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U.S. House of Representatives

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December 6, 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 Staff

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The purpose of this memorandum is to notify you regarding key issues of concern to staff members[1] 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]

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[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 office (*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 Legal 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." The 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.

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.

As a general matter, House employees are free to pursue future employment while still employed by the House, subject to certain ethical constraints. 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.[4] 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 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.[5] Those decisions found that the term "negotiation" should be construed broadly.[6] However, the Committee makes a distinction between "negotiations," which trigger the rule, and "[p]reliminary or exploratory talks," which do not.[7] 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."[8] 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.[9] 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.[10] Federal criminal law

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

[5] 18 U.S.C. § 208.

[6] *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).

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

[8] *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.

[9] House Rule 23, cl. 3.

[10] 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.[11] 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.[12]

In light of these restrictions, 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.[13] 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.[14] Former employees 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.[15] In addition, as addressed in the next section of this memorandum, very senior staff must disclose the employment negotiations in writing to the Standards Committee.

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***

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[11] 18 U.S.C. § 201(b)(2)(A).

[12] *Id.* § 201(c)(1)(B).

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

[14] *See* 18 U.S.C. § 207. These restrictions are explained in detail later in this memorandum. Briefly, "very senior" 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 government in securing official action from any federal official during that year.

[15] 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. 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).

entity.[16] Staff subject to this disclosure requirement are those employees of the House who are paid at an annual rate of $130,500.[17] Staff paid at this rate are referred to as "very senior staff."

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, very senior staff 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]

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 judgment in conducting his public duties."[20] Employees also should avoid situations that might be viewed as presenting even a risk that the individual might be improperly influenced by personal financial interests."[21]

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[16] House Rule 27, cl. 2. 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.

[17] 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 2010, Members will earn $174,000 annually, making $130,500 the salary which triggers the disclosure requirement. Employees whose employing authority is not a Member, committee, or leadership office should note that this triggering salary threshold is different than the one that triggers the restrictions on post employment discussed later in this memorandum. Offices whose employees are subject to the two differing salary triggers include the Clerk, Parliamentarian, Office of Legal Counsel, and Chief Administrative Officer.

[18] *See Hedges*, 921 F.2d at 1403 n.2.

[19] House Rule 27, cl. 4.

[20] 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.").

[21] *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 . . . . ").

The Committee has issued forms, available on the Committee Web site (ethics.house.gov), to be used for these notification requirements. When notifying the Committee of negotiations or agreements for future employment or compensation, very senior staff should complete and sign an employment negotiation form, formally titled the "Notification of Negotiations or Agreement for Future Employment."[22] The original, completed form must be submitted to the Committee, but all filers should keep a copy of their submission for their records. There is a separate form for notifying the Committee of recusal, entitled the "Statement of Recusal." Very senior staff who recuse themselves from official matters pursuant to Rule 27 must complete and submit the original recusal form to the Committee.[23]

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."[24] 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 $335 from any one source must be disclosed on Schedule VII of the termination financial disclosure statement required of departing senior employees.[25] In addition, any agreement for future employment also must be disclosed on Schedule IX of that statement.[26]

POST-EMPLOYMENT RESTRICTIONS

Since 1989, legislative branch officials, including certain employees, have been subject to restrictions on their post-House employment.[27] 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.[28] The basic rate of pay for Members in calendar year 2010 is $174,000, and thus the post-employment threshold for individuals who terminate their employment with a Member, committee, or leadership office in 2010 is ***$130,500***. The threshold rate for other years is available from the Standards Committee. For employees of "other legislative offices,"[29] the

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[22] House Rule 27, cls. 1-3.

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

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

[25] 5 U.S.C. app. 4 § 102(a)(2)(B).

[26] *Id.* § 109(a)(7)(A). 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.

[27] *See* 18 U.S.C. § 207(e), (f).

[28] *Id.* § 207(e)(7).

[29] For the definition of "other legislative offices," see *supra* note 2.

basic rate of pay triggering the restrictions is level IV of the Executive Schedule, which for 2010 is ***$155,500***.[30]

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.[31] 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 in two or more months. Employees who are subject to the restrictions are referred to as "covered" individuals.

For covered individuals, the law establishes a one-year "cooling-off period" that is measured from the date of the individual's departure from the House payroll.[32] When an office continues an individual on the payroll for the purpose of paying for accrued leave after 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. House employees whose pay is **below** the threshold are **not** subject to the post-employment restrictions set out in the statute, 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 activity by covered former employees 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 Department.

Prohibited Activity

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

- ✕ 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.[33] 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.

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[30] 18 U.S.C. § 207(e)(7)(B).

[31] *Id.* § 207(e)(7). With regard to House employees who are federal civil service or military annuitants, it is the view of the Standards 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] *Id.* § 207(e)(3)-(7).

[33] *Id.*

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:

- Covered former employees on the **personal staff**[34] of a Member may not seek official action, on behalf of other persons, from that Member or from any of the Member's employees.[35]

- Covered former **committee staff**[36] 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.[37] 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.[38]

- Covered former employees on the **leadership staff**[39] may not seek official action, on behalf of other persons, from current Members of the leadership[40] or any current staff of those Members.[41]

- Covered former employees of any **other legislative office**[42] may not seek official action, on behalf of other persons, from current officers and employees of that legislative office.[43]

✕ 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 official duties.[44]

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[34] *Id.* § 207(e)(9)(E).

[35] *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).

[36] *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).

[37] *Id.* § 207(e)(4).

[38] *Id.* (barring communication or appearances on "any matter" on which the former employee seeks action).

[39] *Id.* § 207(e)(9)(H).

[40] 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; chairman of the Democratic Steering 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).

[41] *See id.* §§ 207(e)(5)(B) and (e)(9)(H).

[42] For the definition of "other legislative office," see *supra* note 2.

[43] 18 U.S.C. §§ 207(e)(6) and (e)(9)(G).

- ✕ 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.[45]

- ✕ **Use confidential information obtained by means of personal and substantial participation in 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 negotiations.[46]

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.[47] 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."[48] 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."[49] 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

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[44] *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.

[45] 18 U.S.C. § 207(f)(1)(B).

[46] *Id.* § 207(b).

[47] 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.

[48] 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.*

[49] *Summary of Post-Employment Restrictions of 18 U.S.C. § 207*, *supra* note 44, at 3.

individual is prohibited from contacting on official business.[50] 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.[51]

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 government or political party.

- ✓ **Aid or advise clients** (other than 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.[52] Any such participation must remain behind-

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[50] 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 75, below).

[51] 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.

[52] Former employees who are lawyers may have additional restrictions, as explained in note 15, *supra*.

the-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.[53]

- ✓ **Contact Executive Branch** officials with the intent to influence official action so long as not representing a foreign government or foreign political party.[54]

- ✓ **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.[55]

- ✓ **Contact any Members, officers, and employees of the House 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;[56]

    - The former employee is acting as an **elected official of a state or local government;**[57]

    - 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;[58]

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[53] 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 48 above, including with regard to activities that do not constitute permissible "behind-the-scenes" activities.

[54] 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. § 450i(j); 18 U.S.C. § 207(j)(1)(B).

[55] 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 FAQ" (available on the DOJ Web site, www.justice.gov/criminal/fara/).

[56] 18 U.S.C. § 207(j)(1)(A).

[57] *Id.*

[58] *Id.* (j)(2)(A).

- The former employee is an **employee** of an accredited, degree-granting **institution of higher education** and is acting on behalf of such institution;[59] 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.[60]

✓ **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.[61] 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.[62] 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.[63]

✓ **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.[64]

✓ **Give testimony under oath,** or make statements required to be made under penalty of perjury.[65]

✓ **Contact staff of the Clerk of the House** regarding the individual's compliance with the disclosure requirements under the Lobbying Disclosure Act.[66]

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[59] *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).

[60] 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.*

[61] *Id.* § 207(j)(3).

[62] *Id.* § 207(j)(7)(A).

[63] *Id.* § 207(j)(7)(B)(ii)(II).

[64] *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.

[65] 18 U.S.C. § 207(j)(6).

[66] *Id.* § 207(e)(8).

- ✓ **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.[67]

- ✓ **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.[68]

Example 1. Staff member *A*, who earns more than 75% of a Member's salary, resigns from her position on Member *B*'s personal staff. She may not lobby *B* or anyone on his staff for one year (except on behalf of an exempt organization), but she may lobby any other Member or staff member on behalf of anyone other than a foreign government or political party as soon as she leaves the House payroll.

Example 2. Staff member *C*, who earns more than 75% of a Member's salary, resigns from his position on the Ways and Means Committee. He may not lobby 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, lobby any other Member or staff member on any issue, except on behalf of a foreign government.

Example 3. Staff member *D*, who earns *less* than 75% of a Member's salary, 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*, who earns more than 75% of a Member's salary, resigns from Member *G*'s staff to accept a position in an Executive Branch agency. *F* may lobby *G* immediately on behalf of the agency.

Example 5. Staff member *H*, who earns more than 75% of a Member's salary, resigns from his congressional position to join the staff of the Governor of his state. As a state employee, *H* may lobby anyone in Congress, including his former employing Member, on behalf of the state.

Example 6. Staff member *I*, who earns more than 75% of a Member's salary, resigns her congressional position and moves back to her home state. *I* may lobby state government officials on behalf of any clients.

Example 7. Staff member *J*, who earns more than 75% of a Member's salary, 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

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[67] *See id.* § 207.

[68] *See id.*

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*, who earns more than 75% of a Member's salary, 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. *M* may not lobby *N* or the committee for one year following his termination from each employer. Thus, *M* would be barred from lobbying *N* until July 1, and current and former members of the committee and current committee staff until December 31 of the following year.

Example 10. During his one-year "cooling-off" period, former staff member M 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, in that the request would be a communication intended to influence official action.

Example 11. During his first year after leaving House employment, *P*, who had been a committee staff member paid more than 75% of a Member's salary, 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, in that 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 Governments	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 Government	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 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 all Congressional offices immediately as employee of college or university	May contact immediately	May contact immediately	May contact immediately
Charitable Hospital or Medical Research Org.	May contact all Congressional offices immediately as employee of hospital or medical research 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 which violated the restrictions, whichever is greater.[69] The statute further authorizes the Attorney General to seek an injunction prohibiting a person from engaging in conduct that violates the act.[70]

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.[71] 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.[72]

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."[73] 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."[74]

An employee (or former employee) 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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[69] 18 U.S.C. § 216.

[70] *Id.* § 216(c).

[71] *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").

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

[73] 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").

[74] 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, 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. Office of Government Ethics of which the Committee is aware.[75]

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.[76] 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.[77] Extensions of up to 90 days are available upon written request.[78] Note that the salary threshold for filing disclosure statements is lower than that which triggers the post-employment restrictions discussed above. For 2010, the financial disclosure filing threshold is an annual salary rate of $119,553.60 for 60 days or more.[79]

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.[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 covered employee accepts a future position while still on the House payroll, the employee will have to disclose the agreement on the individual'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 employee 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]

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[75] 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.

[76] 5 U.S.C. app. 4 § 101(e).

[77] *See* Comm. on Standards of Official Conduct, *Instruction Guide for Completing Calendar Year 2009 Financial Disclosure Statement Form A* (*2009 Form A FD Instructions*) at 2.

[78] 5 U.S.C. app. 4 § 101(g)(1); *see also 2009 Form A FD Instructions, supra* note 77, at 3.

[79] *See* 5 U.S.C. app. 4 § 109(13)(B)(i).

[80] *Id.* § 101(e).

[81] *Id.* § 102(a)(7).

[82] *See id.*; *see also 2009 Form A FD Instructions, supra* note 77, at 23.

[83] 5 U.S.C. app. 4 § 102(a)(2)(B).

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.[84] Any departing employee who is not required to file a termination report for this reason must notify the Clerk *in writing* of that fact.[85]

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,[86] as long as they remain on the government 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.[87] In calendar year 2010, a covered employee 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.[88] Regardless of whether compensation is received, a covered employee may not allow his or her name to be used by an organization that provides fiduciary services. In addition, a covered employee may not receive any honoraria (*i.e.*, a payment for a speech, article or appearance),[89] although he or she may receive compensation for teaching, if the employee first secures specific prior permission from this Committee.[90]

> ***Example 12.*** Staff member *Q*, who earns more than 75% of a Member's salary, plans to join a law firm when he leaves his official position. Since this is a firm providing professional services of a fiduciary nature, *Q* may not commence his new employment until he is off the congressional payroll.

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[84] *Id.* § 101(e).

[85] *See 2009 Form A FD Instructions, supra* note77, at 2.

[86] 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.

[87] 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 2010, the limit is $33,033. 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 would exceed the statutory limit. *Id.*

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

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

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

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 factfinding in nature. The gift rule requires that such travel be related to official duties,[91] 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.

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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.

[91] *Id.*, cl. 5(b)(1)(A).