



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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May 16, 1989

CHAIRMAN'S OFFICE
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The Honorable Barney Frank, Chairman
Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6216

Signed by:.....

Re: Proposed Amendments to Section 207 of the Ethics in
Government Act

Dear Mr. Chairman:

This is in response to your letter of May 1, 1989, requesting my comments regarding the impact on this agency and its personnel of the President's proposed modification to 18 U.S.C. 207(c). Existing Subsection 207(c) bars certain senior federal employees from any contact with their former employing agency for one year, even with respect to entirely new matters, after the individual's resignation from the government. The modification proposed in the President's bill would extend the no-contact ban to all agency personnel paid at or above the basic rate of pay for grade GS-17 and at levels ES 5 and 6 in the Senior Executive Service. Current Subsection 207(d) applies the one-year ban only to those persons who are designated by the Director of the Office of Government Ethics as holding "a position which involves significant decision-making or supervisory responsibility."

In my view, the approach in existing law, and in the bill you sponsored in the last session of Congress, H.R. 9, is preferable. Both existing law and H.R. 9 provide that only those mid-level senior officials designated by the Office of Government Ethics, based upon the duties of their positions, are subject to the one-year ban. Enactment of the President's bill would inhibit the Commission's ability to recruit highly qualified employees for senior level positions. S.1, a related bill pending in the Senate, would have still more draconian effects. All of these bills, however, would to greater or lesser degrees, discourage capable people from serving in responsible career civil service positions.

Background

The one-year ban was enacted to prevent former high-ranking officials from contacting for one-year the agencies that employed them because of the official's presumed special influence over, or access to, his or her former colleagues. The prohibition was designed to promote public confidence that governmental decisions are made in an impartial manner. While the one-year ban may foster public confidence, it does so at a high price -- the bar is a significant disincentive to senior level government service.

Under present law, the application of the ban is restricted to Executive Level positions, and to those SES and GS-level senior officials whose positions involve significant decision-making or supervisory responsibility, as determined by the Director of the Office of Government Ethics. The present provision thus recognizes that it is unfair and illogical to impose a ban on former officials who served in positions that did not influence and provide opportunities for authority over a significant number of agency employees.

Under existing law (and under H.R. 9 1/), the five Commissioners of the Securities and Exchange Commission are covered by the one-year ban because they occupy Executive Level

1/ Section 2 of the January 23 redraft of H.R. 9 would expand the one-year ban in two respects. However, neither of these amendments would affect the Commission:

First, the bill would add a new Subsection 207(c) which would ban all contact with presidential appointees in the former employee's department or agency, even if the department or agency is otherwise "compartmentalized" under authority granted to the Director of the Office of Government Ethics. The Commission has never been compartmentalized.

Second, the bill would add a new Subsection 207(d) which would prohibit officials at Executive Levels I and II from contacting any government official at Executive Levels I through V in any department or agency. The Commission has no appointees at Executive Levels I and II.

positions. In addition, the Director of the Office of Government Ethics has designated 14 Senior Executive Service positions as meeting the criteria in Subsection 207(d) and thus subject to the ban. The Commission's other 42 Senior Executive Service positions, and its one GS-17 position, are exempt. Those who are exempt do have substantial duties and responsibilities that are important to the successful completion of the mission of the Commission, but are not heads of major divisions or offices that establish Commission policy; nor do they have substantial decision-making and supervisory responsibility, as compared to their supervisors. They do not enjoy the same degree of public visibility and influence as those in designated positions and, therefore, the imposition of the one-year ban on these individuals would subject them to a significant disadvantage in obtaining post-government employment. Moreover, because of the more limited scope of their responsibilities, the one-year ban would, as to these persons, engender little or no corresponding benefit in terms of public confidence in agency processes.

Potential Impact of Section 201 of the President's Bill

Under the President's bill, the application of the one-year ban would depend solely on an employee's pay classification, regardless of the duties of his or her position. ^{2/} I recognize that the current process of designating positions based on duties involves administrative effort, and that a bright line standard would streamline administration of the law. However, the U.S. Supreme Court, in a landmark decision under the federal securities laws, recently rejected a bright-line rule in language I believe is useful to repeat here:

"A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in light of all the circumstances. But ease of application alone is not an excuse for ignoring the purposes of the * * * [law] and Congress' policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding * * *, must necessarily be over- or underinclusive." Basic Incorporated v. Levinson, 99 L.Ed. 194, 211 (1988).

^{2/} Section 201 of the President's bill would amend Subsection 207(c) of Title 18 by applying the one-year ban to everyone who is a "senior covered person." The term "senior covered person" is defined at the President's proposed amendment to Subsection 207(1)(5).

If the application of Subsection 207(c) turns upon the rate of pay of the position, rather than on an analysis of the duties of the position, the results will necessarily be "over- or underinclusive." If the cut-off for coverage of the one-year ban were to be set at the ES 5 and GS-17 level, three positions at the Commission which are now designated would no longer be covered, and eight positions which are exempt would be covered. This reflects the fact that significant decision-making authority and supervisory responsibility do not always correspond to pay scales.

Moreover, enactment of the President's proposal might well result in a further weakening of the relationship between pay and duties. The difference between an ES 4 and an ES 5 salary is currently only \$2,200. Given the substantial burden the one-year ban imposes on post-government employment, many officials might choose to forego a minimal after-tax difference in salary in order to avoid the ban. Thus, for example, a senior Commission official, such as a Division Director, could request to be paid at the ES 4 level, or decline pay raises above that level. The individual's duties and responsibilities -- and any special ability to influence colleagues after leaving the agency -- would, of course, not be influenced by the resulting slight reduction in salary. Indeed, if the President's bill in this respect becomes law, some Commission employees at ES 5 and 6 levels are considering a request to be reduced to ES 4, while retaining their current positions.

Potential Impact of Section 2 of S.1

S.1, the proposed "Integrity in Post Employment Act of 1989," would also eliminate the current procedure of designating mid-level senior positions as subject to the one-year ban based on the duties of the position. ^{3/} Under this proposal, all employees compensated at the basic rate for GS-16 and above would be covered by the ban. At the Commission, this would mean that 157 mid-level employees would be covered, compared to the current figure of 14. As I stated in my letter to you last year (a copy of which is enclosed), if this provision is enacted, it is likely to cause a significant number of the newly affected persons to resign before the effective date of the legislation. This would constitute a sudden and major loss of expert and experienced

^{3/} Section 2 of S.1 would amend Subsection 207(c)(1) of Title 18 by imposing the one-year ban on everyone who is a "senior official." The term "senior official" is defined at the proposed amendments to Subsection 207(e)(1)(A).

staff. Recruiting for and promotion to the positions vacated would become more difficult. The Commission's ability to discharge its statutory responsibilities would inevitably suffer as a result.

Cumulative Disincentive to Career Government Service

Apart from these specific concerns regarding the bills, I would urge Congress to consider, before it proceeds in this area, the enervating cumulative effect of imposing additional restrictions on the senior civil service. Commission mid-level senior officials, most of whom are lawyers, receive substantially lower salaries than their peers in the private securities bar. They exercise, however, significantly more far-reaching responsibilities than do most private attorneys. Yet, they are --

- frozen in a pay scale which is dependent upon an increase in Congressional salaries;
- compelled to make public disclosure of significant confidential, personal financial information with respect to themselves and their spouses;
- subject to stringent post-employment restrictions; and
- limited in their personal and professional activities in a variety of ways that are not applicable to their private sector counterparts.

An expansion of the one-year ban, and the proposed stiffening of public disclosure requirements, would add to these burdens. They are, however, reactions to isolated incidents involving political appointees, not by career civil servants. It is counterproductive that these incidents should trigger added restrictions for career officials upon whom the effective functioning of the federal government is heavily dependent.

* * *

In summary, for the foregoing reasons, I favor the approach of present law with respect to the one-year ban, as reflected in H.R. 9.

The Honorable Barney Frank, Chairman
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I appreciate the opportunity to comment on this legislation. I would be pleased to provide any additional information, or to comment on other aspects of proposed ethics legislation under consideration by the Subcommittee, if you believe it would be useful.

Sincerely,



David S. Ruder
Chairman

Enclosure

Craig T. James
cc: The Honorable ~~James T. Craig~~
The Honorable Jack Brooks
The Honorable Hamilton Fish, Jr.
The Honorable John D. Dingell
The Honorable Norman F. Lent
The Honorable Edward J. Markey
The Honorable Matthew J. Rinaldo
The Honorable Donald W. Riegle, Jr.
The Honorable Jake Garn
The Honorable Christopher Dodd
The Honorable John Heinz
Mr. James Murr, Office of Management and Budget