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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2641

RIN 3209-AA14

Post-Employment Conflict of Interest Restrictions; Revision of Departmental Component Designations

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule; amendments.

SUMMARY: The Office of Government Ethics is revising the component designations of several departments, for purposes of the one-year post-employment conflict of interest restriction for senior employees, at 18 U.S.C. 207(c). OGE is adding several new component designations, revoking several existing component designations, and changing the names of others, based upon the recommendations of the departments concerned.

EFFECTIVE DATES: This final rule is effective November 23, 2004, except for the removals of certain designated components from appendix B to part 2641, as set forth in amendatory paragraph 3 below, which are effective on February 22, 2005.

FOR FURTHER INFORMATION CONTACT: W. Gregg Burgess, Associate General Counsel, Office of Government Ethics; telephone: (202) 482-9300; TDD: (202) 482-9293; fax: (202) 482-9237.

SUPPLEMENTARY INFORMATION:

A. Substantive Discussion

18 U.S.C. 207(c) prohibits a former "senior employee," for a period of one year, from knowingly making, with the intent to influence, any communication to or appearance before an employee of the department or agency in which he served in any capacity during the one-year period prior to termination from senior service, if that communication or

appearance is made on behalf of any other person, except the United States. For purposes of 18 U.S.C. 207, a "senior employee" is any individual whose rate of basic pay is equal to or greater than 86.5 percent of the rate for level II of the Executive Schedule.

The representational bar of 18 U.S.C. 207(c) usually extends to the whole of any department or agency in which a former senior employee served in any capacity during the year prior to termination from a senior employee position. However, 18 U.S.C. 207(h) provides that whenever the Director of OGE determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate department or agency. As a result, a former senior employee who served in a "parent" department or agency is not barred by 18 U.S.C. 207(c) from making communications to or appearances before any employee of any designated component of that parent, but is barred as to employees of that parent or of other components that have not been designated. Moreover, a former senior employee who served in a designated component of a parent department or agency is barred from communicating to or making an appearance before any employee of that component, but is not barred as to any employee of the parent or of any other component.

Under 18 U.S.C. 207(h)(2), component designations do not apply to persons employed at a rate of pay specified in or fixed according to subchapter II of 5 U.S.C. chapter 53 (the Executive Schedule). Component designations are listed in appendix B of 5 CFR part 2641.

The Director of OGE regularly reviews the component designations and determinations and, in consultation with the department or agency concerned, makes such additions and deletions as are necessary. As specified in 5 CFR 2641.201(e)(3)(iii), the Director "shall by rule make or revoke a component designation after considering the recommendation of the designated agency ethics official." Section 2641.201(e)(6) further provides

that, before designating an agency component as distinct and separate for purposes of 18 U.S.C. 207(c), the Director must find that there exists no potential for use by former senior employees of undue influence or unfair advantage based on past Government service, and that the component is an agency or bureau within a department or agency that exercises functions which are distinct and separate from the functions of the parent department or agency and from the functions of other components of that parent.

Pursuant to the procedures prescribed in 5 CFR 2641.201(e), several departments have forwarded written requests to OGE that their department's listing in appendix B be amended. After carefully reviewing the requested changes in light of the criteria in 18 U.S.C. 207(h) as implemented in 5 CFR 2641.201(e)(6), the current Acting Director of OGE has determined to grant all the requests and amend appendix B to 5 CFR part 2641 as explained below.

Department of Commerce

The Department of Commerce (DOC) has advised that the name of one DOC component currently listed in appendix B of part 2641 has been changed. According to DOC, the "Bureau of Export Administration" is now the "Bureau of Industry and Security." Therefore, the OGE Acting Director is amending the DOC listing in appendix B to reflect the current name of this component.

Department of Defense

The Department of Defense (DOD) has advised that the name of one DOD designated component currently listed in appendix B of part 2641 has been changed. According to DOD, the "National Imagery and Mapping Agency" is now the "National Geospatial-Intelligence Agency." Therefore, the Acting Director is amending the DOD listing in appendix B to reflect the current name of this component.

Department of Homeland Security

The Department of Homeland Security (DHS), which was created in the Homeland Security Act of 2002, Public Law No. 107-296, 116 Stat. 2135, has requested that the Director designate seven distinct and separate components in DHS for purposes of 18 U.S.C. 207(c). DHS has requested such designations

for its Directorates of "Emergency Preparedness and Response" (EPR), Information Analysis and Infrastructure Protection (IAIP), and "Science and Technology" (S&T), as each was created by separate statutory provision under the Homeland Security Act of 2002. Largely composed of the Federal Emergency Management Agency (FEMA), the EPR was established to ensure that the nation is prepared for catastrophes, including natural disasters and terrorist assaults. The IAIP was established to merge the capability to identify and to assess a broad range of intelligence information from Federal, State, and local authorities concerning threats to the homeland. The S&T functions to serve as the primary research and development arm of DHS to organize the scientific and technological resources of the nation to prevent or mitigate the effects of catastrophic terrorism.

In addition to these Directorates, DHS has requested the following distinct and separate component designations: the "Federal Law Enforcement Training Center" (FLETC), the "Transportation Security Administration" (TSA), the "United States Coast Guard" (USCG), and the "United States Secret Service" (USSS), all four of which were previously designated as distinct and separate components at other departments. The Homeland Security Act of 2002 established that each of these four entities shall be maintained as a distinct and separate entity within DHS.

The Acting Director is granting the requests of DHS and amending appendix B to part 2641 to add a listing for DHS as a parent department and to designate the requested seven distinct and separate components in the DHS listing.

Department of Justice

The Department of Justice (DOJ) has requested revocation of the "Immigration and Naturalization Service" (INS) currently listed in appendix B of part 2641 as a designated component of DOJ, because the functions of INS have been transferred to the Department of Homeland Security. In addition, in accordance with the Homeland Security Act of 2002, the "Bureau of Alcohol, Tobacco, Firearms and Explosives" (ATF) has been established as a new distinct entity within DOJ. Therefore, DOJ has also requested that this bureau be designated a distinct and separate component of DOJ. The Acting Director is granting the DOJ requests and therefore is amending the DOJ listing in appendix B to part 2641 to revoke the component

designation of INS and to designate ATF as a new component.

Department of Labor

The Department of Labor (DOL) has advised that the name of one DOL designated component currently listed in appendix B of part 2641 has been changed. According to DOL, the "Pension and Welfare Benefits Administration" is now the "Employee Benefits Security Administration." Therefore, the Acting Director is amending the DOL listing in appendix B to part 2641 to reflect the current name of this component.

Department of Transportation

The Department of Transportation (DOT) has advised that the functions of the Transportation Security Administration (TSA) and the United States Coast Guard (USCG) have been transferred to the Department of Homeland Security in accordance with the Homeland Security Act of 2002, and has therefore requested that the component designations of TSA and USCG be revoked. The Acting Director is granting the DOT requests and is accordingly revising the DOT listing in appendix B to part 2641 to revoke the component designations of TSA and USCG.

Department of the Treasury

In connection with the changes pursuant to the Homeland Security Act of 2002, the Department of the Treasury (Treasury) has requested that the following four component designations be revoked, since these components no longer are a part of Treasury: "Bureau of Alcohol, Tobacco and Firearms" (BATF), "Federal Law Enforcement Training Center" (FLETC), "United States Customs Service" (USCG), and "United States Secret Service" (USSS). The Acting Director is granting Treasury's requests and is accordingly revising the Treasury listing in appendix B to part 2641 to revoke the component designations of BATF, FLETC, USCG and USSS.

Further, Treasury has requested that the recently-established Treasury bureau, the "Alcohol and Tobacco Tax and Trade Bureau" (TTB) be designated a distinct and separate component of Treasury. TTB was established under the Homeland Security Act of 2002. TTB has all the authorities related to the administration and enforcement of the provisions of the tax code relative to alcohol, tobacco, firearms and certain other excise taxes. The Acting Director is granting this additional Treasury request and is accordingly amending the Treasury listing in appendix B to part

2641 to add TTB as a designated component.

Effective Dates

As indicated in 5 CFR 2641.201(e)(4), a designation "shall be effective as of the effective date of the rule that creates the designation, but shall not be effective as to employees who terminated senior service prior to that date." Initial designations were effective as of January 1, 1991. The effective date of subsequent designations is indicated by means of parenthetical entries in appendix B to part 2641. The new component designations made by this rulemaking document, as well as the component name changes being reflected herein (which do not affect their underlying component designation dates), are effective November 23, 2004.

As also provided in 5 CFR 2641.201(e)(4), a revocation is effective 90 days after the effective date of the rule that revokes the designation. Accordingly, the component designation revocations made in this rulemaking will take effect February 22, 2005. Revocations are not effective as to any individual terminating senior service prior to the expiration of the 90-day period.

B. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553, as the Acting Director of the Office of Government Ethics, I find that good cause exists for waiving the general requirements for notice of proposed rulemaking, opportunity for public comment, and, except as to the component revocations (see the preamble discussion above), a 30-day delayed effective date. It is important and in the public interest that the designation or revocation herein by OGE of the specified separate departmental components, as well as the component name changes, all of which reflect the current organization of the concerned departments and, as to the new component designations, relieve a restriction, be published in the **Federal Register** and take effect as promptly as possible.

Regulatory Flexibility Act

As Acting Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this rule will not have a significant economic impact on a substantial number of small entities because it affects only Federal departments and agencies and current and former Federal employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this rule because it does not contain information collection requirements that require the approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), the final rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law at the same time this rulemaking document is sent to the Office of the Federal Register for publication in the **Federal Register**

Executive Order 12866

In promulgating this final rule, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This rule has not been reviewed by the Office of Management and Budget under that Executive order since it deals with agency organization, management, and personnel matters and is not "significant" under the order.

Executive Order 12988

As Acting Director of the Office of Government Ethics, I have reviewed this rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Part 2641

Conflict of interests, Government employees.

Approved: November 16, 2004.

Marilyn L. Glynn,

Acting Director, Office of Government Ethics.

■ Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending 5 CFR part 2641 as follows:

PART 2641—POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS

■ 1. The authority citation for part 2641 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 207; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

■ 2. Effective November 23, 2004, appendix B to part 2641 is amended by revising the listings for the Department of Commerce, the Department of Defense, the Department of Justice, the Department of Labor, the Department of Transportation and the Department of the Treasury, and by adding a listing for the Department of Homeland Security, to read as follows:

Appendix B to Part 2641—Agency Components for Purposes of 18 U.S.C. 207(c)

* * * * *

Parent: Department of Commerce

Components

Bureau of the Census
Bureau of Industry and Security (formerly Bureau of Export Administration) (effective January 28, 1992)
Economic Development Administration
International Trade Administration
Minority Business Development Administration
National Oceanic and Atmospheric Administration
National Telecommunications and Information Administration
Patent and Trademark Office
Technology Administration (effective January 28, 1992)

Parent: Department of Defense

Components

Department of the Air Force
Department of the Army
Department of the Navy
Defense Information Systems Agency
Defense Intelligence Agency
Defense Logistics Agency
Defense Threat Reduction Agency (effective February 5, 1999)
National Geospatial-Intelligence Agency (formerly National Imagery and Mapping Agency) (effective May 16, 1997)
National Reconnaissance Office (effective January 30, 2003)
National Security Agency
* * * * *

Parent: Department of Homeland Security

Components

Directorate of Emergency Preparedness and Response (effective November 23, 2004.)
Directorate of Information Analysis and Infrastructure Protection (effective November 23, 2004.)
Directorate of Science and Technology (effective November 23, 2004.)

Federal Law Enforcement Training Center (effective November 23, 2004.)
Transportation Security Administration (effective November 23, 2004.)
United States Secret Service (effective November 23, 2004.)
United States Coast Guard (effective November 23, 2004.)

* * * * *

Parent: Department of Justice

Components

Antitrust Division
Bureau of Alcohol, Tobacco, Firearms and Explosives (effective November 23, 2004.)
Bureau of Prisons (including Federal Prison Industries, Inc.)
Civil Division
Civil Rights Division
Community Relations Service
Criminal Division
Drug Enforcement Administration
Environment and Natural Resources Division
Executive Office for United States Attorneys² (effective January 28, 1992)
Executive Office for United States Trustees³ (effective January 28, 1992)
Federal Bureau of Investigation
Foreign Claims Settlement Commission
Immigration and Naturalization Service (expiring February 22, 2005.)
Independent Counsel appointed by the Attorney General
Office of Justice Programs
Office of the Pardon Attorney (effective January 28, 1992)
Offices of the United States Attorney (94)⁴
Offices of the United States Trustee (21)⁵
Tax Division
United States Marshals Service (effective May 16, 1997)
United States Parole Commission

Parent: Department of Labor

Components

Bureau of Labor Statistics
Employee Benefits Security Administration (formerly Pension and Welfare Benefits Administration) (effective May 16, 1997)
Employment and Training Administration
Employment Standards Administration
Mine Safety and Health Administration
Occupational Safety and Health Administration
Office of Disability Employment Policy (effective January 30, 2003)

* * * * *

² The Executive Office for United States Attorneys shall not be considered separate from any Office of the United States Attorney for a judicial district, but only from other designated components of the Department of Justice.

³ The Executive Office for United States Trustees shall not be considered separate from any Office of the United States Trustee for a region, but only from other designated components of the Department of Justice.

⁴ Each Office of the United States Attorney for a judicial district shall be considered a separate component from each other such office.

⁵ Each Office of the United States Trustee for a region shall be considered a separate component from each other such office.

Parent: Department of Transportation

Components

Federal Aviation Administration
 Federal Highway Administration
 Federal Motor Carrier Safety Administration
 (effective January 30, 2003)
 Federal Railroad Administration
 Federal Transit Administration
 Maritime Administration
 National Highway Traffic Safety
 Administration
 Saint Lawrence Seaway Development
 Corporation
 Surface Transportation Board (effective May
 16, 1997)
 Transportation Security Administration
 (effective January 30, 2003, expiring
 February 22, 2005.)
 United States Coast Guard (expiring February
 22, 2005.)

Parent: Department of the Treasury

Components

Alcohol and Tobacco Tax and Trade Bureau
 (effective November 23, 2004.)
 Bureau of Alcohol, Tobacco and Firearms
 (expiring February 22, 2005.)
 Bureau of Engraving and Printing
 Bureau of the Mint
 Bureau of the Public Debt
 Comptroller of the Currency
 Federal Law Enforcement Training Center
 (expiring February 22, 2005.)
 Financial Crimes Enforcement Network
 (FinCEN) (effective January 30, 2003)
 Financial Management Service
 Internal Revenue Service
 Office of Thrift Supervision
 United States Custom Service (expiring
 February 22, 2005.)
 United States Secret Service (expiring
 February 22, 2005.)

■ 3. Effective February 22, 2005, appendix B to part 2641 is further amended by:

■ A. Removing the Immigration and Naturalization Service from the listing for the Department of Justice;

■ B. Removing the Transportation Security Agency and the United States Coast Guard from the listing for the Department of Transportation; and

■ C. Removing the Bureau of Alcohol, Tobacco and Firearms, the Federal Law Enforcement Training Center, the United States Custom Service and the United States Secret Service from the listing for the Department of the Treasury.

[FR Doc. 04-25897 Filed 11-22-04; 8:45 am]

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FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 102, 104, and 106

[Notice 2004-15]

Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission ("Commission") is revising portions of its regulations regarding the definition of "contribution" and the allocation of certain costs and expenses by separate segregated funds ("SSFs") and nonconnected committees. A new rule explains when funds received in response to certain communications by any person must be treated as "contributions." In the allocation regulations, the final rules eliminate the previous allocation formula under which SSFs and nonconnected committees used the "funds expended" method to calculate a ratio for use of Federal and non-Federal funds for administrative and generic voter drive expenses, replacing it with a flat 50% minimum. These rules also spell out how SSFs and nonconnected committees must pay for voter drives and certain public communications. Other changes proposed previously regarding the definitions of "political committee" and "expenditure" are not being adopted. Further information is provided in the supplementary information that follows.

DATES: Effective January 1, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Assistant General Counsel, Mr. J. Duane Pugh Jr., Senior Attorney, Mr. Richard T. Ewell, Attorney, Mr. Robert M. Knop, Attorney, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission published a Notice of Proposed Rulemaking on March 11, 2004. See Notice of Proposed Rulemaking on Political Committee Status, 69 FR 11736 (Mar. 11, 2004) ("NPRM"). Written comments were due by April 5, 2004 for those commenters who wished to testify at the Commission hearing on these proposed rules, and by April 9, 2004 for commenters who did not wish to testify. The NPRM addressed a number of proposed changes to 11 CFR parts 100, 102, 104, 106 and 114. The Commission received over 100,000 comments from

the public with regard to the various issues raised in the NPRM. The comments are available at <http://www.fec.gov/register.htm> under "Political Committee Status." The Commission held a public hearing on April 14 and 15, 2004, at which 31 witnesses testified. A transcript of the public hearing is also available at <http://www.fec.gov/register.htm> under "Political Committee Status." For the purposes of this document, the terms "comment" and "commenter" apply to both written comments and oral testimony at the public hearing.

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follows were transmitted to Congress on November 18, 2004.

Explanation and Justification

Solicitations

The Commission is adopting one addition to the regulatory definition of "contribution" in 11 CFR part 100, subpart B. This addition comports with the statutory standard for "contribution" by reaching payments "made * * * for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.51 and 100.52. This addition has several exceptions to avoid sweeping too broadly.

11 CFR 100.57—Funds Received in Response to Solicitations

Section 100.57 is a new rule that explains when funds received in response to certain communications by any person must be treated as "contributions" under FECA. Paragraph (a) sets out the general rule, paragraphs (b) and (c) create two specific exceptions: Paragraph (b) addresses certain allocable solicitations, and paragraph (c) addresses joint fundraisers. These rules in new 11 CFR 100.57 apply to all political committees, corporations, labor organizations, partnerships, organizations and other entities that are "persons" under the Federal Election Campaign Act of 1971, as amended ("FECA"). See 2 U.S.C. 431(11). The rules apply without regard to tax status, so they reach all FECA "persons," including, for example, entities described in or operating under section 501(c)(3), 501(c)(4), and 527 of the Internal Revenue Code.