Office of Government Ethics
96X8

Letter to an Alternate Designated Agency Ethics Official dated April 4, 1996

This responds to your letter dated March 12, 1996, regarding the applicability of the one-year ban at 18 U.S.C. § 207(c) to a former General Counsel and Designated Agency Ethics Official of your agency. Because your request for formal guidance does not meet the criteria delineated in 5 C.F.R. § 2638.303, your concerns will be addressed instead in an informal ethics advisory letter. We conclude that [the former employee] is not restricted by section 207(c) from representing private clients before the [agency], provided his post-employment conduct remains consistent with the written advice you provided to him in your February 22, 1996 opinion letter.

As background, you informed us that [the former employee] resigned from his Government position on February 23, 1996. He was at that time serving as a member of the Senior Executive Service (SES), at an ES-4 pay level. Prior to his departure from the [agency], you provided [the former employee] a detailed overview of the post-employment restrictions applicable to him after he terminated Government service. Specifically, your February opinion letter advised him, among other things, that the one-year ban under section 207(c) did not apply to him because of the short-term waiver granted by the Office of Government Ethics (OGE) to certain members of the SES. We find that your advice to [the former employee], on the applicability of section 207(c), was correct and consistent with OGE's January 4, 1996 DAEOgram (DO-96-001).

Additionally, you asked us for advice on a recommended "cooling off" period that would enable [the former employee] to avoid any possible "appearance of impropriety" issues. You specifically referenced the general ethics principle found at 5 C.F.R. § 2635.101(b)(14). You also noted [the former employee's] belief that a "cooling off" period of four to six months would be appropriate in his case.

As a general matter, agencies should always be sensitive to impartiality issues that can arise in situations where former senior Government employees return to their former agencies to represent private clients. In many cases, the representation may be permissible under the conflict of interest statutes. However, Congress imposed a "cooling off" period in section 207(c) to provide former senior employees and their agencies a period of time to adjust to new roles and to help diminish the appearance that Government decisions may be affected by the improper use of the senior employee's former position. 1 Congress has, in its judgment, decided to limit the statute's application to individuals who have the most senior career and political appointments. [The former employee] did not fall within the class of senior employees subject to the one-year "cooling off" ban at the time of his departure from the [agency].

As you know, [the former employee] may decide not to represent clients before the [agency] for his own personal reasons. However, as you correctly advised him, the conflict of interest statutes do not impose a "cooling off" period in [the former employee's] case. His representations must, however, comply with applicable post-employment requirements. Further, we note that your letter does not raise any "appearance of impropriety" issues, under the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), because [the former employee] is a former Government employee and is therefore not subject to the ethical principles contained in the Standards of Conduct, including the general principle that requires employees to avoid actions that create the appearance that the law or the Standards of Conduct have been violated.

While ethics laws may not affect [the former employee's] post- Government employment activities, the [agency] may want to explore whether or not it has any independent statutory authority to regulate party representation that is provided by former high level [agency] employees in matters pending before the [agency], even when such representation would be in compliance with current conflict of interest requirements. We note that many Federal entities have established rules of practice that, in some cases, affect party representation in proceedings under statutes administered by these Federal entities. 2

For example, the Merit Systems Protection Board (MSPB) permits a party to choose a representative in an MSPB appellate proceeding. It also has procedures that allow an opposing party or a judge, by motion, the opportunity to challenge the designation of a representative on the grounds that it involves a conflict of interest or a conflict of position. 3 Moreover, the Farm Credit Administration (FCA) has procedures whereby a person practicing before the FCA may be permanently or temporarily denied the privilege of practicing before the FCA if such person is found, among other things, to have engaged in unethical or improper conduct. 4 The [agency] may want to review the scope of its own statutory authority to regulate party representation in [agency] proceedings.

Finally, this Office is not aware of any other "cooling off" bans or other ethics restrictions that may apply to [the former employee], aside from those post-employment restrictions about which [the former employee] was properly informed in your February opinion letter. I hope this discussion is useful to you in your efforts to advise [the former employee] on the application of post-employment requirements to his representational activities on behalf of his new law firm.

Sincerely,

Stephen D. Potts
Director

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1. See OGE Informal Advisory Letter 90 x 17.

2. See, e.g., 13 C.F.R. § 103.13-3 (Small Business Administration), 47 C.F.R. § 1.21-1.27 (Federal Communications Commission), 17 C.F.R. § 201.2 (Securities and Exchange Commission), and 31 C.F.R. § 10.26 (Department of the Treasury).

3. See 5 C.F.R. § 1201.31(b) & (c).

4. See 12 C.F.R. § 623.4(a).