

Office of Government Ethics

03 x 9

**Letter to a Private Attorney
dated November 26, 2003**

This is in reply to your request of October 7, 2003, for a formal advisory opinion, on behalf of the employer of a former "senior employee" of the executive branch of the Federal Government. Your request concerns the scope of the post-employment bar applicable to former senior employees¹ at 18 U.S.C. § 207(c)(1). Although your request does not meet the criteria for the rendering of a formal advisory opinion, we are pleased to provide the following guidance to you.

According to your letter, you represent the employer of a former senior employee, described hypothetically as a former employee [of a component of the Department of Defense]. Your client plans to use the former senior employee to assist with international marketing of defense-related products and services. In performing this work, the former senior employee may engage in communications to and appearances before other agencies, including other agencies within the Department of Defense (DoD). It has been your client's experience that civilian or military employees [of the DoD component] are sometimes in attendance at a meeting at an agency other than the [DoD component].

18 U.S.C. § 207(c)(1) establishes what is known as a one-year cooling-off period. It provides that a senior employee of the executive branch:

who, within one year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination,

¹ A "senior" employee is defined in 18 U.S.C. § 207(c)(2)(A) and in 5 C.F.R. § 2641.101.

on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

18 U.S.C. § 207(g) sets forth a special rule with regard to detailees. It provides that a person who is detailed from one department or agency to another shall be considered an employee of both departments or agencies during the period of the detail. Thus, a current employee to whom communications are made is to be considered an employee of both his own agency and the agency to which he has been detailed. Moreover, a former senior employee (or other former employee) who had been detailed to another agency would be considered an employee of both his own agency and the agency to which he had been detailed for purposes of the applicable restrictions of 18 U.S.C. § 207.

18 U.S.C. § 207(h) provides a mechanism for departments and agencies to ameliorate the effects of the one-year cooling off period in appropriate cases. The Director of the Office of Government Ethics (OGE) may designate a component of a department or agency as a distinct and separate bureau within that department or agency when the component exercises distinct functions and there is no potential for use of undue influence or unfair advantage based on past Government service. In that instance, the former senior employee may engage in representational activities before the other components of the department or agency. At Appendix B to 5 C.F.R. part 2641, the Director of OGE has designated the following as distinct and separate components within DoD: Army, Air Force, Navy, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Threat Reduction Agency, National Imagery and Mapping Agency, and National Security Agency.

Your question concerns whether and to what extent 18 U.S.C. § 207(c)(1) prohibits a communication to or an appearance before an agency or department other than the [DoD component] when a current employee of the [DoD component] may be present at the other agency or department and receive the communication. You present three scenarios in which this question may arise: (1) a current employee [of the DoD component] could be an observer at a meeting on another DoD agency's matter, but play no role in either the meeting or that DoD agency's decision-making on the matter; (2) the current employee [of the DoD component] could

play an active role in the meeting and in subsequent decision-making by the other DoD agency; or (3) the current employee [of the DoD component] could be formally detailed to the other agency and could be attending in his or her capacity as a detailee.

Your position is that the prohibition in 18 U.S.C. § 207(c)(1) does not apply because, in each of the situations described in your letter, any former senior employee [of the DoD component] who might receive the communication or be present at the appearance would be acting, if at all, on behalf of an agency other than the [DoD component]. In the absence of additional specific information about a particular meeting, we cannot agree with this interpretation.

The proper focus under 18 U.S.C. § 207(c)(1) is whether the communication or appearance is made with the intent to influence an officer or employee at the former senior employee's former agency, in connection with a matter in which the former employee is seeking official action from an officer or employee of his former agency. Accordingly, in order for the one-year cooling-off period to be triggered, the appearance does not have to be before the former senior employee's agency, but only before an employee of the former senior employee's agency.² Without having specific information about why the current employee [of the DoD component] is at the meeting, what the [DoD component's] interest is in the matter under consideration at the meeting, and what the former senior employee expects to communicate, we cannot say that section 207 is inapplicable.

We can, however, advise you generally with respect to the hypothetical situations you presented. First, we believe that calling an employee an "observer" at a meeting would not necessarily mean that the employee is insulated from an attempt to influence. The reasons for an employee's being at a meeting will vary. A former senior employee would need to obtain a fuller explanation of why the current employee of his former department or agency is attending the meeting in order to

² Prior to 1989, the language of 18 U.S.C. § 207(c) required that the former senior employee's communication or appearance be to, or before, his former agency or an employee thereof. That language was modified when the statute was amended in 1989. The language referring to communications to or appearances before the senior employee's former agency was removed.

ascertain whether representational contacts made at the meeting would be barred by 18 U.S.C. § 207(c)(1). Moreover, where a current employee [of the DoD component] is participating in the meeting, either as an employee of the [DoD component] or as a detailee, we see no reason to assume that section 207(c) is inapplicable. In such a case, the former senior employee presumably would anticipate that the employee [of the DoD component] would take some action in response to his communication or appearance, such as making a recommendation to the agency hosting the meeting. Under the circumstances, the communication or appearance would be made to influence an officer or employee of the [DoD component] in connection with a matter in which the former senior employee is seeking official action.

If your client's employee plans to attend meetings at which he believes an employee [of the DoD component] may be present, he should obtain a list of the names of employees who will be attending the meeting and the department or agency that employs them. If any employees from his former department or agency appear on such a list, further inquiry will need to be made about the role they will play at the meeting. The Designated Agency Ethics Official (DAEO) at the department or agency at which the former senior employee served would be available to assist in obtaining that information, as part of the counseling service to which all former employees are entitled.

We trust that this general guidance will be of assistance to you. As noted above, agencies have the responsibility to provide assistance to former Government employees who seek advice on specific problems. If you have specific questions about the post-employment activities of a former senior employee, we encourage you to contact the Designated Agency Ethics Official at the department or agency at which that former senior employee served.

Sincerely,

Marilyn L. Glynn
General Counsel