

United States Senate

SELECT COMMITTEE ON ETHICS
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Guidance on the Post-Employment Contact Ban

Purpose

Application of the post-employment restrictions set forth in federal criminal laws and Senate rules applies to both former and current Senate personnel and has been the focus of recent investigations by the Senate Select Committee on Ethics. We are providing this guidance to reinforce prior explanations in the *Senate Ethics Manual* and in the Committee's training materials in order to assure that the Senate community understands what the law and rules allow and what is prohibited. If you have any questions about a specific situation or wish to arrange for a briefing on this topic, you are strongly encouraged to contact the Committee's staff at 4-2981.

Generally, Senators and senior staff who have left the Senate may not contact their former colleagues with the intent to influence their official actions on behalf of anyone else during a "cooling off" period after they leave the Senate. **Former Senators are banned for two years from contacting the Senate and House of Representatives. Former officers and "senior staff" are banned for one year from contacting only the Senate. And all former Senate employees, even if not senior, are prohibited from making certain lobbying contacts for one year after leaving.**

However, even during the period when departed Senators and staff are banned from official contacts with their former colleagues, **purely social contact** with former colleagues is generally permitted. They may also make **political contributions** to, and sponsor or attend campaign fundraisers for, current Members of Congress, subject to the restrictions described below. Former Senators and staff may also play a **solely background role** advising others who seek official action from the Congress, that is, providing "behind-the-scenes" assistance, with one important exception.¹ Former Senators and staff may also contact government officials **outside of the Congress** on behalf of a client immediately upon leaving the Senate. Additional exceptions to the ban are discussed in the *Senate Ethics Manual*, at 90-91 (2003 ed.).

¹ Under 18 U.S.C. § 207(f), there is a one-year ban on former Senate personnel from knowingly *aiding or advising* a foreign government or foreign political party with the intent to influence a decision of any federal official, including any Member of Congress, in carrying out the individual's official duties. Section 207(f) also prohibits knowingly representing a foreign government or foreign political party *before* any federal official, including any Member of Congress, with the intent to influence a decision of such official.

The Restrictions for Former Senators

For two years after leaving office, federal criminal law (18 U.S.C. § 207(e)) prohibits former Senators from knowingly communicating or appearing before any current Member or employee of the Senate or House of Representatives if they have the intent to influence official actions and they are acting on behalf of any other person. This ban applies to any matter on which the former Senator seeks official action on behalf of someone else, regardless of whether the former Senator is a registered lobbyist or is retained or employed by those who lobby, and even if the contact would not be considered to be a “lobbying contact” under other laws or rules.²

All Senate personnel should be aware of the broad manner in which the terms “communication” and “appearance” have been defined under the criminal law. For example, requesting or scheduling a meeting, on behalf of any other person, with a former colleague’s office is prohibited.

Additionally, under Senate rules (Rule 37.8) former Senators who are lobbyists or who work for an entity that employs or retains lobbyists may not lobby current Senators and staff for two years. For purposes of the rules, the term “lobbying” is defined as “any oral or written communication to influence the content or disposition of any issue before Congress, including any pending or future bill, resolution, treaty, nomination, hearing, report, or investigation.”³

While the conduct prohibited by the Senate rules is narrower than that barred by criminal law, the *Senate Ethics Manual* cautions that “[a]ll persons are advised to obey the broadest applicable restriction, whether it be under law or rule, and individuals should be particularly careful to keep within the law, as it carries criminal penalties.”⁴ Thus, the Committee advises former and current Senators and staff to follow the criminal law and apply its restriction broadly, to avoid even the appearance of impropriety.

The Restrictions for Former Officers and Senior Staff

Under the same federal criminal statute, Senate officers and senior staff are barred for one year from knowingly communicating or appearing before their former Senate colleagues if their intent is to influence official actions and they are acting on behalf of any other person. As discussed above, the statutory ban applies to any matter on which the covered individual seeks official action on behalf of someone else, regardless of whether the former officer or senior staffer is a registered lobbyist or works for those who lobby. Other than the ban only lasting one

² The provisions of 18 U.S.C. § 207 should not be confused with those of the Lobbying Disclosure Act of 1995, as amended (2 U.S.C. § 1601 *et seq.*). Merely because a particular activity does not constitute “lobbying” for purposes of the registration statute or Senate rules does not mean that the activity is permissible under the criminal law.

³ Senate Rule 37.13(c). There are exceptions for testimony before a Congressional committee, a communication submitted for the public record, and a communication by an individual acting solely in the individual’s own behalf to express a personal opinion or to redress a personal grievance.

⁴ *Senate Ethics Manual*, at 90. Possible penalties for violating § 207(e) include both imprisonment of up to one year (or up to five years for willful violations) and a fine of up to \$50,000 per contact.

year and applying only to the Senate, this law applies to former Senate officers and senior staff in the same manner as it does to former Senators.

A former Senate employee is covered by the criminal law if the employee was paid at or above a rate of pay of least 75% of a Member's salary (\$130,500 for CY 2012) for 60 days or more, in total, during the last year of Senate employment (the "senior rate"). Thus, it may be possible for an employee to become subject to the post-employment contact ban by the receipt of a "bonus" or merit adjustment that is paid during two or more months in the year before they leave the Senate.

Under Senate rules (Rule 37. 9(c)), former officers and senior staff who become lobbyists or work for an entity that retains or employs lobbyists may not lobby the Senate for one year. Again, former officers and senior staff are advised to follow the broader restrictions of the criminal law.

The Restrictions for All Other Former Staff

Those individuals who earned below the senior rate of pay before leaving the Senate are only covered by Senate rules. All former **personal office staff** may not lobby their own office for one year (Senate Rule 37.9). Former **committee staff** and former **personal office staff with "substantive committee responsibilities"** may not lobby the Members or staff of their relevant committee (including all subcommittees) for one year. Substantive responsibilities include, but are not limited to, "assisting in the drafting of committee bills or assisting at hearings and in mark-up (as opposed to committee monitoring and liaison services for a Member's personal office)." ⁵ Former **leadership staff** may not lobby any Member or staffer of their party's leadership, including the personal staff of their former Senator, for one year.

What Current Senators and Staff Need to Know

Current Members, officers, and employees may not knowingly assist former Senators and staff to violate these restrictions.

No Aiding Violations by Former Senators and staff

Although the law and Senate rules are targeted at former Senate personnel, all current Members and staff are also prohibited from assisting them in violating these laws or rules. This means that current Senate Members, officers, and employees **may not aid or abet** a covered individual in violating the criminal law or Senate rules. ⁶ For example, current Senate Members,

⁵ *Senate Ethics Manual*, at 87.

⁶ The same restriction appears to apply in the Executive Branch. For example, regulations implementing § 207 that are applicable to Executive Branch employees state that a person who "aids, abets, counsels, commands, induces, or procures commission of a violation of section 207 is punishable as a principal under 18 U.S.C. § 2." 5 C.F.R. § 2641.103 (2011) (Note). See also *United States v. Robert W. Ney*, Crim. No. 06-272 (D.D.C. 2006) (criminal information charged that former Congressman aided and abetted violations of the post-employment restrictions by a former Congressional staffer in violation of 18 U.S.C. §§ 207(e) and 2).

officers, and employees who know, or have reason to know, that former Senate personnel are subject to these restrictions, should not attend or schedule official meetings with the former Senator or staffer or otherwise assist the individual in taking any action that would violate the law or rules. Paragraph 2 of the Code of Ethics for Government Service provides that any person in government service should “[u]phold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.” Other provisions of the Code state that government employees must “[p]ut loyalty to the highest moral principles and the country” above loyalty to others, and to uphold all of these principles, “ever conscious that public office is a public trust.”

All members of the Senate community have a responsibility to uphold the law and to avoid even the appearance of impropriety. Any current Senator or staffer who knowingly assists a covered individual to violate the criminal law or Senate rule may themselves be subject to disciplinary action and possible referral to the Department of Justice.

No “Informational” Exception

The legislative history of § 207(e) makes clear the broad scope of the restriction and the intent to prohibit “specific contacts in which the former official did not advocate or plead on behalf of his client, but simply makes contact on behalf of another”⁷ Thus, a contact by a former Senator or staffer covered by this provision merely seeking information from a current employee may be problematic under the statute when the information is sought on behalf of a client.

The mere request for information by a former Member or senior staffer on behalf of an influential constituent will often induce official action even if no express request is made. Such a request would alert the Senate employee to the constituent’s interest in a particular issue and sometime influences the answer. Moreover, a request for routine information not intended to induce some action would not require the services of a former Senator or senior staffer, thus raising the inference that the contact is in fact intended to influence the recipient in some way. These types of **informational requests** made by individuals with “clout” on behalf of another, typically made with the intent to influence, often induce the intended action and are **prohibited**.⁸

Additionally, an exception does not exist when a Senate office would have taken the official action that is being sought by the former Senator or staffer anyway. A violation of the law is complete once contact is made with the intent to influence. It does not matter whether the contact actually influenced action. The prohibited contact by itself creates the appearance that official actions may have been improperly affected.⁹

⁷ S. Rep. 100-101, at 22 (1987).

⁸ See H.R. Rep. 100-1068, at 16 (1988). See also S. Rep. 95-170, at 32-33 (1977) (stating that post-employment restrictions reflect Congress’s determination that former officials should be prevented from using “information, influence, and access acquired during government service at public expense, for improper and unfair advantage in subsequent dealings with that department or agency”).

⁹ See H.R. Rep. 100-1068, at 16.

What to Do If You Are Contacted by Someone Subject to the Restrictions

Senators or staff who have reason to believe that they may have received a prohibited contact from a former colleague should not assist the individual and should affirmatively explain that the individual's conduct appears to be improper and that it must cease. Senators and staff should advise the former colleague to contact the Committee and also promptly inform the Committee themselves of the steps taken to cease the communications.

If you are uncertain about whether an individual may be subject to the Senate-wide ban, the Secretary of the Senate posts the names of former Senators, officers, and senior staff, along with the beginning and ending dates of their post-employment contact ban period, on the Senate's website (http://www.senate.gov/legislative/termination_disclosure/report2012.htm). Senate offices and committees should have some mechanism in place to identify individuals who are subject to a ban on contacting their office.