

requirements of paragraphs (b)(1) and (2) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. OMB ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (b)(1) and (2) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(c) *Timing of requests for fee waivers.* Requests for a waiver or reduction of fees should be made when the request is first submitted to OMB and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester shall be required to pay any costs incurred up to the date the fee waiver request was received.

PART 1304—POST EMPLOYMENT CONFLICT OF INTEREST

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AUTHORITY: Title V, Section 501(a), Pub. L. 95-521, as amended, 92 Stat. 1864; and Sections 1 and 2, Pub. L. 96-28, 93 Stat. 76 [18 U.S.C. 207]; 5 CFR 737.

SOURCE: 45 FR 84007, Dec. 22, 1980, unless otherwise noted.

§ 1304.4601 Purpose.

(a) This section sets forth OMB's policy and procedures under the Ethics in Government Act of 1978, 18 U.S.C. 207, and the Office of Personnel Management's implementing regulations, 5 CFR part 737, for determining violations of restrictions on post-employment activities and for exercising

OMB's administrative enforcement authority.

(b) These regulations bar certain acts by former Government employees which may reasonably give the appearance of making unfair use of prior Government employment and affiliations. OMB acts on the premise that it has the primary responsibility for the enforcement of restrictions on post-employment activities and that criminal enforcement by the Department of Justice should be undertaken only in cases involving aggravated circumstances.

(c) These regulations do not incorporate possible additional restrictions contained in a professional code of conduct to which an employee may also be subject.

(d) Any person who holds a Government position after June 30, 1979, is subject to the restrictions under this section; except that the new provisions applicable to Senior employees designated by the Director of the Office of Government Ethics are effective February 28, 1980.

§ 1304.4604 Definitions.

(a) *Government Employee* includes any officer or employee of the Executive Branch, those appointed or detailed under 5 U.S.C. 3374, and Special Government Employees. It does not include an individual performing services for the United States as an independent contractor under a personal service contract.

(b) *Former Government Employee* means one who was, and no longer is, a Government employee.

(c) *Special Government Employee* means an officer or employee of an agency who is retained, designated, appointed, or employed to perform temporary duties on a full-time or intermittent basis for not more than 130 days during any period of 365 consecutive days. This applies whether the Special Government Employee is compensated or not.

(d) *Senior Employee* means an employee or officer as designated in the statute or by the Director of the Office of Government Ethics. The Director of the Office of Government Ethics has designated civilians who have significant decision-making or supervisory

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responsibility and are paid at or equivalent to GS-17 or above as Senior Employees. Civilians paid at the Executive level are automatically designated by statute as Senior Employees. (A list of Senior Employee positions is found at 5 CFR 737.33.)

§ 1304.4605 Post-employment restrictions.

(a) General Restrictions Applicable to All Former Government Employees:

(1) *Permanent Bar.* A former Government employee is restricted from acting as a representative before an agency as to a particular matter involving a specific party if the employee participated personally and substantially in that matter as a Government employee. The government employee is also restricted from making any oral or written communication to an agency with the intent to influence on behalf of another person as to a particular matter involving a specific party if the former Government employee participated personally and substantially in that matter as a Government employee.

(2) *Two-Year Bar.* (i) A former Government employee is restricted for two years from acting as a representative before an agency as to a particular matter involving a specific party if the employee had official responsibility for that matter. The former Government employee is also restricted for two years from making any oral or written communication to any agency with the intent to influence on behalf of another person as to a particular matter involving a specific party if the employee had official responsibility for that matter.

(ii) In order to be a matter for which the former Government employee had official responsibility, the matter must actually have been pending under the employee's responsibility within the period of one year prior to the termination of such responsibility.

(iii) The statutory two-year restriction period is measured from the date when the employee's responsibility for a particular matter ends, not from the termination of Government service.

(b) Restrictions Applicable Only to Former Senior Employees:

(1) *Two-Year Bar on Assisting in Representing.* (i) A former Senior Employee is restricted for two years from assisting in representing another person by personal appearance before an agency as to a particular matter involving a specific party if the former Senior Employee participated personally and substantially in that matter as a Government employee.

(ii) The statutory two-year period is measured from the date of termination of employment in the position that was held by the Senior Employee when he participated personally and substantially in the matter involved.

(2) *One-Year Bar on Attempts to Influence Former Agency.* (i) A former Senior Employee is restricted for one year from any transactions with the former agency on a particular matter with the intent to influence the agency, regardless of the former Senior Employee's prior involvement in that matter.

(ii) This restriction is aimed at the possible use of personal influence based on past Government affiliations in order to facilitate transaction of business. Therefore, it includes matters which first arise after a Senior Employee leaves Government service.

(iii) The restriction applies whether the former Senior Employee is representing another or representing himself, either by appearance before an agency or through communication with that agency.

(c) OFPP is a separate agency for purposes of the foregoing restrictions on post-employment activities.

§ 1304.4606 Exemptions.

(a) *General.* (1) Communications made solely to furnish scientific or technological information are exempt from these prohibitions.

(2) A former Government employee may be exempted from the restrictions on post-employment practices if the Deputy Director of OMB, in consultation with the Director of the Office of Government Ethics, executes a certification that is published in the FEDERAL REGISTER. The certification shall state that the former Government employee has outstanding qualifications in a scientific, technological or other technical discipline; is acting with respect to a particular matter which requires

such qualifications; and the national interest would be served by his participation.

(b) *Specific.* The one-year bar shall not apply to a former Senior Employee's representation on new matters if the former Senior Employee is:

(1) An elected State or local government official, who is acting on behalf of such government; or

(2) Regularly employed by or acting on behalf of an agency or instrumentality of a State or local government; an accredited, degree-granting institution of higher education; or a non-profit hospital or medical research organization.

§ 1304.4607 Advice to former Government employees.

The Office of General Counsel, OMB, has the responsibility for providing assistance promptly to former Government employees who seek advice on specific problems.

§ 1304.4608 Administrative Enforcement Procedures (18 U.S.C. 207(j); 5 CFR 737.27).

(a) Whenever an allegation is made that a former Government employee has violated 18 U.S.C. 207(a), (b) or (c) or any of the regulations promulgated thereunder by the Office of Government Ethics or by OMB, the allegation and any supporting evidence shall be transmitted through the Office of General Counsel to the Deputy Director, OMB.

(b) Allegations and evidence shall be safeguarded so as to protect the privacy of former employees prior to a determination of sufficient cause to initiate an administrative disciplinary proceeding.

(c) If review by the Office of General Counsel, OMB, shows that the information concerning a possible violation does not appear to be frivolous, the Deputy Director, OMB, shall expeditiously provide all relevant evidence, any appropriate comments, and copies of applicable agency regulations to the director, Office of Government Ethics, and to the Criminal Division, Department of Justice. Unless the Department of Justice informs OMB that it does not intend to initiate criminal prosecution, OMB shall coordinate any

investigation or administrative action with the Department of Justice in order to avoid prejudicing criminal proceedings.

(d) After appropriate review and recommendation by the Office of General Counsel, if the Deputy Director, OMB, determines that there is reasonable cause to believe that there has been a violation, the Deputy Director may direct the Office of General Counsel to initiate an administrative disciplinary proceeding and may designate an individual to represent OMB in the proceeding.

(e) *Notice.* The Office of General Counsel shall provide the former Government employee with adequate notice of its intention to institute a proceeding and with an opportunity for a hearing. The notice must include a statement of allegations, and the basis thereof, in sufficient detail to enable the former Government employee to prepare an adequate defense; notification of the right to a hearing; and an explanation of the method by which a hearing may be requested.

(f) *Hearing.* A hearing may be obtained by submitting a written request to the Office of General Counsel.

(g) *Examiner.* The presiding official at the proceedings shall be the hearing examiner, who is delegated authority by the Director, OMB, to make an initial decision. The hearing examiner shall be an attorney in the Office of General Counsel designated by the General Counsel. The hearing examiner shall be impartial and shall not have participated in any manner in the decision to initiate the proceedings.

(h) *Time, date and place.* The hearing shall be conducted at a reasonable time, date, and place. The hearing examiner shall give due regard in setting the hearing date to the former Government employee's need for adequate time to properly prepare a defense and for an expeditious resolution of allegations that may be damaging to his reputation.

(i) *Hearing rights.* The hearing shall include, as a minimum, the right to represent oneself or to be represented by counsel; the right to introduce and examine witnesses and to submit physical evidence; the right to confront and cross-examine adverse witnesses; the

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right to present oral argument; and, on request, the right to have a transcript or recording of the proceedings.

(j) *Burden of proof.* OMB has the burden of proof and must establish substantial evidence of a violation.

(k) *Decision.* The hearing examiner shall make a decision based exclusively on matters of record in the proceedings. All findings of fact and conclusions of law relevant to the matters at issue shall be set forth in the decision.

(l) *Appeal within OMB.* Within 30 days of the date of the hearing examiner's decision, either party may appeal the decision to the Director. The Director shall make a decision on the appeal based solely on the record of the proceedings or on those portions of the record agreed to by the parties to limit the issues. If the Director modifies or reverses the hearing examiner's decision, he shall specify the findings of fact and conclusions of law that are different from those of the hearing examiner.

(m) *Administrative sanctions.* Administrative sanctions may be taken if the former Government employee fails to request a hearing after receipt of adequate notice or if a final administrative determination of a violation of 18 U.S.C. 207 (a), (b) or (c) or regulations promulgated thereunder has been made. The Director may prohibit the former Government employee from appearance or communication with OMB on behalf of another for a period not to exceed five years (5 CFR 737.27(a)(9)(i)) or take other appropriate disciplinary action (5 CFR 737.27(a)(9)(ii)).

(n) *Judicial review.* Any person found by an OMB administrative decision to have participated in a violation of 18 U.S.C. 207 (a), (b) or (c) or regulations promulgated thereunder may seek judicial review of the administrative decision.

PART 1305—RELEASE OF OFFICIAL INFORMATION, AND TESTIMONY BY OMB PERSONNEL AS WITNESSES, IN LITIGATION

Sec.

1305.1 Purpose and scope.

1305.2 Production prohibited unless approved.

1305.3 Procedures in the event of a demand for disclosure.

1305.4 Procedure in the event of an adverse ruling.

1305.5 No private right of action.

AUTHORITY: 31 U.S.C. 502.

SOURCE: 62 FR 29285, May 30, 1997, unless otherwise noted.

§ 1305.1 Purpose and scope.

This part contains the regulations of the Office of Management and Budget (OMB) concerning procedures to be followed when, in litigation (including administrative proceedings), a subpoena, order or other demand (hereinafter in this part referred to as a “demand”) of a court or other authority is issued for the production or disclosure of:

(a) Any material contained in the files of OMB;

(b) Any information relating to materials contained in the files of OMB; or

(c) Any information or material acquired by any person while such person was an employee of OMB as a part of the performance of the person's official duties or because of the person's official status.

§ 1305.2 Production prohibited unless approved.

No employee or former employee of OMB shall, in response to a demand of a court or other authority, produce any material contained in the files of OMB, disclose any information relating to materials contained in the files of OMB, or disclose any information or produce any material acquired as part of the performance of the person's official duties, or because of the person's official status, without the prior approval of the General Counsel.

§ 1305.3 Procedures in the event of a demand for disclosure.

(a) Whenever a demand is made upon an employee or former employee of OMB for the production of material or the disclosure of information described in § 1305.2, he shall immediately notify the General Counsel. If possible, the General Counsel shall be notified before the employee or former employee concerned replies to or appears before the court or other authority.