

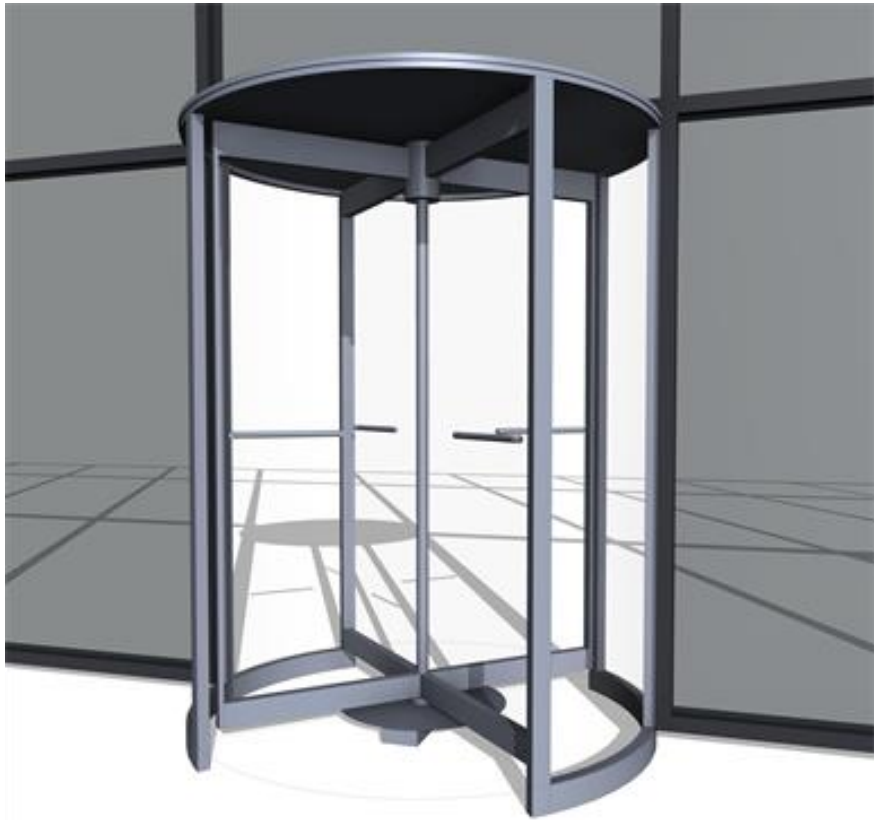


# ACC NCR Revolving Door Roundtable – Heightened Compliance Considerations During a Presidential Transition Year

April 9, 2021



# What is the 'Revolving Door'?



- A variety of post-Government employment restrictions that apply to former Government employees and military personnel as they transition to private industry from federal service and vice versa
- Specific provisions apply to an individual based upon their role, appointment status, and duties performed as a Government employee

# Key Statutes and Regulations

- 18 U.S.C. § 207 – Restrictions on former officers, employees, and elected officials of the executive and legislative branches
  - As implemented in 5 CFR Parts 2635 and 2641
- Section 1045 of the FY18 NDAA & DoD Instruction 1000.32
- President's Ethics Pledge (EO 13989)
- 41 U.S.C § 2104 – Certain former DoD acquisition and contracting officials cannot accept compensation from a defense contractor for one year
- Section 847 of the 2008 NDAA – Requires *written* post-Government employment advice for certain former DoD personnel before working for a defense contractor within two years of leaving DoD

# 18 U.S.C. § 207

- Primary source of post-Government employment restrictions
- Intent is to prevent former Federal employees or officers from exerting undue influence or using information gained while working for the Federal Government to unfairly benefit a new employer
- Prohibits individuals from engaging in certain activities on behalf of persons or entities other than the Federal Government, whether or not done for compensation
- Does not bar any individual from accepting employment with any private or public employer after Federal service

# 18 U.S.C. § 207

- Specifically, the statute prescribes criminal penalties for any employee or officer who, after terminating Federal employment
  - knowingly makes
  - with the intent to influence
  - any communication with or appearance before
  - an employee of the Executive or Judicial Branch
  - on behalf of another
  - in connection with a particular matter that either
  - the employee participated in personally or substantially, or
  - was under the employee's official responsibility during the employee's last year of service

# 18 U.S.C. § 207

- “Particular Matter” includes any
  - Investigation, application, request for a ruling or determination, rulemaking\*, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding
- “Appearance” and “communication” are broader than formal representation
  - Communication occurs when you impart or transmit information of any kind -- including facts, opinions, ideas, questions or direction
  - An appearance occurs when you physically present yourself before an employee of the Executive or Judicial Branch, in either a formal or informal setting
- “Intent to influence” includes seeking a discretionary Federal ruling, benefit, approval, or other action, or is made for the purpose of influencing Federal action that involves an appreciable element of dispute

# Restrictions Under 18 U.S.C. § 207

- **Permanent (“Lifetime”) Ban:** Bars all former employees from contacting or appearing before any Federal agency or court regarding particular matters involving specific parties in which they participated personally and substantially at anytime during Federal service. “Lifetime” means the lifetime of the particular matter (*e.g.* contract), *not* the person. § 207(a)(1)
- **2-Year Ban:** Bars all former employees from contacting or appearing before any Federal agency or court regarding particular matters involving specific parties that were under their official responsibility during their last year of Federal employment. § 207(a)(2)
- **1-Year Cooling Off:** Bars “Senior Employees” for one year after leaving a senior position from contacting or appearing before their former agency to seek official action. § 207(c) “Former agency” may be a smaller, designated component for larger agencies when approved by OGE. 5 CFR 2641, Appendix B

# Restrictions Under 18 U.S.C. § 207

- **1-Year Trade or Treaty Assistance Ban:** Bars “Senior Employees” for one year after leaving a senior position from representing, aiding, or advising another on the basis of covered information, concerning any ongoing trade or treaty negotiation in which the employee participated personally and substantially in their last year of service. § 207(b)
- **1-Year Restriction on Aiding Foreign Entities:** Bars “Senior Employees” for one year after leaving a senior position from representing, aiding, or advising a foreign entity with the intent to influence a decision of a federal department or agency, or a Member of Congress, in carrying out their official duties. Includes behind the scenes assistance. § 207(f)



# Exceptions to 18 U.S.C. § 207

- Official government duties, including carrying out official duties on behalf of state and local governments and institutions, hospitals, and organizations
- International organizations
- Statements based on the individual's own special knowledge in the particular area that is the subject of the statement, if no compensation is received
- Communications solely for the purpose of furnishing scientific or technological information, with outstanding qualifications in a scientific, technological, or other technical discipline
- Testimony under oath
- Political parties and campaign committees

# Section 1045 FY18 NDAA

- Section 1045, effective Dec. 12, 2017, added another layer of post-Government employment (PGE) restrictions specific to departing DoD senior officials.
  - Unlike 18 USC 207, Section 1045 does not allow DoD to designate separate components
  - Added Lobbying Disclosure Act restrictions, including “behind the scenes” restriction for “DoD matters” vis-à-vis non-DoD agencies
- Lobbying contacts and efforts in support of such contacts, *including*
  - preparation and planning activities,
  - research and other background work that is intended, at the time it is performed, for use in contacts, and
  - coordination with the lobbying activities of others.

# Section 1045 “Lobbying Contact”

- Any oral or written/electronic communication to a covered executive or legislative branch official that is made on behalf of a client, *including*
  - administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license)
- “Covered executive branch officials”:
  - President;
  - Vice President;
  - Officers or employees of the Executive Office of the President;
  - Any officer or employee serving in an Executive Level I through V position;
  - Any member of the uniformed services serving at or above grade O–7; and
  - Any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character (NC-SES and “Schedule C” employees).

DoDI 1000.32

# Section 1045 Lobbying Contact Exceptions

- Communications excluded from the definition of Lobbying Contacts include\* those
  - Made in a speech, publication, or other material distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication
  - A request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official
  - Information provided in writing in response to an oral or written request by a covered executive branch official for specific information
  - Required by subpoena, civil investigative demand, or statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, grant, loan, permit, or license
  - Made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications

\*See DoD Instruction 1000.32 for complete list

2 USC § 1602

# President's Ethics Pledge – EO 13989

- Applies to former Biden Administration political appointees
- Extends the 18 USC 207(c) representational ban to two years
- Adds a one-year “behind the scenes” restriction on former political appointees who are subject to 18 USC 207(c)
- For the later of two years or the remainder of the administration, no former political appointee may
  - Lobby any covered executive branch official or non-career member of the Senior Executive Service (NC-SES)
  - Engage in activity would require registration under the FARA.

# Key Takeaways

1. The 'Revolving Door' is and remains a legal minefield for Government employees transitioning to the private sector, as well as their potential employers
2. Which restrictions apply to a particular employee and the resulting practical effects is a highly fact-specific inquiry
  - Which federal employment status and activities 'trigger' a given restriction?
  - How does the restriction affect the employee's ability to perform their private sector role?
3. 3-way ethics dialogue: Employee – Ethics Officer – Employer



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