Report to the

Administrative Conference of the United States

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the authors, and do not necessarily reflect those of the Conference or its committees.

ABOUT THE ADMINISTRATIVE CONFERENCE

The Administrative Conference of the United States is a permanent, independent federal agency established by the Administrative Conference Act of 1964 (5 U.S.C. §§ 571-576). The purpose of the Administrative Conference is to improve the procedures of federal agencies so that the agencies may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest while administering regulatory, benefit, and other government programs. The Conference provides a forum in which agency officials, private lawyers, university professors, and other experts in administrative law and government can combine their experience and judgment in cooperative efforts to study procedural problems and explore solutions.

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Administrative Conference
of the United States

A GUIDE TO FEDERAL ETHICS LAWS FOR PRESIDENTIAL APPOINTEES

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FOREWORD

The Administrative Conference of the United States has prepared this guide to assist presidential appointees in understanding and complying with federal ethics laws during their government service. The Conference is an independent federal agency established in 1964 and charged with recommending improvements to federal administrative processes.

Reform of federal ethics laws usually focuses on tightening the statutes and regulations governing federal officials' actions. This is understandable because calls for reform often arise following instances of public officials' misconduct, and the fastest and most visible response to such wrongdoing is to write new rules to prevent a repetition of the particular conduct. A consequence of this reaction to particular instances of misconduct is a "ratcheting up" of federal ethics restrictions.

Certainly there is need for continued review and, where appropriate, strengthening of our ethics laws and their enforcement. But I suggest that that is not enough. To quote Alexander Solzhenitsyn, "[a] society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities."* Most people knowledgeable about federal government operations believe that federal officials will seek to conform their conduct to high ethical standards, not merely the letter of the law, if those standards are known to them.

This requires focus on ethics education -- for new presidential appointees as well as for departing government officials. Towards this end we asked Professor Robert N. Roberts to prepare A GUIDE TO FEDERAL ETHICS LAWS FOR PRESIDENTIAL APPOINTEES. He has produced this guide, providing a brief introduction to federal ethics laws and how they apply to specific situations a federal official may confront. It should be viewed as a supplement to the official advice of designated agency ethics officials and the White House Counsel's Office.

The Administrative Conference also is currently studying various aspects of federal ethics laws, including the Ethics in Government Act's public financial reporting requirements and the conflict-of-interest rules for federal advisory bodies, with a view towards their improvement. Of course, we welcome your interest and participation in our efforts to improve federal ethics laws and the administrative process generally.

I want, finally, to take this opportunity to thank Richard Austin, Acting Administrator of the General Services Administration, and his staff for their support in making this guide available.

Marshall J. Breger
Chairman
Administrative Conference of
the United States

*A. Solzhenitsyn, A World Split Apart, in SOLZENITSYN AT HARVARD 3 (R. Berman ed. 1980).

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A GUIDE TO FEDERAL ETHICS LAWS FOR PRESIDENTIAL APPOINTEES

by Professor Robert N. Roberts*

November 1988

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Introduction

This guide highlights the most common ethics problems executive branch presidential appointees will face while serving in the federal government. It is hoped that this discussion will help appointees to know when to seek out professional assistance in determining whether federal laws and regulations prohibit proposed conduct.

Although this guide discusses a number of criminal laws dealing with official misconduct by executive branch officials, presidential appointees are much more likely to find themselves in a controversy surrounding compliance with administrative standards of conduct regulations. Prudent appointees, therefore, will become familiar with their agencies' standards of conduct regulations as well as the relevant criminal prohibitions.

While the author is confident that the information and interpretations set forth in the guide are generally current and accurate,* it is emphasized that this guide is not an official source of interpretations of the relevant federal statutes, executive order, and regulations. Moreover, a guide of this length cannot adequately anticipate and answer the questions that may be presented by the myriad circumstances that may confront executive branch officials.

Therefore, it is important to stress that the presidential appointee's main source of guidance on federal ethics laws will be the designated agency ethics official (or "DAEO") in the agency in which the appointee serves. In addition, official interpretations are issued by the United States Office of Government Ethics and the United States Department of Justice in appropriate circumstances. Mention is made throughout the guide of where the presidential appointee should turn when additional advice is needed.

The officials responsible for managing the different elements of the executive branch ethics program realize that all the restrictions and reporting requirements may

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seem overwhelming to some entering the government. Nevertheless, all presidential appointees have an affirmative duty to understand how ethics restrictions apply to their official duties and their private lives. When appointees fail to familiarize themselves with ethics statutes and regulations, they run a risk of becoming embroiled in misconduct controversies which may do serious damage to their personal reputations and make it more difficult for them to perform their official duties. Equally important, presidential appointees who fail to take sufficient time to learn the restrictions may inadvertently contribute to the public perception that unethical conduct is rampant in federal departments and agencies.

Part One

Conduct Prior To Federal Service And The White House Ethics Clearance Process

The first contact most presidential appointees have with ethics regulations and restrictions occurs when the White House or transition team considers them for an appointment. Federal laws and regulations say nothing about ethics clearance activities by a transition team or the White House staff. For instance, federal law does not require someone being considered for a presidential appointment to provide the transition team or White House detailed personal and financial information.

As a practical matter, however, someone will not be considered for an appointment without first submitting detailed personal and financial information. Pre-nomination or appointment clearance procedures thus constitute the first occasion most individuals who ultimately accept high-level positions come face to face with ethics laws and regulations. Because of the short amount of time between an election and a new president taking office, it is often difficult to spend time explaining how the pre-nomination clearance process relates to maintaining high standards of ethical conduct in government.

The following discussion presents questions that the typical presidential appointee might have with respect to the pre-nomination or appointment clearance process.

A. The Collection Of Personal And Financial Information.

What type of personal information will the counsel for a presidential transition or the White House Counsel's Office typically request as a condition of being considered for a presidential appointment?

Recent presidential transitions and the White House Counsel's Office have required prospective appointees to complete extensive personal qualifications statements that require them to disclose detailed information on their employment history, criminal and civil litigation history, and any other information that might prove embarrassing to the appointee or the President. In addition, prospective

appointees are required to authorize a full field FBI background check and the release of recent tax returns.

What financial information must a prospective appointee provide to a transition team or to the White House Counsel's Office?

Since the enactment of the public financial disclosure requirements of the Ethics in Government Act of 1978, the White House Counsel has required prospective appointees to complete a draft SF 278, the "Executive Personnel Financial Disclosure Report."

How will the presidential transition and the White House Counsel's Office use the financial information collected to help prospective appointees to comply with conflict-of-interest laws and regulations?

The financial information provided by a prospective appointee has proven essential in working with individuals to resolve actual or potential conflicts between their private financial affairs and their future responsibilities as high-level executive branch officials. The most frequent serious potential problems involve the criminal prohibitions against private supplementation of one's government salary (18 U.S.C. § 209), and "self-dealing," a term used throughout this guide to refer to participation in matters affecting one's financial interests (18 U.S.C. § 208).

B. Conflict-Of-Interest Analysis And Remedial Measures

What is meant by the prohibition against supplementation of the government salary of an executive branch officer or employee?

Congress in 1917 enacted a criminal law prohibiting anyone from giving anything of value to an executive branch officer or employee with the intent of supplementing his or her government salary. The law also prohibits an executive branch officer or

employee from receiving anything of value given with the intent of supplementing his or her government salary. Congress enacted the prohibition on receiving private supplements to prevent officers and employees from being unduly influenced by the person providing the supplement.

The supplementation of salary prohibition is discussed more fully in Part Two below.

What is meant by the prohibition against self-dealing?

Members of a transition team responsible for conflict-of-interest clearance or the White House Counsel's Office will look at the prospective appointee's financial holdings to determine whether the individual might have to take action with respect to particular program areas in which the appointee has a financial interest. "Self-dealing," as mentioned, is the short term used in this guide to refer to the taking of such action by an executive branch official.

Such a detailed review of all prospective appointees' financial affairs is made necessary by the executive branch-wide self-dealing prohibition in Section 208 of Title 18 of the United States Code. In addition, however, the conflict-of-interest clearance staff will determine whether the appointee will be serving in a federal department or agency whose employees are specifically prohibited from holding specific types of financial interests (*see* Part Two below for examples of such departments and agencies). Finally, the conflict-of-interest clearance will include a determination of whether any financial interest of the nominee might violate the self-dealing restrictions of Presidential Executive Order 11,222.

The application of these self-dealing provisions are discussed fully in Part Two below.

What is the most effective way to resolve most self-dealing problems?

Although Section 208 does not require divestiture of any financial interest, the most effective way to resolve a potential financial self-dealing problem is for the appointee to dispose of the problem interest or property.

Why might presidential appointees find it difficult to dispose of their financial holdings to avoid conflicts of interest?

Many presidential appointees find it difficult to completely restructure their financial holdings as a condition of entering government and, equally important, divestiture of many types of property will create tax liability for a presidential appointee.

What methods other than divestiture are available to resolve the potential Section 208 problems of a presidential appointee?

The entering into recusal agreements and establishing blind trusts have been used most frequently to resolve potential self-dealing problems.

What is a recusal agreement?

A recusal agreement is simply a statement that the executive branch official will not participate in matters that may affect his or her financial interests or those of the official's spouse, other family members or business associates.

What kinds of problems are associated with entering into recusal agreements?

The most serious problem is keeping track of the official's financial interests as they relate to his or her responsibilities as a high-level presidential appointee. The more extensive the financial holdings, the more difficult it is ensure that the official does not participate in a matter which may affect his or her financial interests.

Can placing one's financial holdings in a blind trust affect an executive branch official's liability under Section 208 and other self-dealing prohibitions?

Yes, but the extent of the effect on an official's liability depends upon the type of blind trust established. Federal law provides for the establishment of either a Qualified Blind Trust or a Qualified Diversified Blind Trust. Use of either type of blind trust requires compliance with the Ethics in Government Act's strict requirements for the establishment of such trusts. If those requirements are met, the official may be allowed to participate in some matters even if the participation has the effect of increasing the value of the assets of the trust.

What is the difference between a Qualified Blind Trust and a Qualified Diversified Blind Trust?

The major difference involves the immediate treatment of assets placed in the blind trust for purposes of conflict-of-interest law compliance. Assets placed in a "qualified blind trust" are treated as interests of the official for purposes of requiring recusal until the trustee notifies the official that the trustee has disposed of the assets. In contrast, as soon as assets are placed in a "diversified blind trust" the assets are deemed to not be financial interests of the official.

Why does the "qualified diversified" blind trust provide immediate immunity from self-dealing prohibitions and the "qualified" blind trust not?

The requirements for the establishment and approval of a qualified diversified blind trust are much stricter with respect to the type of assets that can be placed in the trust and the types of assets that the trustee can acquire during the duration of the trust. The most important requirement for a qualified diversified trust is the diversified portfolio requirement (*see* 5 CFR § 734.404(b)(2)). In addition, assets placed in qualified diversified blind trust must eventually be divested.

Is the establishment of a blind trust the best solution to Section 208 and other self-dealing conflict-of-interest problems?

There is no simple answer to this question. Blind trusts have the principal advantage of permitting the trustee to participate in a wide variety of financial transactions without the officer or employee having constantly to worry about violating self-dealing prohibitions. Consequently, many officials find that establishing blind trusts makes it easier for them to perform their official duties. On the other hand, the official must give up day-to-day control over investment decisions to an independent trustee to take advantage of the blind trust provisions of the Ethics in Government Act.

C. Public Financial Disclosure By Presidential Appointees

When must a prospective presidential appointee file a public financial disclosure statement under the Ethics in Government Act?

A nominee to a position requiring Senate confirmation has up to five days from the date of transmittal of the nomination from the President to the Senate to file the required SF 278 form with the Office of Government Ethics. An individual can file prior to nomination once the President has announced an intent to nominate the individual to such a position. Other presidential appointees have thirty days after assuming office to file their completed disclosure statements with their designated agency ethics official.

Are there special procedures to help a nominee to a position requiring Senate confirmation meet the short deadline for filing their disclosure statement?

The Office of Government Ethics has established expedited filing and review procedures for individuals appointed by the President and subject to confirmation by the Senate. These expedited procedures are part of the Office's regulations implementing the public financial disclosure requirements of the Ethics in

Government Act. (*See* 5 CFR Part 734.) The practice for presidential nominees is as follows:

Usually before the nomination is formally sent to the Senate, the White House Counsel's Office requires the nominee to complete the SF 278 form. After reviewing the form for accuracy, the White House Counsel will transmit the form to the Office of Government Ethics, and at the appropriate time, the Office will forward the form to the designated agency ethics official (DAEO) of the department or agency where the nominee will be serving. The DAEO then conducts an independent review of the SF 278 to determine if any conflict-of-interest problems appear on the face of the statement. If the DAEO concludes that there are no conflicts of interest under applicable statutes and regulations, the form is forwarded to the Director of the Office of Government Ethics for another independent review. If the Director of the Office of Government Ethics finds no conflicts of interest, the statement with a certification of compliance is forwarded to the appropriate Senate committee.

What impact does the certification by the DAEO and the Director of the Office of Government Ethics have on an appointee's liability for noncompliance with applicable reporting requirements under federal statutes and regulations?

The Ethics in Government Act provides for stiff civil penalties for noncompliance by a nominee who provides incomplete or misleading information (5 U.S.C. App. § 204). Review or clearance by the White House Counsel's Office, the appointee's designated agency ethics official, and/or the Office of Government Ethics does not alter that obligation.

D. Senate Confirmation And Ethics Clearance

What are the major differences between ethics clearance procedures prior to nomination and those conducted by the Senate committees responsible for reviewing the qualifications of nominees?

The clearance activities are regarded as separate by the White House and the Senate committees. Typically Senate committees will not rely upon information provided by the White House but will instead require a nominee to provide detailed personal and financial information. The Senate committees' forms and requirements vary depending on the agency in which the nominee will serve.

Will Senate committees independently check the background of nominees where the White House or the transition office already has completed a background check before making a formal nomination?

The transition office and the White House generally do not give Senate committees access to the information they have gathered about a prospective nominee. This occasionally leads to a full background investigation by a Senate confirmation committee. More typically in recent years, the Executive Office of the President and the chairman of the confirmation committee will negotiate procedures and conditions under which the report of the FBI's field investigation is revealed to the committee chairman, the ranking minority member and, sometimes, others on the committee.

Also, since the passage of the Ethics in Government Act, Senate committees have relied heavily on review of the SF 278 forms by the appropriate agency DAEO and the Office of Government Ethics to determine whether the nominee has resolved any conflict-of-interest problems. In fact, Senate committees as a general rule will not proceed until the Director of the Office of Government Ethics has informed the committee that a review of the disclosure statement has determined that no conflicts of interest exist under applicable statutes and regulations.

What other information will the Director of the Office of Government Ethics forward to the appropriate Senate committee along with the approved public financial disclosure form?

The Director of the Office of Government Ethics typically will forward copies of, or discuss in its opinion letter, any agreements the prospective nominee has made to resolve any actual or apparent conflicts of interest. This includes agreements to establish blind trusts, to divest particular assets, or to recuse himself or herself from participation in particular matters.

Part Two

Official Conduct And The Public Trust

The greatest number of official conduct problems involve instances where questions are raised regarding whether government officials have used the power of their office to further their own financial interests or the interests of individuals and organizations that have a direct stake in the formulation and implementation of official policy. Consequently, federal statutes and regulations deal with both actual use of positions for private gain and the appearance of preferential treatment.

A. Prohibition Against Supplementation Of Federal Salary

May executive branch officials seek outside compensation for their government service, and may private parties voluntarily supplement the salaries of executive branch officials to enable them to perform their official duties without worrying about financial pressures?

Section 209 of Title 18 of the United States Code prohibits private supplementation of the salaries of executive branch officers and employees. The statute makes it a criminal offense for anyone to offer or accept anything of value with the intent of supplementing the salary of an executive branch officer or employee for the performance of official duties.

Does the supplementation of salary prohibition apply only to supplements given after an individual becomes an executive branch official?

If the presidential appointee receives a payment or other supplement prior to entering federal service, it would constitute a violation of Section 209 if the payment were made to ease the transition of the individual to government service. A payment made for past contributions to a particular organization would not violate the

supplementation prohibition, however. The legality of lump-sum payments made to appointees prior to their entering government service depends upon the circumstances surrounding the payments.

When would a severance payment made by an employer to an individual who has accepted a presidential appointment violate the supplementation of salary prohibition of Section 209?

The legality of severance payments made to employees who enter the federal government depends upon the circumstances in which they were made. As a general rule, the Department of Justice and the Office of Government Ethics have found that payments made for past services rendered to an employer do not violate the supplementation of salary prohibition. However, the employer's statement that the payment was made because of past services is not in itself sufficient to establish that the payment was made for past services. The Department of Justice and the Office of Government Ethics also will look at the employer's history of severance payments.

Does the supplementation of salary prohibition require executive branch officials to cease participation in employer-sponsored stock option, pension, retirement or other employer benefit plans after they enter the federal government?

Section 209 exempts from its coverage bona fide pension, retirement, health insurance, or other welfare benefit plans.

Which government officials have the authority to determine whether continued participation in an employer benefit plan falls within the bona fide exception?

Pursuant to a memorandum of understanding with the Department of Justice, the Office of Government Ethics has authority to issue rulings regarding the applicability of the Section 209 bona fide employer benefit plan exception. The appointee's designated agency ethics official will address the issue first in his or her initial review of the SF 278, in close consultation with the Office of Government Ethics.

The Office of Government Ethics can also work on the issue with the White House Counsel's Office prior to the individual's nomination.

Does continued participation in a bona fide benefit plan operated by a former employer raise any other potential conflict-of-interest problems for a presidential appointee?

Even though Section 209 exempts an executive branch official's continued participation in a bona fide benefit program, the benefits received are treated as the financial interests of the official for purposes of determining whether the official has a conflict of interest in a particular matter.

Does Section 209 permit a former employer to pay the relocation expenses of an employee entering the federal service or to help the employee by letting him or her make use of the employer's relocation services?

In all likelihood, the use of a relocation service provided by a former employer would violate the prohibition against supplementation of salary.

B. Bribery And Acceptance Of Illegal Gratuities

Section 201 (a)-(b) of Title 18 of the United States Code contains prohibitions on bribing federal officials and Section 201 (c) of Title 18 prohibits the acceptance of an illegal gratuity.

What are the elements of the federal bribery offense?

The federal bribery statute prohibits any public official from accepting anything of value "corruptly" in return for being influenced in their performance of any act.

What is an illegal gratuity and what is the difference between accepting an illegal gratuity and accepting a bribe?

Section 201 (c)(1)(B) of Title 18 of the United States Code makes the acceptance of an illegal gratuity, or tip, a lesser included offense under the federal bribery statute.

There are two major differences between the illegal gratuity and the bribery prohibition. In contrast to the bribery provision, the illegal gratuity provision does not require proof of "corrupt intent" on the part of the government official who receives something of value. In addition, the illegal gratuity prohibition does not include a quid pro quo requirement. In other words, it would be a violation of the illegal gratuity statute if the official knew he was receiving the thing of value because of past performance of official duties or in anticipation of future performance.

C. Acceptance Of Gifts, Gratuities, Entertainment And Travel Expenses Related To The Performance Of Official Duties

As part of their official duties, presidential appointees frequently must meet with the representatives of organizations that are regulated by or that seek business with the agency in which they serve. Furthermore, the private hosts may believe that it is proper and customary to pay the costs associated with visits, inspections, negotiations, or conferences attended by the appointee. Federal law, however, sharply limits the ability of federal officers and employees to accept such items of value from private sources.

What restrictions does federal law place on executive branch officials with respect to accepting gifts, gratuities, entertainment, meals, lodging, free recreation and other items of value from private individuals and organizations while conducting official business?

First, the General Accounting Office has ruled that any executive branch employee's expenses incurred incident to the conduct of official business are chargeable to an agency's appropriation unless the agency has statutory authority to accept gifts. More importantly, Executive Order 11,222 and implementing administrative regulations generally prohibit executive branch officers and employees from soliciting or accepting any such gifts or items of value from individuals or organizations that are regulated by or seek to obtain business from their agencies.

Travel expenses of executive branch officials may be paid by outside sources only in limited circumstances because acceptance often turns on an agency's statutory authority to accept gifts or other statutes. Therefore, all offers to pay an official's travel expenses should be approved in advance by the official's agency.

May an executive branch official accept any items of value from private individuals and organizations that deal with the official's agency?

Executive Order 11,222 contains an exception for "food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance." (Section (b)(2)). However, most federal departments and agencies have issued regulations that narrowly interpret this exception. Therefore, presidential appointees should review their agency's standards of conduct regulations on this point and, if necessary, contact their designated agency ethics official for guidance.

D. Receipt Of Honoraria

May a presidential appointee accept honoraria from organizations that have a policy of providing honoraria to speakers or other participants in their programs?

Executive branch officials can rarely accept an honorarium because of a combination of statutory and administrative standards of conduct prohibitions. Acceptance of any honorarium should be approved in advance by the appointee's designated agency ethics official.

What restrictions govern the receipt of honoraria by executive branch officials?

As discussed above, Section 209 of Title 18 of the United States Code restricts the private supplementation of executive branch officials' salaries. Section 209 may prohibit the receipt of an honorarium.

In addition, Executive Order 11,222 generally prohibits executive branch officers and employees from accepting any honoraria where (1) their participation involves use of non-public information, (2) the subject matter of the participation involves the day-to-day official responsibilities of the appointee, or (3) the source of the honoraria has business dealings with the appointee's agency. The White House Counsel's Office also has been cautious in allowing acceptance of honoraria by high-level presidential appointees.

Other restrictions are Section 441i of Title 2 of the United States Code, which prohibits executive branch officers and employees from accepting any honoraria in excess of $2,000, and the federal law limiting the outside earned income of presidential appointees to 15% of their government salary during any calendar year (*see* discussion of outside earned income in Part Three below).

E. Self-Dealing

What restrictions are there on an executive branch official's holding financial interests or property that are related to his or her official responsibilities?

There are three types of "self-dealing" prohibitions of which a presidential appointee needs to be aware. First, Section 208 of Title 18, United States Code, prohibits an executive branch official from taking action with respect to particular matters in which the official, his or her spouse, minor children, business associates or entities in which he or she holds a fiduciary position have a financial interest. Second, officials in certain federal departments and agencies are prohibited by specific statute or regulation from holding certain types of financial interests. Third, Executive Order 11,222 contains an executive branch-wide self-dealing provision which prohibits executive branch officials from holding financial interests that may create actual or apparent conflicts of interest.

What impact does Section 208 have on the performance of official duties by executive branch officials?

Section 208 does not prohibit any executive branch official from holding any particular type of financial interest or from engaging in any type of financial transaction. Section 208 is a disqualification or recusal statute, in that it only prohibits an executive branch official from participating in an official capacity in any particular matter which may affect a financial interest held by the official, the official's spouse, minor children, business associates and certain other entities. It makes no difference whether these interests are helped or harmed by the official's action.

Even though Section 208 does not require the divestiture of any financial interest, are there circumstances where divestiture or establishment of a blind trust is a better remedy than disqualification for handling a particular matter?

Presidential appointees who have extensive financial interests whose value may frequently be affected by their participation in agency matters may find that recusals prevent them from effectively discharging the duties of the position to which they have been appointed.

Equally important, appointees who hold a large number of financial interests that may create conflict-of-interest problems may find that it is difficult as a practical matter to ensure that they disqualify themselves from participation in matters where participation would violate Section 208's self-dealing prohibition.

In such circumstances, divestiture or a blind trust may be the preferred remedy for avoiding participation in particular matters in which the official, family members, or business associates and other covered entities have a financial interest.

Does Section 208 contain a de minimis provision or threshold below which it does not apply?

Section 208 does not contain a de minimis or threshold requirement. In other words, the amount or value of financial interests held by executive branch officials has nothing to do with the requirement that they disqualify themselves from participation in matters in which they hold a financial interest.

Does Section 208 provide for any waivers which would permit an executive branch official to participate in matters in which he or she has a financial interest?

Section 208 provides for two statutory waivers. First, an appointee's agency or other appropriate authority may, on a case-by-case basis, waive the provisions of Section 208 for financial holdings of an official or employee if it is determined that the financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from the particular

employee." Second, an agency may publish regulations in the Federal Register waiving from Section 208's coverage a specific type of financial interest held by the agency's employees if it is determined that the financial interest is "too remote or too inconsequential to affect the integrity of the Government officers' or employees' services."

How frequently are Section 208 waivers granted?

The frequency of waivers varies among agencies, depending in part on the types of programs they administer. An appointee should ask his or her designated agency ethics official about the availability of waivers by the agency in which he or she will be serving.

What federal statutes or regulations, other than 18 U.S.C. § 208, require executive branch officers and employees to divest themselves of certain financial interests upon entering the federal government?

Federal statutes and regulations require officers and employees in several agencies to divest themselves of certain financial interests upon accepting positions in those federal departments and agencies. For example:

(1) supervisory employees in the Department of Energy cannot hold financial interests in oil, coal or gas concerns (42 U.S.C.§ 7212);

(2) Securities and Exchange Commission regulations prohibit all employees from holding stocks for speculation (17 C.F.R. § 200.735-5);

(3) HUD regulations contain a presumption that ownership of more than six residential units constitutes real estate speculation, and the regulations prohibit real estate speculation by its employees (24 C.F.R. § 0.735-204); and

(4) all Nuclear Regulatory Commission employees are prohibited from holding securities of companies which manufacture or sell nuclear reactors (10 C.F.R. § 0-735-29).

How does the self-dealing prohibition in Executive Order 11,222 differ from the statutory self-dealing prohibition?

The regulations implementing the self-dealing prohibition of Executive Order 11,222 state that an executive branch officer or employee may not "have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially with his Government duties and responsibilities," 5 C.F.R. § 735.204 (emphasis added). Thus, a major difference between the statute and the executive order -- not only with respect to self-dealing, but as a general matter -- is that the executive order authorizes regulation to prevent not just actual conflicts of interest, but also the appearance of conflicts of interest.

For this reason, federal departments and agencies have broad authority to order their officials and employees to divest themselves of specific financial interests if those interests conflict or appear to conflict substantially with their official duties and responsibilities.

Other differences between 5 C.F.R. § 735.204 and Section 208 are that Section 208 does not have a de minimis requirement and Section 735.204 requires a determination of the existence of a substantial conflict, or the appearance of a substantial conflict, between the financial interests of the employee and his or her government duties and responsibilities.

Who has responsibility for determining whether a substantial conflict of interest exists under Section 735.204?

The Office of Government Ethics is the lead agency for interpreting federal standards of conduct regulations. However, the Office traditionally has deferred to agencies with respect to application of Executive Order 11,222's self-dealing prohibition to specific interests of their employees.

F. Misuse of Government Property

The presidential appointee entering the federal government for the first time needs to understand that, unlike private sector organizations which traditionally have provided their top executives with numerous fringe benefits, strict rules prohibit the use of government property for private purposes.

Which statutes and regulations apply to the use of government property by executive branch officials?

Congress has enacted strict criminal statutes dealing with the misuse of government property. In addition, under Executive Order 11,222, all federal departments and agencies have administrative regulations directed at preventing the misuse of government property.

What criminal prohibitions exist on the misuse of government property by executive branch officials?

The criminal statutes include the following:

(1) theft of government property (18 U.S.C. § 641);

(2) misuse of the franking privilege (18 U.S.C. § 1719);

(3) prohibition against counterfeiting and forging transportation requests (18 U.S.C. § 508);

(4) retention of money not authorized to be received (18 U.S.C. § 643);

(5) concealment, removal, or mutilation of government papers (18 U.S.C. § 2071);

(6) taking or using papers relating to claims against the United States (18 U.S.C. § 285); and

(7) lobbying with appropriated moneys (18 U.S.C. § 1913).

Where can a presidential appointee obtain more information about the federal criminal statutes dealing with the misuse of government property?

A presidential appointee should consult initially with the designated agency ethics official of his or her department or agency. The Department of Justice is the appropriate authority if additional information is needed on the scope of the criminal prohibitions dealing with the misuse of government property.

Are there any administrative regulations dealing with the misuse of government property by executive branch officials?

Section 735.205 of Title 5 of the Code of Federal Regulations specifically prohibits executive branch officers and employees from misusing government property. The regulation states that "[a]n employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities."

Who has responsibility for determining whether something is an "officially approved activity?"

The agency in which the appointee serves.

What are the most common situations that lead to charges that government officials have misused government property?

The two most common types of misuse of government property involve the use of government cars for private purposes and use of the federal telephone system (FTS) to make long distance calls for private purposes. Other frequent problems involve government reimbursement of travel expenses not related to the performance

of government business or the expenses of an official's spouse, and the use of government equipment, supplies or personnel for unauthorized activities.

What accounts for the persistence of problems associated with reimbursement of the travel expenses of executive branch officials?

One explanation for the persistence of problems associated with the reimbursement of travel expenses is the tendency of officials to attempt to maximize their time by scheduling private activities in conjunction with their conduct of official business. For instance, if they must travel to a location to conduct official business, they might also take that opportunity to conduct private business during off-duty hours or to vacation after completion of their official business.

Although an official may honestly be attempting to maximize the use of limited time, the practice of coordinating private business with official duties may raise questions about whether the official arranged public business as a pretext for engaging in private business. This problem is particularly serious with respect to high-level presidential appointees who have considerable discretion to travel as part of their management responsibilities.

To avoid the appearance of scheduling public business to permit an official to engage in private activities, it is prudent for executive branch officials to generally avoid coordinating private business and pleasure activities with the performance of public business. However, where public and private business is combined, the official should clearly document the need for the official travel and clear the private activities on the trip with the designated agency ethics official.

Are any problems created when a presidential appointee engages in partisan political activities while on official business trips?

Although the Hatch Act generally does not limit presidential appointees' participation in partisan political activities during their government service, appointees must be careful not to use government personnel who are covered by the Act or agency resources to further such purposes. Consequently, problems may be created when a presidential appointee undertakes political activities on trips paid for

by their agency. To prevent this, the White House Counsel's Office has provided agencies in the past with guidance on the advance allocation of travel costs and expenses between the official business and political activities. Where the dominant purpose of a trip is political, all costs typically are paid by the political committee.

G. Misuse Of Government Information

In recent years there has been increased concern over the use of government information by executive branch officers and employees for private purposes. This concern is related to the fact that individuals and organizations with access to inside government information may have an unfair advantage in competing for government contracts, investing in financial markets, or participating in government proceedings.

What criminal statutues prohibit misuse of government information by executive branch officials?

Criminal statutes prohibiting the misuse of government information include the following:

(1) 18 U.S.C. § 798 (a) (a crime to disclose classified information);

(2) 18 U.S.C. § 1905 (a crime to disclose confidential information);

(3) 18 U.S.C. § 285 (federal employees prohibited from taking or using papers relating to a claim against the United States); and

(4) 18 U.S.C. § 1902 (a crime to disclose federal crop information).

Which government officials have responsibility for interpreting and enforcing the criminal statutes dealing with the unauthorized release and use of classified and confidential information?

The Criminal Division of the United States Department of Justice and the United States Attorneys have the responsibility of interpreting and enforcing all criminal

statutes dealing with the misuse of government information by private citizens and executive branch officers and employees.

Are there administrative regulations that apply to misuse of government information by executive branch officials?

Yes. Regulations issued pursuant to Executive Order 11,222 state that "for the purpose of furthering a private interest, an employee shall not, except as provided in 735.203(c), directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public." 5 CFR § 735.206.

Which government officials have the authority to interpret and enforce the administrative prohibition against the misuse of government information?

The Office of Government Ethics and the federal departments and agencies share the responsibility for interpreting the scope of the misuse of information prohibition.

H. Appearance of Impropriety

Besides the specific prohibitions and restrictions discussed above, are there any other general ethics laws or regulations directed at the official conduct of executive branch officials?

Executive Order 11,222 contains the following general ethical proscriptions that apply to all executive branch officers and employees: "An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

-- Using public office for private gain;

-- Giving preferential treatment to any person;

-- Impeding Government efficiency or economy;

-- Losing complete independence or impartiality;

-- Making a Government decision outside official channels; and

-- Affecting adversely the confidence of the public in the integrity of the Government.

Have the Office of Government Ethics or individual federal departments and agencies issued regulations interpreting Executive Order 11,222's general official integrity rules?

All federal departments and agencies have issued fairly detailed rules regarding using public office for private gain as part of their self-dealing standards of conduct. Despite some continuing debate over whether the general executive order provisions are self-executing, the general consensus is that agencies may take, and the Office of Government Ethics may recommend, disciplinary action based on the general conduct rules.

What standard is used to determine whether an executive branch official has violated one of the general standards of conduct prohibitions?

In the case of *Special Counsel v. Jeannette E. Nicholas*, 36 M.S.P.R. 445 (March 29, 1988), the Merit Systems Protection Board held that when considering whether the conduct of an executive branch employee had created the appearance of impropriety, "fundamental fairness precludes disciplining an employee for conduct unless he or she should have known it would appear improper to a reasonable observer under the circumstances."

Of course, this is a legal test for disciplining executive branch employees generally. Other considerations may apply to alleged misconduct involving presidential appointees.

Where can an executive branch official obtain assistance in interpreting the scope of the six general prohibitions?

The 1988 Office of Government Ethics Reauthorization Act states that the Director of the Office of Government Ethics has authority to "provide such advice to such officers and employees as the Director considers necessary to ensure compliance with rules, regulations, and Executive orders relating to conflicts of interests or standards of conduct." Section 402 (f)(2)(A)(i). However, the Office of Government Ethics may continue to give federal departments and agencies the responsibility for interpreting the scope of the general prohibitions.

Part Three

Official Duties And Private Relationships

A presidential appointee's relationships with private friends and associates is complicated by the common public perception that it takes good inside government contacts to get things done. Therefore, presidential appointees can expect attempts by private persons to use them to cut through red tape or to obtain access to other decisionmakers on behalf of their private interests. These efforts often are made in ignorance of the ethical restrictions that apply to presidential appointees rather than with a corrupt intent. Additionally, the knowledge that presidential appointees exercise great discretion plays a major role in focusing public scrutiny on their private as well as public lives.

Thus, it is important that presidential appointees acquire a working knowledge of the ethics-related restrictions that apply to their off-the-job as well as their on-the-job conduct. This will assist them in responding to requests for and offers of assistance. The following discussion examines some of the most common off-the-job conduct problems experienced by presidential appointees.

A. Receipt Of Gifts And Other Items Of Value Unrelated To Official Duties

Does current law restrict the receipt of gifts or items of value by a presidential appointee if they are unrelated to the performance of specific governmental duties?

All federal departments and agencies have regulations restricting the receipt of items of value by their employees, even where strong evidence exists that the items were not connected with past or future official actions of the employee. These restrictions are designed to prevent the appearance that an officer or employee might be unduly influenced by the receipt of the items of value.

In addition, Congress has prohibited federal officers and employees from accepting gifts of more than minimal value from a foreign government (5 U.S.C. §

7342(c)); made it a criminal offense to accept certain gratuities under the federal bribery statutes (as discussed in Part Two above); prohibited the supplementation of one's federal salary (18 U.S.C. § 209); and prohibited the receipt of direct or indirect compensation for certain representation before federal agencies (18 U.S.C. § 203).

What types of items are covered by the current prohibitions against acceptance of gifts?

Generally, an executive branch officer or employee may not accept anything of value from a prohibited source, meaning anyone who conducts or seeks to obtain business with his agency; whose operations or activities are regulated by his agency; or whose interests may otherwise be substantially affected by the performance or nonperformance of the officer's or employee's official duties. Section 735.202 of Title 5 of the Code of Federal Regulations. These rules apply to gifts and entertainment related to official business and to gifts and entertainment that are entirely unrelated to specific governmental business but which may still create the appearance of a conflict of interest.

Does Section 735.202 place the burden on executive branch officers and employees to determine whether the source of an item of value falls within the two categories listed above?

All officers and employees have a responsibility to determine whether the source of the item of value has, or is seeking to obtain, contractual business or financial relations with the employee's agency, or conducts operations or activities regulated by the employee's agency.

Does Section 735.202 apply even though the officer or employee does not have any responsibility for taking actions on matters of interest to the source of the gift?

Section 735.202 is not position-specific.

B. Reimbursement Of Travel-Related Expenses Unrelated To Official Duties

What restrictions exist with respect to private reimbursement of the travel and entertainment expenses of presidential appointees that are not related to the performance of official duties?

As explained in Part Two above in connection with the conduct of official business, travel expenses of executive branch officials may be paid by outside sources only in limited circumstances because acceptance often turns on an agency's statutory authority to accept gifts or the provisions of other statutes. Therefore, acceptance of all offers to pay an official's travel expenses should be approved in advance by the agency.

Do federal statutes and standards of conduct regulations prohibit private sources from reimbursing the travel-related expenses of a spouse who travels with the executive branch official?

Federal regulations which restrict the receipt of items of value from individuals and institutions with an interest in the actions of government officials treat the receipt of items of value by a spouse or minor child as if they had been received by the official.

C. Outside Activities Of Presidential Appointees

May presidential appointees supplement their government salaries by pursuing outside employment opportunities?

The practical result of the combination of criminal statutes, administrative standards of conduct, prior policies of the White House Counsel's Office, and the statutory outside earned income limitation is that outside employment opportunities

are severely restricted for executive branch officials. The restrictions on executive branch officials who are not presidential appointees subject to Senate confirmation are less onerous than for those who are.

What are the principal criminal statutes that limit the outside activities of executive branch officials?

The principal statutes are sections 203 and 205 of Title 18 of the United States Code which impose criminal sanctions on government employees who use their free time to represent private parties before federal departments and agencies. These prohibitions are based on the belief that those who work for the government should not go into business representing private citizens against the government, in part because government officials may have access to inside information that might permit their private clients to gain an unfair advantage in governmental proceedings.

What are the specific elements of the criminal prohibitions against taking a job representing a private party with respect to a governmental matter?

The broadest of the two prohibitions, Section 203, prohibits an executive branch officer or employee from directly or indirectly receiving compensation from a private source for services rendered by the officer or employee or another person (*e.g.*, the employee's business associate) in connection with any particular matter in which the government has an interest and which is before any department or agency.

If Section 203 only prohibits compensated assistance, may an executive branch official assist private parties before the government without compensation?

Noncompensated assistance is permitted in only very limited circumstances. Section 205 of Title 18, United States Code, contains a general prohibition on federal employees in any branch of the government from acting as agent or attorney for anyone with or without compensation before any department, agency, or court in any particular matter in which the United States is a party or has a direct and substantial

interest. However, Section 205 does allow a federal officer or employee to represent another person, without compensation, in a disciplinary, loyalty or other personnel matter.

How can the presidential appointee determine whether requested assistance on behalf of a private party would constitute a violation of these criminal laws?

Because of the seriousness of these offenses, a presidential appointee who is asked to represent or intervene on behalf of a private party with respect to a matter before the government should not act on the request until the proposed action is cleared with appropriate ethics officials. These matters should initially be handled by the designated agency ethics official. However, only the Office of Government Ethics or the Department of Justice has authority to issue binding advisory opinions on these criminal conflict-of-interest statutes.

What are the applicable administrative regulations dealing with the outside activities of presidential appointees?

The general regulations implementing Executive Order 11,222 and adopted in some form by almost all federal departments and agencies provide that an executive branch employee shall not engage in outside activity not compatible with the full and proper discharge of the employee's official duties and responsibilities. This includes outside activities that may create an actual or apparent conflict of interest and outside activities which tend to impair the employee's mental or physical capacity to perform their duties and responsibilities in an acceptable manner.

Section 202 of Executive Order 11,222 states that an executive branch employee shall not engage in any outside employment, including teaching, lecturing, or writing which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities. Section 735.203 of Title 5 of the Code of Federal Regulations expands upon this restriction by prohibiting all federal employees from engaging in teaching, lecturing, or writing, with or without compensation, that involves government information not available to the public unless the agency head authorizes the use of such information.

However, the regulations include a much broader restriction with respect to speeches or lectures made by top-level presidential appointees (*see* Exec. Order 11,222, § 401(a) for coverage). The outside employment regulation prohibits these top-level presidential appointees from receiving anything of monetary value "for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his agency, or which draws substantially on official data or ideas which have not become part of the body of public information."

How can presidential appointees determine whether their outside activities violate these standards of conduct regulations?

Almost all federal departments and agencies have established policies regarding outside activities or employment by their employees. These sometimes vary from the general regulations implementing Executive Order 11,222. Consequently, any executive branch official considering outside activities should consult with his or her designated agency ethics official regarding the agency's policies on this subject.

What is the coverage of the statutory limitation on receipt of outside earned income?

Any full-time official of the executive branch whose appointment is made by the President and with the advice and consent of the Senate and who is compensated at a rate of pay which equals or exceeds the lowest rate of pay specified for GS-16 of the General Schedule may not receive outside earned income that exceeds 15% of his or her salary.

What does the law regard as outside earned income?

Outside earned income means any wages, salaries, commissions, professional fees and other compensation that is received for personal services actually rendered. The distinction between outside "earned" income and "unearned" income is important. Absent the existence of a potential conflict of interest, federal law does not restrict

the unearned income (*i.e.*, interest, dividends or other investments) of executive branch officials.

Does federal law require the reporting of outside income on the official's public financial disclosure statement?

Yes. It requires the reporting of the sources of and the exact amount of all earned income over $100 and the sources of all other income over $100 by category or amount.

Part Four
Restrictions Related To The Post-Government Service Activities Of Presidential Appointees

President Reagan's veto of H.R. 5043, the Post-Employment Restrictions Act of 1988, likely caused some uncertainty about the post-government service restrictions that will apply to incoming presidential appointees. However, until the Congress acts on new legislation, the current restrictions apply. This section provides a brief overview of the restrictions on the activities of executive branch officials after they leave government service.

What are the major restrictions related to the post-government service activities of executive branch officials?

The generally-applicable, post-government service requirements fall into three categories. First, Section 208 of Title 18 of the United States Code specifically requires executive branch officials to disqualify themselves from participation in any particular matter that might involve a prospective employer during the course of negotiations about future employment. Second, the public financial disclosure requirements in the Ethics in Government Act require former executive branch officials to file an updated financial disclosure statement within 30 days of their termination of government employment. Third, Section 207 of Title 18 of the United States Code contains four separate rules that restrict the post-government service activities of former officials.

In addition to these generally-applicable requirements, Congress in the Defense Acquisition Improvement Act of 1986 imposed new restrictions and reporting requirements on high-level Defense Department officials and major defense contractors (*see, e.g.*, 10 U.S.C. §§ 2397b, 2397c.)

A. Negotiation For Future Employment And Disqualification

What rules apply to executive branch officials' negotiating for future employment with individuals and organizations outside the federal government?

Section 208 of Title 18 of the United States Code specifically prohibits any executive branch officer or employee from participating personally and substantially in any particular matter in which a prospective employer has a financial interest.

Does Section 208 prohibit any executive branch official from negotiating with any prospective employer?

No. It only requires the official to disqualify himself or herself from participation in matters in which the prospective employer has a financial interest.

Who is responsible for determining whether a prospective employer has a financial interest in a particular matter which might be impacted upon by the personal and substantial participation of the officer or employee?

Once an executive branch official begins negotiations with a prospective employer, the official has an affirmative duty to determine whether any personal and substantial participation would involve a financial interest of the prospective employer.

Does any federal statute require an executive branch official to notify any person or agency prior to beginning employment-related contacts with a prospective employer?

While no statute requires pre-negotiation notification of the designated agency ethics official or other entity, an agency may require such notification. Therefore, a presidential appointee should check with his or her designated agency ethics official

to determine whether the agency has a pre-negotiation notification requirement and to obtain assistance in complying with any disqualification requirements.

B. Disclosure Of Post-Government Service Activities

What reports on post-government service activities are executive branch officials required to file?

The Ethics in Government Act requires an executive branch official who serves in a position requiring the filing of a public financial disclosure statement to also file an updated, or termination, statement within 30 days after the official leaves government service. This requirement would apply to all high-level presidential appointees.

Besides this general reporting requirement, federal law requires certain former Department of Defense civilian and uniformed officers to annually report their post-government service activities to the Department of Defense. In addition, Section 612 of Title 22 of the United States Code requires anyone acting as an agent of a foreign entity to register with the Attorney General.

C. Restrictions On Post-Government Service Representation And Assistance

The most controversial area related to post-government service activities involves the restrictions in Section 207 of Title 18 of the United States Code with respect to former executive branch officials' representing parties in particular matters in which the United States has an interest. The key elements of the four restrictions or prohibitions are summarized below. However, even as summarized, these restrictions are complex. Therefore, a presidential appointee should seek more information about the application of these restrictions from his or her designated agency ethics official or by consulting the detailed regulations and advisory opinions that the Office of Government Ethics has issued on this subject.

What in general are the provisions of Section 207?

Section 207's restrictions deal with two general types of post-government service representation activities of former executive branch officials. Sections 207(a), (b) and (b)(ii) are "switching sides" prohibitions -- they prohibit former officials from representing parties, other than the United States, before the federal government with respect to matters in which they had some involvement while in government. Congress enacted these prohibitions to deal with the perceived problem of former officials' making use of non-public information to try to influence government actions for the benefit of their clients. Section 207(a) contains a life-time prohibition on representation with respect to certain specific matters in which the former official worked; Section 207(b) contains a two-year prohibition with respect to certain matters that were under the former official's responsibility while in government; and Section 207(b)(ii) contains a limited two-year prohibition on aiding and assisting the representation of others in certain specific matters.

In addition to these switching sides provisions, Congress in 1978 added to Section 207 a one-year, no-contact prohibition that applies to senior executive branch officials. Congress enacted this "cooling-off" period because of the belief that former senior government officials can exert undue influence on decisionmakers regardless of their previous involvement in particular matters.

What type of post-government service activity does Section 207(a)'s life-time bar cover?

Section 207(a) prohibits all former executive branch officers and employees from representing anyone with respect to a particular matter involving specific parties in which the former official participated personally and substantially while in government and in which the United States has an interest. The bar covers any knowing communication or contact made with the intent to influence the decision in such a matter.

Does the life-time bar depend on whether the former executive branch official receives compensation for the representation?

No. Section 207(a) does not distinguish between compensated and uncompensated representation or assistance.

Does Section 207(a) prohibit a former executive branch official from rendering assistance to another party by providing advice or information or other off-scene assistance?

Section 207(a) only prohibits direct representation efforts. It does not prohibit a former official from helping a party prepare to represent himself. However, criminal statutes may forbid a former executive branch official from using confidential or classified government information in providing such off-scene assistance. In addition, professional codes -- such as that governing lawyers -- may forbid such assistance in such matters.

Which former executive branch officials are covered by Section 207(b)'s two-year bar on participating in matters under one's official responsibility, and what is its reach?

As with the life-time bar, all former executive branch officers and employees are subject to Section 207(b)'s two-year prohibition on representation in matters that were under their official responsibility within the year preceding their termination of government service. It is important to emphasize, however, that the two-year official responsibility bar only applies to particular matters involving specific parties during the one year period prior to the official's termination of government service.

Does the two-year official responsibility bar treat the rendering of assistance in the same manner as the life-time bar?

Yes. The two-year official responsibility bar does not prohibit aiding and assisting that does not involve direct representation or communication involving a covered matter.

How does Section 207(b)(ii)'s two-year aiding and assisting by personal presence bar differ from the life-time and the two-year official responsibility bars?

Section 207(b)(ii) has the narrowest reach of all four of Section 207's post-government service activities prohibitions. It provides that for a two-year period after leaving government, a former senior executive branch official may not aid or assist in the representation of another person by personal presence before the government on any particular matter in which he or she could not act as the person's actual representative because of his or her prior participation in the matter while in government. In effect, this is a very limited aiding and assisting prohibition that applies only to senior government officials.

Which executive branch officials are "senior officials" for purposes of Section 207(b)(ii)'s two-year aiding and assisting by personal presence bar?

All Executive Level civilian officials and members of the uniformed services in grade O-9 are automatically "senior officials." In addition, Congress gave the Office of Government Ethics the responsibility for designating as "senior officials" other executive branch positions involving significant decisionmaking or supervisory responsibility. The Ethics in Government Act, however, limits the pool of possible designated positions to GS-17 or equivalent positions, members of the Senior Executive Service, and the ranks of O-7 and O-8 in the uniformed services. The Office of Government Ethics reviews the designations annually.

What are the provisions of Section 207(c)'s one-year no-contact bar?

Section 207(c) prohibits a former senior executive branch official for one-year after leaving government service from attempting to influence anyone in his or her former agency with respect to a particular matter in which the former agency has an interest. The former executive branch official need not have had any prior involvement with the matter; indeed, the matter may have arisen after the former official's departure from government.

Why does the statute prohibit representation or communication with respect to entirely new matters?

Proponents of the one-year no-contact bar believe that unfairness, or at least the appearance of preferential treatment, exists when former senior government officials lobby their former agencies. Arguably, former senior officials have a much easier time gaining access to key decisionmakers than other persons. A cooling-off period, therefore, reduces the influence that former officials bring to bear on current officeholders.

Are any types of matters or communications not covered by the one-year no-contact period?

Yes. Section 207(c) exempts the furnishing of scientific and technical information if it is provided through approved procedures; participation by a former official if the agency head determines that the national interest necessitates the former official's participation; and communications on behalf of state or local governments, non-profit hospital or medical research organizations, and educational institutions. The Office of Government Ethics also has interpreted Section 207(c) to not apply to purely social or informational communications, responses to the former agency's requests for information, and personal matters or representation. An appointee should direct further questions about its coverage to his or her designated agency ethics official.

If a former senior executive branch official worked in a subunit of a large department or agency, would the one-year no-contact bar prohibit him or her from representing another person before all subunits of the department or agency?

Not necessarily. Congress recognized that some federal agencies are so large that those working for a separate component or subunit of the agency may have little knowledge about the workings of the other components or subunits of the parent agency. Therefore, Congress included a provision in the Ethics in Government Act authorizing the Director of the Office of Government Ethics to designate components of large agencies as "separate agencies" for purposes of the one-year cooling-off period. If so "compartmentalized" by such a designation, a former official from one subunit of a parent agency could represent someone in another subunit in the first year after leaving government.

Presidential appointees should check with their designated agency ethics official to determine whether their department or agency has been compartmentalized by the Office of Government Ethics and whether they may nevertheless be subject to restrictions by virtue of the position they hold. For example, a former senior official may not take advantage of compartmentalization if his or her service in the parent agency involved supervision of the separately designated subunit.