Considerations When Hiring Executive Branch Employees

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As the Obama administration winds down, the number of administration officials leaving the government will increase dramatically. The traditional exodus that accompanies the end of a presidential administration creates opportunities for the private and nonprofit sectors to recruit talented individuals with unique experience. Without appropriate controls, however, this process can create legal and reputational risks for prospective employers and employees alike.

Federal laws restrict the recruiting and post-government professional activity of executive branch employees — and missteps can lead to administrative, civil and even criminal penalties. And in the current Washington, D.C., environment, even the smallest ethical misstep could lead to unwelcome congressional and media scrutiny of former officials, as well as their new employers and clients.

To manage these risks, prospective employers and employees should be attentive to the legal regime governing the transition from federal employment to the private sector, even before any communications regarding future employment begin. To that end, we provide an overview of the basic restrictions applicable to most executive branch employees. (This article does not address the rules applicable to members of Congress, congressional staff or procurement officials, or any agency-specific rules.) The application of these rules can vary substantially based on one's previous position in government and anticipated private sector role, so individualized planning and counseling are essential.

Negotiating Future Employment, 18 U.S.C. § 208(a)

Current executive branch employees may be required to recuse themselves from certain matters while seeking private sector employment. A criminal statute, 18 U.S.C. § 208(a), prohibits current executive branch employees from participating in matters affecting the financial interests of an organization with which the employee is negotiating or has any arrangement concerning prospective employment.

Under regulations promulgated by the Office of Government Ethics (set forth at 5 C.F.R. § 2635.603), this prohibition applies whenever an employee is "seeking employment" — a status that can include even casual, open-ended conversations about the potential employment opportunities at a particular organization. More specifically, the prohibition will apply if the employee:

• Is engaged in negotiations for employment;
• Has made an unsolicited request for employment; or
• Has made a response other than a rejection of an unsolicited communication from any person regarding possible employment.

An employee is no longer seeking employment if the employee or prospective employer rejects the possibility of employment and all discussions of possible employment have terminated. Merely deferring discussions to the foreseeable future (e.g., "I cannot discuss any job with you now, but I would like to speak with you after matter X is over.") does not constitute rejection of an unsolicited employment overture.

Given the obvious sensitivities, organizations need to exercise care in discussing potential employment with current executive branch employees. To avoid inadvertently triggering the restrictions of this provision, organizations should carefully coordinate any employment-related outreach to executive branch employees and limit the number of individuals who are authorized to initiate employment discussions. Companies should educate those individuals, and other persons interacting with government employees, regarding what interactions can give rise to a recusal obligation.

Post-Government Employment Restrictions, 18 U.S.C. § 207

Federal ethics laws also restrict the activities of former executive branch employees after they leave government. The primary post-government employment restrictions are codified at 18 U.S.C. § 207 and in regulations promulgated by the Office of Government Ethics at 5 C.F.R. § 2641. We summarize the principal restrictions and provide some practical observations below.

Summary of Restriction	**Duration**
Ban on communicating with or appearing before the government in particular matters in which the employee participated personally and substantially while in government. 18 U.S.C. § 207(a)(1). No former government employee may knowingly make, with the intent to influence, any communication to or appearance before any officer or employee of the executive branch on behalf of another person in connection with a particular matter involving a specific party or parties, where the U.S. is a party or has a direct and substantial interest, *where the employee participated personally and substantially in the matter while in government.* Important considerations: • The prohibition is on communications or appearances before the government; behind-the-scenes work is permitted. Note, however, de facto communication through	Permanent

an intermediary is still prohibited (e.g., "Your former colleague X told me that I should be sure to tell you that …"). • Because the matter must involve specific parties, matters of general applicability (e.g., rulemakings, formulations of general policy) would normally be excluded.	
Ban on communicating with or appearing before the government in particular matters pending under the employee's official responsibility during final year in government. 18 U.S.C. § 207(a)(2). No former government employee may knowingly make, with the intent to influence, any communication to or appearance before any officer or employee of the executive branch on behalf of another person in connection with a particular matter involving a specific party or parties, where the U.S. is a party or has a direct and substantial interest, *where the employee knows or reasonably should know the matter was pending under the employee's official responsibility within a year prior to his/her termination of government service.* Important considerations: • This prohibition is broader than the one above, in that it covers matters under an employee's authority that were handled by subordinates, even if the employee did not personally work on them. • As above, the prohibition is on communications or appearances before the government; behind-the-scenes work is permitted. • As above, because the matter must involve specific parties, matters of general applicability would normally be excluded.	Two years after termination of government service

Ban on "senior" employees contacting any officers or employees of their former department or agency. 18 U.S.C. § 207(c); Executive Order 13490. No former "senior" government employee may knowingly make, with the intent to influence, any communication to or appearance before any officer or employee of his/her former department or agency on behalf of any other person in connection with any matter on which he/she seeks official action. By statute, "senior" employees are holders of positions whose rate of pay is set by the Executive Schedule (5 U.S.C.§§ 5311-18) and others whose rate of pay exceeds a statutory amount (currently, $160,111.50). Important considerations: • As above, the prohibition is on communications or appearances before the government; behind-the-scenes work is permitted. • Most departments are divided into "components" for purposes of this rule, and the bar applies only to communications or appearances before the component in which the employee served. • The ban applies to communications with all officers or employees of the former department (or component) or agency, regardless of their seniority. The ban is not limited to particular matters involving specific parties — it applies even to communications about matters of general applicability.	One year after termination of government service, extended to two years under Executive Order 13490 for employees subject to the Obama administration's ethics pledge, discussed below
Ban on "very senior" employees contacting any other individuals appointed to the Executive Schedule or officers or employees of their former agency. 18 U.S.C. § 207(d). No former "very senior" government employee (typically,	Two years after termination of government service

cabinet-level appointees and the most senior White House staff) may knowingly make, with the intent to influence, any communication to or appearance before any other Executive Schedule appointee or any officer or employee of his/her former department or agency on behalf of any other person in connection with any matter on which he/she seeks official action. Important considerations: • As above, the prohibition is on communications or appearances before the government; behind-the-scenes work is permitted. • The ban applies to communications with all officers or employees of the former department or agency, regardless of their seniority. The ban also extends to communications or appearances before Executive Schedule appointees at other government departments or agencies. • The ban is not limited to particular matters involving specific parties — it applies even to communications about matters of general applicability.	
Ban on aiding or advising private parties on trade or treaty negotiations on the basis of confidential information obtained during final year in government. 18 U.S.C. § 207(b). No former employee who participated personally and substantially in any trade or treaty negotiation on behalf of the United States within a year prior to his/her termination of government service, and who had access to confidential information concerning the negotiation, may knowingly represent, aid or advise any other person concerning such negotiation. Important considerations:	One year after termination of government service

• This prohibition precludes even behind-the-scenes advice.	
Ban on "senior" and "very senior" employees representing, aiding or advising foreign entities before U.S. agencies. 18 U.S.C. § 207(f). No former "senior" or "very senior" employee may knowingly represent, aid or advise a foreign government or political party with the intent to influence an official decision of any officer or employee of any U.S. agency. Important considerations: • This prohibition precludes even behind-the-scenes advice.	One year after termination of government service

The Obama Administration's Ethics Pledge, Executive Order 13490

Political appointees in the Obama administration have been required to sign the ethics pledge in Executive Order 13490, which obligates them to comply with certain commitments that go beyond the statutory restrictions above, subject to enforcement by the U.S. Department of Justice and other federal agencies. The pledge contains two commitments relevant to post-government activity.

First, the pledge extends the statutory "cooling-off" period for "senior" employees from one year to two years. While the duration of the ban has doubled, the scope of the statutory prohibition and its exceptions — set forth at 18 U.S.C. § 207(c) and summarized above — remain the same. Note that, unless the executive order is modified, the two-year cooling-off period will continue to apply even after the end of the Obama administration.

Second, the pledge prohibits former appointees from lobbying certain officials in the Executive Branch while registered as a lobbyist (or obligated to register) under the Lobbying Disclosure Act for the duration of the administration — i.e., until Jan. 20, 2017. This restriction will expire when the next administration takes office.

Limitation On Compensation, 18 U.S.C. § 203

A separate criminal provision, 18 U.S.C. § 203, prohibits federal employees from sharing in compensation earned by others if the money was earned for representing clients before the government during the employee's government service. Thus, for example, government employees joining law firms or lobbying firms would be prohibited from sharing in any of the firms' income earned for representing clients before the government while the employee was in government.

Under relevant ethics opinions, this restriction does not apply to persons who receive a salary from their new employer or who do not share in profits. To comply with this restriction — which applies to both the provider and recipient of such compensation — the compensation of former government employees brought in as partners typically is set at a fixed rate that excludes any profit-sharing for one to two years following their termination of government employment.

Special Considerations For Lawyers Under Rules Of Professional Conduct

Lawyers should be mindful of additional restrictions imposed by applicable rules of professional conduct. Rule 1.11 of the American Bar Association's Model Rules of Professional Conduct states that "a lawyer who has formerly served as a public officer or employee of the government" — even in a nonlawyer position — may not "represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation."

Covered matters are limited to those involving a specific party or parties. The matters subject to this prohibition are the same as those subject to the lifetime ban in 18 U.S.C. § 207(a)(1), but Rule 1.11 goes a step further to preclude even behind-the-scenes participation on a covered matter. In addition, the lawyer must be screened from all matters he/she worked on while in government in order to allow his/her firm to carry on the representation. Many states have adopted this model rule.

Lawyers subject to the District of Columbia Rules of Professional Conduct face an additional restriction. The D.C. version of Rule 1.11 is not limited to matters involving specific parties that a lawyer worked on personally and substantially while in government, but extends to matters "substantially related" to such matters, requiring a broader screen for former government employees than that required by the model rules.

Neither Model Rule 1.11 nor D.C. Rule 1.11 prevent a lawyer from advising behind-the-scenes on matters covered by the prohibition on communicating or appearing before the government with respect to matters under the lawyer's official responsibility (18 U.S.C. § 207(a)(2)) or the cooling-off rules applicable to former senior or very senior employees (18 U.S.C. §§ 207(c), (d)). These rules also should not prevent lawyers from engaging in lobbying activities regarding matters of general applicability, such as legislation, rulemaking or other matters of general policy.

Conclusion

While these restrictions can create many traps for the unwary, careful attention and planning can minimize the legal and reputational risks that accompany hiring or retaining former executive branch employees. The talent, experience and perspective those individuals can contribute will almost certainly justify the effort.

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