

NATIONAL GOVERNMENT ETHICS
SUMMIT
MARCH 8-10 2016

NAVIGATING THE POST-
GOVERNMENT EMPLOYMENT
RESTRICTIONS:

Senior Employees

Focus of the Presentation

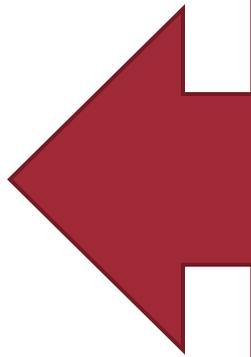
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- 18 U.S.C. 207(c)
- 18 U.S.C. 207(d)
- Exceptions
- Ethics Pledge, para. 4

Before we get started...

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- 18 U.S.C. 207(a)
- 18 U.S.C. 207(b)
- 18 U.S.C. 207(f)
- Ethics Pledge, para. 5
- Procurement Integrity Act
- 18 U.S.C. 203
- Agency-Specific Regulations
- 18 U.S.C. 207(e)
- Emoluments Clause



Remember the wide range of other post-government employment restrictions that could apply

Methodology

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- Step-by-step approach
- Review elements
- Fact patterns with Roger V. Dorr



Fact Pattern

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- Director, Pharmaceutical Health Agency (PHA)
 - September 2015 – Present
 - \$165,000
- Grant Director, National Endowment for the Sciences (NES)
 - May 2010 – September 2015
 - \$120,000
 - Detailed to EOP: May – Aug. 2015



Fact Pattern

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NOTIFICATION OF POST-EMPLOYMENT NEGOTIATION OR AGREEMENT AND RECUSAL STATEMENT

Section 17 of the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act) requires certain employees to file a statement notifying their agency ethics official of any negotiation for or agreement of future employment or compensation with a non-federal entity within three business days after commencement of the negotiation or agreement. Employees who file this notification statement also must file with their agency ethics official a recusal statement whenever there is a conflict of interest or appearance of a conflict of interest with the entity. In any such case, the employee must recuse, unless the employee has first obtained a written waiver or authorization as discussed in 5 C.F.R. § 2635.605, or qualifies for a regulatory exemption pursuant to 18 U.S.C. § 208(b)(2).

NOTIFICATION OF POST-EMPLOYMENT NEGOTIATION OR AGREEMENT

| | |
|---|------------------------------|
| Name of Employee | Roger Dorr |
| Agency/Office | PHA |
| Date Negotiation or Agreement Commenced | 3/9/16 |
| Name(s) of Non-Federal Entity or Entities Disclose each non-federal entity with which you are negotiating for or have an agreement of future employment or compensation. | Pharmaceutical Affairs Group |

18 U.S.C. 207

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| | |
|--------|--|
| (a)(1) | Permanent Ban on Switching Sides |
| (a)(2) | Two-Year Official Responsibility Provisions |
| (b) | One-Year Ban on Trade or Treaty Negotiation Activities |
| (c) | One-Year “Cooling-Off” Period for Former “Senior” Employees |
| (d) | Two-Year “Cooling-Off” Period for Former “Very Senior Employees |
| (f) | One-Year Ban on Former “Senior” and “Very Senior” Employees Representing, Aiding, or Advising a Foreign Entity |
| (j) | Exceptions |

18 U.S.C. 207(c)

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| | |
|---|--|
| A Former <u>Senior</u> Employee [may not] | |
| Knowingly Make | With the Intent to Influence |
| Any Communication or Appearance | |
| To or Before an Employee of the Agency or Department | |
| In which the Former Employee Served in <u>Any</u> Capacity | During the One-Year Period Prior to Termination from Senior Service |
| On Behalf of Any Other Person (except the U.S.) | |
| In connection with any matter | In which the former employee seeks official action by an employee of the Agency or Department |
| For <u>One Year</u> After Service in a <u>Senior Position</u> Terminates | |

Fact Pattern: Is Roger a “Senior Employee”

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- Director, Pharmaceutical Health Agency (PHA)
 - October 2015 – Present
 - \$165,000
- Grant Director, National Endowment for the Sciences (NES)
 - May 2010 – October 2015
 - \$120,000
 - Detailed to EOP: Jan. – June 2015



Applicability: “Senior Employees”

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- Basic pay at or above 86.5% of the rate of basic pay for level II of the Executive Schedule = **\$160,111.50** for CY16
 - Roger’s rate of basic pay is \$165,000
- Positions with pay fixed according to the Executive Schedule
- 0-7 or above uniformed services grade
 - \geq Brigadier General / Rear Admiral (lower half)
- Appointed by the President under 3 U.S.C. § 105(a)(2)(B)
- Appointed by the Vice President to a position under 3 U.S.C. § 106(a)(1)(B)

Pharmaceutical Affairs Group

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- Contact PHA concerning clients' ongoing investigations
- Attend events and parties
- Attend PHA meetings with clients
- Prepare reports for clients on pharmaceutical compliance issues that the client will present to PHA



Communication or Appearance

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- Contact PHA concerning clients' ongoing investigations

A “communication” can be made orally, in writing, or through electronic transmission.



Communication or Appearance

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- Attend PHA meetings with clients

An “appearance” extends to a former employee’s mere physical presence at a proceeding when the circumstances make it clear that his or her attendance is intended to influence the United States.



Communication or Appearance

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- Prepare reports for clients on pharmaceutical compliance issues that the client will present to PHA

**Behind-the-scenes
assistance not prohibited**



Intent to Influence

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- Contact PHA concerning clients' ongoing investigations:
 - ▣ Call to complain about the agency's investigatory methods

An “intent to influence” may be found if the communication or appearance is made for the purpose of:

- Seeking a discretionary Government ruling, benefit, approval, or other action, or
- Is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular Government action to be taken.

Intent to Influence

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- Contact PHA concerning clients' ongoing investigations:
 - ▣ Call to ask for the date of a client's hearing

Certain communications to and appearances before employees of the United States are not made with the intent to influence, within the meaning of paragraph (e)(1) of this section, including, but not limited to, communications and appearances made solely for the purpose of:

- Making a routine request not involving a potential controversy, such as a request for publicly available documents or an inquiry as to the status of a matter

Intent to Influence

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- Attend cocktail parties where PHA employees will be in attendance
 - No one is “talking shop”

Certain communications to and appearances before employees of the United States are not made with the intent to influence, within the meaning of paragraph (e)(1) of this section, including, but not limited to, communications and appearances made solely for the purpose of:

- **Purely social contacts**

Intent to Influence

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- Attend PHA meetings with clients
 - ▣ Small, informal, and nonpublic meeting
 - ▣ Introduced as client's compliance and governmental affairs advisor
 - ▣ Former director of PHA; appearance possibly before subordinates
 - ▣ Paid a fee for attending

Relevant factors

- The former employee has been given actual or apparent authority to make any decisions, commitments, or substantive arguments in the course of the appearance;
- The former employee's presence is relatively prominent;
- The appearance is before former subordinates or others in the same chain of command as the former employee; and
- The former employee is paid for making the appearance

Intent to Influence

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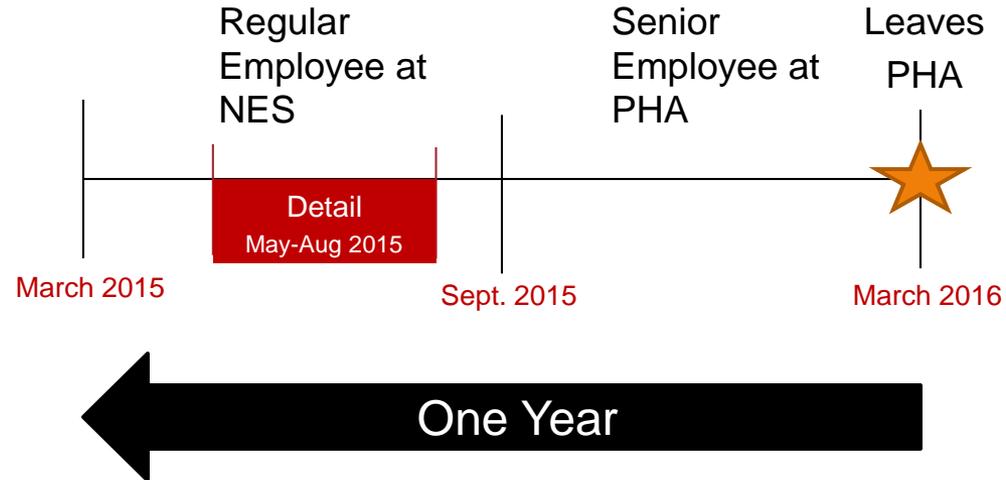
- Attend PHA meetings with clients
 - ▣ Large, formal, and public meeting
 - ▣ Clients make no reference to Roger's involvement
 - ▣ Roger sits in the back to observe
 - ▣ Former director of PHA; appearance possibly before subordinates

Relevant factors

- Appearance inconspicuous
- Little to identify him with the client
- Employee is present for informational purposes

Former Agency

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Former Agency

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- Meet with officials at the Department of Health and Human Services (HHS)

He may meet with HHS officials since a communication to or appearance before such persons is not made to or before his former agency

Former Agency

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- Meet with officials at the Department of HHS
 - ▣ In attendance: PHA employee detailed in HHS

He may not make communications to or appearances before PHA employees on detail to another agency.

Former Agency

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- Lobby key Members of Congress on behalf of clients

He may contact Members of Congress or their staff since a communication to or appearance before such persons is not made to or before his former agency

Former Agency

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- Lobby key Members of Congress on behalf of clients
 - OMB (component of EOP) employees in attendance at meeting with Congressman

Roger may not argue his client's position at that meeting since his arguments would unavoidably be directed to the OMB employee in his capacity as an employee of the OMB (a component of EOP, Roger's former agency).

Former Agency

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- Serve on panel at a conference attended by PHA employees

A former senior employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to make a prohibited communication or appearance if the forum:

- Is not sponsored or co-sponsored by the former senior employee's former agency;
- Is attended by a large number of people; and
- A significant proportion of those attending are not employees of the former senior employee's former agency.

On Behalf of Another

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- A former employee makes a communication or appearance on behalf of another person if:
 - The former employee is acting as the other person's agent or attorney, **OR**
 - The former employee is acting with the consent of the other person, whether express or implied, **AND**
 - The former employee is acting subject to some degree of control or direction by the other person in relation to the communication or appearance.

Matter on which Former Senior Employee Seeks Official Action

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- Representational bar applies with respect to any matter concerning which the former senior employee is seeking official action by a current employee of such agency on behalf of any other person
 - Does not require that the matter involve a specific party
 - Does not require that the former employee have ever been in any way involved in the matter
 - Does not require that the matter be previously pending at the former agency

Length of Restriction

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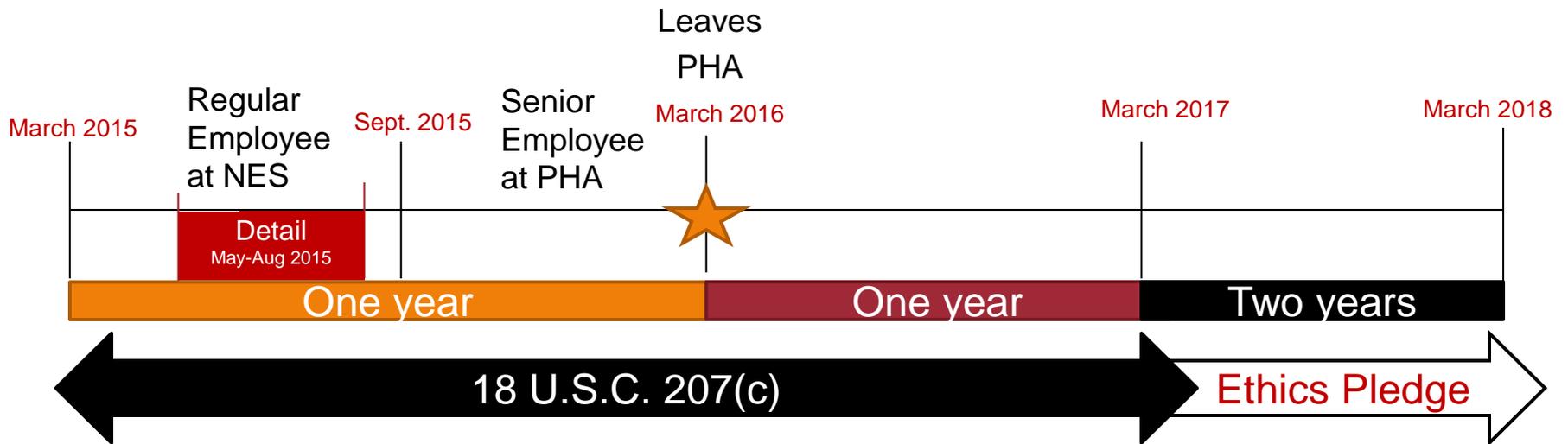
- One-year restriction

- Measured from the date when the employee ceases to serve in a senior employee position
 - Not measured from the date when the employee terminates Government service (unless those events occur simultaneously)

- E.O. 13490, “Ethics Pledge”
 - Paragraph 4: For any former “senior employee” who signed the Pledge and is covered by the post-employment restrictions set forth in 18 U.S.C. § 207(c), the “cooling-off” period is extended to two years following the end of the employee’s appointment

Roger's Timeline

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Do any exceptions apply?

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| Exceptions / Waivers | (a)(1) | (a)(2) | (b) | (c) | (d) | (f) |
|---|--------|--------|-----|-----|-----|-----|
| Official Government Duties (j)(1) | X | X | X | X | X | X |
| State and Local Governments and Institutions, Hospitals, and Organizations (j)(2) | | | | X | X | |
| International Organizations (j)(3) | X | X | X | X | X | X |
| Special Knowledge (j)(4) | | | | X | X | |
| Scientific or Technological Information (j)(5) | X | X | | X | X | |
| Testimony under Oath or Statements Made under Penalty of Perjury (j)(6) | X | X | X | X | X | X |
| Political Parties and Campaign Committees (j)(7) | | | | X | X | |
| Presidential Waiver (k) | X | X | X | X | X | X |

Exceptions to 18 U.S.C. 207

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What types of exceptions?

- Content-Specific

These exceptions focus on the content of the representation.

- Content-Neutral

These exceptions do not focus on the content of the representation, but rather focus on the type of entity that the employee is representing, the status of the employee, or other non-content based criteria.

Client: University of American Medicine

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Do any exceptions apply?

33

| Exceptions / Waivers | (a)(1) | (a)(2) | (b) | (c) | (d) | (f) |
|---|--------|--------|-----|-----|-----|-----|
| Official Government Duties (j)(1) | | | | | | |
| State and Local Governments and Institutions, Hospitals, and Organizations (j)(2) | | | | | | |
| International Organizations (j)(3) | | | | | | |
| Special Knowledge (j)(4) | | | | | | |
| Scientific or Technological Information (j)(5) | | | | | | |
| Testimony under Oath or Statements Made under Penalty of Perjury (j)(6) | | | | | | |
| Political Parties and Campaign Committees (j)(7) | | | | | | |
| Presidential Waiver (k) | | | | | | |

The restrictions contained in subsections (c), (d), and (e) shall not apply to acts done in carrying out official duties as an employee of—

- a) an agency or instrumentality of a **State or local government** if the appearance, communication, or representation is on behalf of such government, or
- b) an accredited, degree-granting **institution of higher education**, as defined in section 101 of the Higher Education Act of 1965, or a **hospital or medical research organization**, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986, if the appearance, communication, or representation is on behalf of such institution, hospital, or organization.

18 U.S.C. § 207(j)(2)

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- Client: University of American Medicine (UAM)

(1) Is the UAM one of the specific entities?

(2) Is the former employee an “employee” of the specified entity?

(3) Is this a communication or appearance that would be prohibited by any law other than 207(c) or (d)?

18 U.S.C. § 207(j)(2):

Is UAM one of the specific entities?

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- Is UAM an agency of instrumentality of a state of local government?
18 U.S.C. 207(j)(2)(A)
- Is UAM a hospital or medical research organization?
18 U.S.C. 207(j)(2)(B)
- Is UAM an Institute of Higher Education?
18 U.S.C. 207(j)(2)(B)

Some colleges and universities are part of the state government.

Merely being affiliated with the state, however, is not the same as being an instrumentality of the state.

501(c)(3)

Terms defined in the Internal Revenue Code

- 1) 2 or 4-year post-secondary school**
- 2) Public or other nonprofit organization**
- 3) Accredited
ope.ed.gov/accreditation**

18 U.S.C. § 207(j)(2)

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- Is Roger an employee of the specified entity?

The employee must be in an employer-employee relationship with the specified entity



- Is this a communication or appearance that would be prohibited by any law other than 207(c) or (d)?

The exception only applies to the prohibitions of 207(c) and (d), so it will not, for example, apply if the employee personally worked on the matter while a government employee

Client: University of American Medicine

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- The client wants Roger to use his subject-matter expertise in a meeting with PHA officials on the review of a new drug developed by the University. The review is based on a test that Roger was instrumental in developing.



Do any exceptions apply?

38

| Exceptions / Waivers | (a)(1) | (a)(2) | (b) | (c) | (d) | (f) |
|---|--------|--------|-----|-----|-----|-----|
| Official Government Duties (j)(1) | | | | | | |
| State and Local Governments and Institutions, Hospitals, and Organizations (j)(2) | | | | | | |
| International Organizations (j)(3) | | | | | | |
| Special Knowledge (j)(4) | | | | | | |
| Scientific or Technological Information (j)(5) | | | | | | |
| Testimony under Oath or Statements Made under Penalty of Perjury (j)(6) | | | | | | |
| Political Parties and Campaign Committees (j)(7) | | | | | | |
| Presidential Waiver (k) | | | | | | |

The restrictions contained in subsections (c), (d), and (e) shall not prevent an individual from making or providing a statement, which is based on the individual's own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received.

Special Knowledge

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- ❑ Exception to the restrictions of 18 U.S.C. 207(c) and (d) only
- ❑ Uncompensated
- ❑ Statement of facts observed by the former employee
- ❑ Based on “special knowledge”

The client wants Roger to use his subject-matter expertise in a meeting with PHA officials on the review of a new drug developed by the University. The review is based on a test that Roger was instrumental in developing.

Can Roger meet with PHA about the new drug?

Do any exceptions apply?

| Exceptions / Waivers | (a)(1) | (a)(2) | (b) | (c) | (d) | (f) |
|---|--------|--------|-----|-----|-----|-----|
| Official Government Duties (j)(1) | | | | | | |
| State and Local Governments and Institutions, Hospitals, and Organizations (j)(2) | | | | | | |
| International Organizations (j)(3) | | | | | | |
| Special Knowledge (j)(4) | | | | | | |
| Scientific or Technological Information (j)(5) | | | | | | |
| Testimony under Oath or Statements Made under Penalty of Perjury (j)(6) | | | | | | |
| Political Parties and Campaign Committees (j)(7) | | | | | | |
| Presidential Waiver (k) | | | | | | |

Notwithstanding 207(a), (c) or (d), an employee may make a communication *solely* for purposes of furnishing scientific or technological information if:

- Done in accordance with Agency procedures; or
- If the agency, in consultation with OGE, publishes certification in the Federal register that
 - The employee has outstanding scientific or technological qualifications
 - That those qualifications are needed in the particular matter; and
 - That the national interest is served by the former employees' participation.

Scientific or Technological Information

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- ❑ Communication for the purpose of providing technological or scientific information
 - ❑ Solely for the purpose of conveying information
 - ❑ Related to the natural sciences (does not include non-technical disciplines such as law, economics, or political science)
- ❑ Incidental remarks permitted
 - ❑ Practical consideration (risk, cost, speed of implementation)
 - ❑ Statement about the kind, form or adequacy of information required to make a finding
 - ❑ Does NOT permit the presentation of arguments or the basis for why the Government should take a specific action
- ❑ Procedural matters
 - ❑ Agency procedures or
 - ❑ Federal Register certification

The client wants Roger to use his subject-matter expertise in a meeting with PHA officials on the review of a new drug developed by the University. The review is based on a test that Roger was instrumental in developing.

Client: Pharma-litical Party

42



Do any exceptions apply?

43

| Exceptions / Waivers | (a)(1) | (a)(2) | (b) | (c) | (d) | (f) |
|---|--------|--------|-----|-----|-----|-----|
| Official Government Duties (j)(1) | | | | | | |
| State and Local Governments and Institutions, Hospitals, and Organizations (j)(2) | | | | | | |
| International Organizations (j)(3) | | | | | | |
| Special Knowledge (j)(4) | | | | | | |
| Scientific or Technological Information (j)(5) | | | | | | |
| Testimony under Oath or Statements Made under Penalty of Perjury (j)(6) | | | | | | |
| Political Parties and Campaign Committees (j)(7) | | | | | | |
| Presidential Waiver (k) | | | | | | |

A former senior or very senior employee will not violate § 207(c) or (d) if his communication or appearance is solely on behalf of a candidate in his or her capacity as candidate or an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party.

18 U.S.C. § 207(j)(7)(B): Limitations

The exception will not apply if:

- (i) the representation is before the Federal Election Commission by a former employee of the FEC; or
- (ii) the representation is made at the time the person is employed by a person or entity other than —
 - (I) a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party; or
 - (II) a person or entity who represents, aids, or advises only persons or entities described above.

Employer: Michigan State Government

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Do any exceptions apply?

46

| Exceptions / Waivers | (a)(1) | (a)(2) | (b) | (c) | (d) | (f) |
|---|--------|--------|-----|-----|-----|-----|
| Official Government Duties (j)(1) | | | | | | |
| State and Local Governments and Institutions, Hospitals, and Organizations (j)(2) | | | | | | |
| International Organizations (j)(3) | | | | | | |
| Special Knowledge (j)(4) | | | | | | |
| Scientific or Technological Information (j)(5) | | | | | | |
| Testimony under Oath or Statements Made under Penalty of Perjury (j)(6) | | | | | | |
| Political Parties and Campaign Committees (j)(7) | | | | | | |
| Presidential Waiver (k) | | | | | | |

A former senior or very senior employee will not violate § 207(c) or (d) if his communication or appearance is made in carrying out official duties as an employee of . . .

(a) an agency or instrumentality of a State or local Government if the appearance, communication, or representation is on behalf of such government

Do any exceptions apply?

47

| Exceptions / Waivers | (a)(1) | (a)(2) | (b) | (c) | (d) | (f) |
|---|--------|--------|-----|-----|-----|-----|
| Official Government Duties (j)(1) | | | | | | |
| State and Local Governments and Institutions, Hospitals, and Organizations (j)(2) | | | | | | |
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| Scientific or Technological Information (j)(5) | | | | | | |
| Testimony under Oath or Statements Made under Penalty of Perjury (j)(6) | | | | | | |
| Political Parties and Campaign Committees (j)(7) | | | | | | |
| Presidential Waiver (k) | | | | | | |

A former employee will not violate § 207 if his communication or appearance is on behalf of:

- United States;
- District of Columbia; or
- As an elected official of a State or local government.

Thank you!

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