership office in 2020 is **\$130,500**. The threshold rate for other years is available from the Ethics Committee. For employees of “other legislative offices,”³² the basic rate of pay triggering the restrictions is level IV of the Executive Schedule, which for 2020 is **\$170,800**.³³ Please note that this rate of pay is subject to change in 2021.

An employee is subject to these restrictions if the employee is paid at or above the threshold rate for at least 60 days during the one-year period preceding termination of the employee’s House service.³⁴ Accordingly, it is possible for an employee who is usually paid below the threshold rate to become subject to the post-employment restrictions by the receipt of a “bonus” or merit adjustment that is paid by adjusting the employee’s basic rate of pay in two or more months, even if the adjustment is intended to be temporary.³⁵ Employees who are subject to the restrictions are referred to as “covered” individuals.

²⁷ Please note that the requirement to file a Financial Disclosure Statement covering calendar year 2020 applies to officers and employees whose basic rate of pay for at least 60 days in 2020 was \$131,239, or a monthly salary at or above \$10,936. Staff paid at this rate are referred to as “senior staff.”; *See* Ethics in Government Act (EIGA) §§ 109(13) and 101(d), 5 U.S.C. app. §§ 109(13) and 101(d).

²⁸ 5 U.S.C. app. § 102(a)(2)(B).

²⁹ *Id.* § 102(a)(7)(A).

³⁰ *See* 18 U.S.C. § 207(e), (f).

³¹ *Id.* § 207(e)(7). With regard to House employees who are federal civil service or military annuitants, it is the view of the Ethics Committee that the post-employment restrictions apply to those whose combined House salary and annuity were at or above the threshold rate for the specified time period.

³² For the definition of “other legislative offices,” see note 2, above.

³³ 18 U.S.C. § 207(e)(7)(B).

³⁴ *Id.* § 207(e)(7).

³⁵ The Committee has determined that lump sum payments, when properly used by an employing office, do not constitute part of the recipient’s “basic rate of pay.” *See 2008 House Ethics Manual* at 240, n.112.

For covered individuals, the law establishes a one-year “cooling-off period” that begins from the date of the individual’s departure from the House payroll.³⁶ When an office continues an individual on the payroll for the purpose of paying for accrued leave after the individual’s services to the House have ceased, the one-year cooling-off period will not begin until after the individual’s final day on the House payroll. In general, House employees whose pay is **below** the threshold are **not** subject to the post-employment restrictions set out in the statute, with the exception of the provision described earlier in this memorandum regarding participation in trade and treaty negotiations, and no other provision of federal statutory law or the House rules establishes any comparable restrictions on post-employment activity.

Set out below is a detailed description of prohibited and permitted post-employment activities of former staff 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 Department of Justice (DOJ), rather than by the Ethics Committee. While the Ethics Committee interpretations of 18 U.S.C. § 207 are not binding on DOJ, 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 DOJ or OGE of which the Committee is aware. Accordingly, an employee (or former employee) who has any concerns about the applicability of the post-employment restrictions to his or her proposed conduct should contact the Ethics Committee for guidance.³⁷ The Committee also recommends covered employees seek guidance from outside counsel.

Prohibited Activity

Under the statute, a covered former employee may **not**, for a period of **one year** after House employment:

- ✗ **Knowingly communicate with or appear before the employee’s former employing office or committee** with the intent to influence, on behalf of any other person, the official actions or decisions of a Member, officer, or employee in such office or on such committee.³⁸ An individual who was employed by more than one House office (i.e., “shared staff”) during the individual’s last twelve months of employment with the House is subject to the post-employment restrictions with respect to each of the individual’s employing offices if the employee’s combined House salaries exceeded the triggering threshold.

The statute excepts certain representations made on behalf of specific types of entities, as described below in the context of “permissible activity.” With regard to restricted activity, the statute specifically provides that:

³⁶ *Id.* § 207(e)(3)-(7).

³⁷ 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.

³⁸ *Id.*

- Covered former employees on the **personal staff**³⁹ of a Member may not seek official action, on behalf of other persons, from that Member or from any of the Member's employees.⁴⁰
- Covered former **committee staff**⁴¹ may not seek official action, on behalf of other persons, from any current Member or employee of the employing committee or from any Member who was on the committee during the last 12 months the former employee worked there.⁴² This restriction bars contacts with any of these individuals on any subject relating to official business, regardless of whether it pertains to matters within the committee's jurisdiction.⁴³
- Covered former employees on the **leadership staff**⁴⁴ may not seek official action, on behalf of other persons, from current Members of the leadership⁴⁵ or any current staff of those Members.⁴⁶
- Covered former employees of any **other legislative office**⁴⁷ may not seek official action, on behalf of other persons, from current officers and employees of that legislative office.⁴⁸

✗ **Knowingly represent a foreign entity, i.e., 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 official duties.⁴⁹

³⁹ *Id.* § 207(e)(9)(E).

⁴⁰ *Id.* § 207(e)(3). The statute expressly prohibits contacting any employee of a Member whom the departed employee is prohibited from contacting. *Id.* § 207(e)(3)(B)(ii).

⁴¹ *Id.* § 207(e)(9)(A). For the purposes of the statute, a **detailee** is deemed to be an employee of both the entity from which the detailee comes and the House committee to which the individual is detailed. *Id.* § 207(g).

⁴² *Id.* § 207(e)(4).

⁴³ *Id.* (barring communication or appearances on “any matter” on which the former employee seeks action).

⁴⁴ *Id.* § 207(e)(9)(H).

⁴⁵ The “leadership” of the House of Representatives consists of the Speaker; majority leader; minority leader; majority whip; minority whip; chief deputy majority whip; chief deputy minority whip; assistant minority leader; chairman of the Democratic Steering and Policy Committee; chairman and vice chairman of the Democratic Caucus; chairman, vice chairman, and secretary of the Republican Conference; chairman of the Republican Research Committee; chairman of the Republican Policy Committee; and any similar position created after the statute took effect. 18 U.S.C. § 207(e)(9)(L).

⁴⁶ *See id.* §§ 207(e)(5)(B) and (e)(9)(H).

⁴⁷ “[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 General Counsel, and Chief Administrative Officer. *See* 18 U.S.C. § 207(e)(9)(G).

⁴⁸ 18 U.S.C. §§ 207(e)(6) and (e)(9)(G).

⁴⁹ *Id.* §§ 207(f)(1)(A) and (i)(1)(B). Section § 207 restricts activities with respect to a “foreign entity,” which is defined as either the “government of a foreign country” or a “foreign political party” as those terms are, in

- ✗ **Knowingly aid or advise a foreign entity, i.e., 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.⁵⁰
- ✗ **Use confidential information obtained by means of personal and substantial participation in ongoing trade or treaty negotiations** within one year preceding the employee's departure from the House payroll, in the course of representing, aiding, or advising anyone other than the United States regarding those ongoing negotiations.⁵¹

As to the prohibition against making any “communication to or appearance before” anyone in the legislative branch, covered former employees should be aware of the broad manner in which DOJ has defined those terms.⁵² 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.”⁵³

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.”⁵⁴ The provision is broad enough that it precludes a covered former employee even from, for example, requesting or scheduling, for or on behalf of any other person, a meeting with any Member, officer, or employee whom the individual is

turn, defined in the Foreign Agents Registration Act (22 U.S.C. § 611(e), (f)). *See id.* § 207(f)(3). A U.S. Office of Legal Counsel (OLC) opinion of August 13, 2008, concluded that a foreign corporation is to be considered a foreign entity for purposes of 18 U.S.C. § 207(f) if it “exercises sovereign authority or functions de jure (i.e., by formal delegation) or de facto.” *See* OLC Memorandum Opinion, *Application of 18 U.S.C. § 207(f) to a Former Senior Employee* (available on the OLC website at <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/06/23/op-olc-v032-p0115.pdf>). *See also* U.S. OGE, LA-16-08: *Introduction to the Primary Post-Government Employment Restrictions Applicable to Former Executive Branch Employees*, at 10 (September 23, 2016) (available on the OGE website at [https://www.oge.gov/web/oge.nsf/All%20Documents/3741DC247191C8B88525803B0052BD7E/\\$FILE/LA-16-08.pdf?open](https://www.oge.gov/web/oge.nsf/All%20Documents/3741DC247191C8B88525803B0052BD7E/$FILE/LA-16-08.pdf?open)). Also pertinent to these provisions of the statute is an OLC opinion of June 22, 2004, which concludes that 18 U.S.C. § 207(f) covers representational contacts with Members of Congress. *See* OLC Memorandum Opinion, *Application of 18 U.S.C. § 207(f) to a Former Senior Employee* (available on the OLC website at https://www.justice.gov/sites/default/files/olc/opinions/2004/06/31/op-olc-v028-p0097_0.pdf).

⁵⁰ 18 U.S.C. § 207(f)(1)(B).

⁵¹ *Id.* § 207(b).

⁵² 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.

⁵³ OLC, “*Communications*” under 18 U.S.C. § 207 at 3 (Jan. 19, 2001) (available on the OLC website at http://www.justice.gov/sites/default/files/olc/opinions/2001/01/31/op-olc-v025-p0059_0.pdf). 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.*

⁵⁴ *Introduction to the Primary Post-Government Employment Restrictions Applicable to Former Executive Branch Employees*, note 49 above, at 3.

prohibited from contacting on official business.⁵⁵ 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 these one-year “cooling-off period” restrictions, departing employees should also 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.⁵⁶

Permissible Activity

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

- ✓ **Contact Members, officers, and employees of the Senate, and – except for those officials specified above in the section on “Prohibited Activity” – Members, officers, and employees of the House and other Legislative Branch offices**, with intent to influence official action so long as not representing a foreign entity, i.e., a foreign government or foreign political party.
- ✓ **Aid or advise clients** (other than foreign entities, i.e., foreign governments or foreign political parties) **concerning how to lobby Congress**, provided the former employee makes no appearance before or communication to those officials specified above in the “Prohibited Activity” section. Such a “background role” would not pose the contemplated risk of improper influence since the current officials would not be aware of the former employee’s participation.⁵⁷ However, any such participation must remain behind-the-

⁵⁵ 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 DOJ 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 37, above).

⁵⁶ 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.

⁵⁷ Former employees who are lawyers may have additional restrictions, as explained above in note 17 of this Memorandum.

scenes; during the one-year “cooling-off” period, former employees must not permit their name to be openly associated with such contact by other persons.⁵⁸

- ✓ **Contact Executive Branch** officials with the intent to influence official action so long as not representing a foreign entity, i.e., a foreign government or foreign political party.⁵⁹
- ✓ **Contact state government officials** with the intent to influence state government actions or decisions. Former employees should comply with any state laws governing such contacts.
- ✓ **Contact one foreign government on behalf of another** foreign government.⁶⁰
- ✓ **Contact any Members, officers, and employees of the House and Senate and other Legislative Branch officials** on official business under any of the following circumstances:
 - The former employee is carrying out official duties on behalf of the **federal government** or the District of Columbia;⁶¹
 - The former employee is acting as an **elected official of a state or local government**;⁶²

⁵⁸ As noted above, the major restrictions set forth in 18 U.S.C. § 207(e) focus on communications and appearances. By contrast, if a covered former employee 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 (with the exception of the provision that applies to all former employees relating to ongoing trade or treaty negotiations). This construction is consistent with regulations promulgated by 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 OLC opinion that is cited in note 51 above, including with regard to activities that do not constitute permissible “behind-the-scenes” activities.

⁵⁹ Covered former employees 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 federal employee. *See* 25 U.S.C. § 5323(j) (formerly 25 U.S.C. § 450i(j)); 18 U.S.C. § 207(j)(1)(B).

⁶⁰ 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. Covered former employees 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 FAQs” (available on the DOJ website, www.justice.gov/nsd-fara).

⁶¹ 18 U.S.C. § 207(j)(1)(A).

⁶² *Id.*

- The former employee 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;⁶³
 - The former employee is an **employee** of an accredited, degree-granting **institution of higher education** and is acting on behalf of such institution;⁶⁴ or
 - The former employee is an **employee** of a **charitable hospital or medical research organization** and is acting on behalf of such hospital or organization.⁶⁵
- ✓ **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.⁶⁶ Otherwise, covered employees 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.⁶⁷ However, if the former employee is employed by a person or entity who represents, aids, or advises only such persons or entities, the communications would be prohibited.⁶⁸
 - ✓ **Make statements based upon the “special knowledge”** of the former employee concerning the particular area that is the subject of the statement, if **no compensation** is received in connection therewith.⁶⁹
 - ✓ **Give testimony under oath**, or make statements required to be made under penalty of perjury.⁷⁰

⁶³ *Id.* (j)(2)(A).

⁶⁴ *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).

⁶⁵ 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.*

⁶⁶ *Id.* § 207(j)(3).

⁶⁷ *Id.* § 207(j)(7)(A).

⁶⁸ *Id.* § 207(j)(7)(B)(ii)(II).

⁶⁹ *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 to be “relatively narrow.” *See* 73 Fed. Reg. 36183 (June 25, 2008). While these definitions are not binding on the Ethics Committee, they provide guidance as to how the term should be interpreted.

⁷⁰ 18 U.S.C. § 207(j)(6).

- ✓ **Contact staff of the Clerk of the House** regarding the individual’s compliance with the disclosure requirements under the Lobbying Disclosure Act.⁷¹
- ✓ **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.⁷²
- ✓ **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.⁷³

Unless stated otherwise, each of the following examples assumes that the staffer is a covered former employee because their compensation while on House payroll triggered the substantive post-employment restrictions.

Example 1. Staff member *A* resigns from her position on Member *B*’s personal staff. She may not contact *B* or anyone on his staff for one year (except on behalf of an exempt organization), but she may contact any other Member or staff member on behalf of anyone other than a foreign entity, i.e., a foreign government or foreign political party, as soon as she leaves the House payroll.

Example 2. Staff member *C* resigns from his position on the Ways and Means Committee. He may not contact any current member or employee of Ways and Means, or any Member who was on that committee during *C*’s last year of congressional service, on behalf of any non-exempt person or entity, for one year. He may, however, contact any other Member or staff member on any issue, except on behalf of a foreign entity, i.e., a foreign government or foreign political party.

Example 3. Staff member *D*, who is not a covered employee, resigns from her position on Member *E*’s staff to become a lobbyist. *D* may immediately lobby *E* or any other Member for any client.

Example 4. Staff member *F* resigns from Member *G*’s staff to accept a position in an Executive Branch agency. *F* may contact *G* immediately on behalf of the agency.

Example 5. Staff member *H* resigns from his congressional position to join the staff of the Governor of his state. As a state employee, *H* may contact anyone in Congress, including his former employing Member, on behalf of the state.

⁷¹ *Id.* § 207(e)(8).

⁷² *See id.* § 207.

⁷³ *See id.*

Example 6. Staff member *I* resigns her congressional position and moves back to her home state. *I* may contact state government officials on behalf of any clients.

Example 7. Staff member *J* resigns his position with Member *K* and begins work as a lobbyist at a lobbying firm. One of *J*'s clients is a state university. *J* may not lobby *K* on behalf of the university (or any other client) for one year following his departure from the House. However, if *J* were an employee of the university rather than an outside retained lobbyist, contact with *K* on behalf of the university would be permitted.

Example 8. Staff member *L* resigns his congressional position to become a lobbyist. For the first year after leaving the Hill, *L* lobbies only Executive Branch personnel, and *L* has no foreign clients. *L* is complying with the law.

Example 9. During his final year of House employment, staff member *M* worked for Member *N* from January to June 30, and for a committee from July 1 through December 30. December 30 was *M*'s final day on the House payroll. *M* was paid more than 75% of a Member's salary while in each position. *M* may not contact *N* or the committee on behalf of any non-exempt person or entity for one year following his termination from each employer. Thus, *M* would be barred from contacting *N* until July 1 of the following year and current and former members of the committee and current committee staff until December 31 of the following year.

Example 10. Staff member *M*, from the previous example, was paid less than the triggering rate in the Member's office, then she accepted a promotion to a committee that did pay more than the triggering rate. *M* would not be restricted from contacting the Member office once she ends her employment with the House.

Example 11. During his one-year "cooling-off" period, former staff member *O* wishes to call his former employing Member to request that she meet with representatives of one of his clients to discuss legislation of interest to the client. *O* would not be present at the meeting. *O* would violate the statute by requesting the meeting because the request would be a communication intended to influence official action.

Example 12. During his first year after leaving House employment, *P* wishes to contact a current employee of that committee to urge him to support federal funding for a non-profit organization operated by a friend of *P*. The non-profit organization is not a client of *P*, and *P* would receive no compensation for making the contact. *P* would violate the statute by doing so because the statute bars such contacts regardless of whether the former employee would be compensated for them.

Entity Contacted by Covered Former Employee

Entity Represented by Covered Former Employee

	Former Congressional Office/Committee	Executive Branch	Foreign Entity	State Governments
Private Entity	Must wait 1 year before contacting former Congressional office or committee directly. May immediately advise entity behind scenes. May contact other Congressional offices immediately	May contact immediately	May contact immediately	May contact immediately
Federal, State, or Local Government	May contact all Congressional offices immediately as employee or elected official of the federal, state, or local government	May contact immediately	May contact immediately	May contact immediately
Tribal Government	Must wait 1 year before contacting former Congressional office or committee directly. May immediately advise entity behind scenes. May contact other Congressional offices 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 House employee	May contact immediately	May contact immediately
Foreign Entity	Must wait 1 year before contacting any Congressional office or committee directly 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 directly 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 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 classifies the subject matter as one of national interest, may immediately advise international organization and contact Congress directly; otherwise, must wait 1 year to do either	If Secretary of State classifies the subject matter as one of national interest, 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 Org.	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 \$102,446 for each violation or the value of the compensation received for the act which violated the restrictions, whichever is greater.⁷⁴ The statute further authorizes the Attorney General to seek an injunction prohibiting a person from engaging in conduct that violates the act.⁷⁵

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 close attention by DOJ, as reflected in the guilty pleas by former House staff and others to criminal violations of the statute.⁷⁶ 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 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.⁷⁷

Example 13. Staff member *Q* resigned as chief of staff for Member *R* last month to become a registered federal lobbyist for a local non-profit organization. *R* is a covered employee and subject to the post-employment ban for a year. *Q* asks several of *R*'s current employees to support increased funding for the non-profit and schedules a time for them to discuss the matter further. If *R*'s employees accept the meeting with *Q*, they could be considered aiding and abetting *Q* to violate her post-employment restrictions. Furthermore, in an Ethics 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."⁷⁸ 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

⁷⁴ See 18 U.S.C. § 216; see also 28 C.F.R § 85.5 (2020).

⁷⁵ See 18 U.S.C. § 216(c).

⁷⁶ See, e.g., *United States v. Jack A. Abramoff*, Docket No. 06-CR-001 (D.D.C.) ("Abramoff action"). Similarly, in September 2006, former Representative Robert W. Ney pleaded guilty to conspiracy to violate, among other statutes, the post-employment restrictions for former covered employees ("Ney action"). Also note, in September 2012, a former Senate staffer, Doug Hampton, was sentenced to one year probation for violating the post-employment restriction ("Hampton action").

⁷⁷ See, e.g., *Abramoff* and *Ney* actions, note 71 above.

⁷⁸ 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").

resignation, “in a manner that created the appearance that his official decisions might have been improperly affected.”⁷⁹

FINANCIAL DISCLOSURE REQUIREMENTS FOLLOWING DEPARTURE FROM HOUSE EMPLOYMENT

A departing staff member who was required to file a Financial Disclosure statement because of the employee’s rate of pay must file a final Financial Disclosure Statement, called a Termination Report, within 30 days of leaving the House payroll.⁸⁰ However, an employee in a Member’s office who has filed only because the employee was designated as a “Principal Assistant” does not have to file a Termination Report unless the individual was designated as principal assistant to a Member leaving the House.⁸¹ Extensions of up to 90 days are available upon written request to the Committee when made prior to the original due date.⁸² Please note that the salary threshold for filing disclosure statements is higher than that which triggers the post-employment restrictions discussed above. For 2020, “senior staff” for financial disclosure purposes is anyone paid at annual salary rate of \$131,239 (or a monthly salary of \$10,936) for 60 days or more.⁸³

The Termination Report, filed on the same form as the annual report, covers all financial activity through the filer’s last day on the House payroll.⁸⁴ Schedule F (“Agreements”) of the report requires disclosure of any agreement entered into by the filer, oral or written, with respect to future employment.⁸⁵ Thus, if a senior staff employee accepts a future position while still on the House payroll, the employee will have to disclose the agreement on the individual’s Termination Report. 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.⁸⁶ The employee will also have to disclose, on Schedule H (“Travel Payments and Reimbursements”) of

⁷⁹ 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 73 above, vol. I; *See also*, Senate Select Comm. on Ethics, *Report of the Preliminary Inquiry into the Matter of Senator John E. Ensign* (May 10, 2011) available at https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=676ADD17-2C7F-40F7-A4D9-B35526E4DA97.

⁸⁰ 5 U.S.C. app. § 101(e).

⁸¹ *See* Comm. on Ethics, *2019 Instruction Guide for Completing Financial Disclosure Statements and Periodic Transaction Reports (2019 FD and PTR Instructions)* at 5.

⁸² 5 U.S.C. app. § 101(g)(1); *see also* *2019 FD and PTR Instructions* at 7.

⁸³ *See* 5 U.S.C. app. § 109(13)(B)(i). The 60 days do not have to be consecutive; being paid at the senior staff rate for any two months of the calendar year triggers the requirement to file a Termination Report.

⁸⁴ *Id.* § 101(e).

⁸⁵ *Id.* § 102(a)(7).

⁸⁶ *See id.*; *see also* *2019 FD and PTR Instructions* at 35.

the report, any travel reimbursements exceeding \$415 received from any source in connection with job-search activity.⁸⁷

However, a departing employee 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.⁸⁸ Any departing employee who is not required to file a Termination Report for this reason must notify the Clerk *in writing* of that fact.⁸⁹

OUTSIDE EMPLOYMENT AND EARNED INCOME RESTRICTIONS

Departing staff remain subject to all House rules, including the gift rule and the limitations on outside employment and earned income,⁹⁰ as long as they remain on the House payroll. These rules are particularly important to bear in mind when an employee's prospective employer suggests that the individual begin work early, including, for example, while still drawing pay for accrued annual leave.⁹¹ In calendar year 2020, a senior staff employee may not receive outside earned income (including, for example, a signing bonus) in excess of \$28,845, 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.⁹² Regardless of whether compensation is received, a senior staff employee may not allow his or her name to be used by an organization that provides fiduciary services. In addition, a senior staff employee may not receive any honoraria (i.e., a payment for a speech, article, or appearance),⁹³ although he or she may receive compensation for teaching, if the employee first secures specific prior permission from this Committee.⁹⁴

Example 14. Staff member *S*, who earns more than the qualifying senior staff rate of \$131,239, plans to join a law firm when he leaves his official position. Since

⁸⁷ 5 U.S.C. app. § 102(a)(2)(B).

⁸⁸ *Id.* § 101(e).

⁸⁹ See *2019 FD and PTR Instructions at 5*. A form for this purpose is available on the Committee's website, at https://ethics.house.gov/sites/ethics.house.gov/files/FD_TerminationExemption.pdf.

⁹⁰ House Rule 25, cls. 1-5. The outside employment and earned income limitations are also codified at 5 U.S.C. app. §§ 501-502.

⁹¹ Staff members contemplating future employment with the U.S. Senate, the Architect of the Capitol or any other department or agency of the U.S. government should bear in mind that federal law prohibits "dual compensation" in excess of an annually-adjusted dollar limit for simultaneous employment by the House and any of those entities. 5 U.S.C. § 5533(c)(1). For 2020, the limit is \$38,061. Pursuant to the statute, a departing House employee may not commence employment with any of the above-named governmental entities while receiving from the House payments for accrued annual leave if the employee's aggregated gross annual salaries from the two positions would exceed the statutory limit. *Id.*

⁹² House Rule 25, cls. 1-4; see also 5 U.S.C. app. §§ 501-502.

⁹³ House Rule 23, cl. 5; House Rule 25, cl. 1(a)(2).

⁹⁴ House Rule 25, cl. 2(e).

this is a firm providing professional services of a fiduciary nature, S may not commence his new employment until he is off the congressional payroll.

**ACCEPTANCE OF OFFICIALLY CONNECTED
TRAVEL FUNDED BY A PRIVATE SOURCE**

After the adjournment *sine die* of Congress, it is questionable whether any employee of a departing Member may participate in any privately-funded travel that is fact-finding in nature. The gift rule requires that such travel be related to official duties,⁹⁵ but as of that time, the official responsibilities that may justify participation in such a trip will practically have come to an end. However, this consideration does not limit the ability of an employee of a departing Member to accept travel from a private source for the purpose of enabling the individual to participate substantially in an officially related event, such as to give a speech.

* * *

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

⁹⁵ *Id.*, cl. 5(b)(1)(A).