November 10, 2003

Barbara B. Hannigan
Ethics Counsel and Designated
Agency Ethics Official
Securities and Exchange Commission
450 Fifth Street, NW., Stop 6-6
Washington, DC 20549-0606

Dear Ms. Hannigan:

This is in response to your letter of October 16, 2003, in which you request permanent waivers of the "one-year cooling off" restrictions of 18 U.S.C. § 207(c) for certain positions at the Securities and Exchange Commission (SEC), pursuant to 18 U.S.C. § 207(c)(2)(C). For the reasons explained below, effective this date I am granting the two requested waivers. This means that the affected positions are likewise not subject to the restrictions of 18 U.S.C. § 207(f) relating to foreign entities.

Your waiver request pertains to all SEC positions classified as being in pay grade SK-17 under the SEC's new pay system, as well as to all positions classified at new grade SK-16 and below, in which the incumbent is supervised by an employee in an SK-17 position. You also request a separate waiver for the SEC's position of Deputy Chief Litigation Counsel, which is supervised by the Chief Litigation Counsel, a position that is already exempt.

On May 19, 2002, SEC instituted a new "pay parity plan." Such a plan was authorized by Congress in January 2002, pursuant to Pub. L. No. 107-123, but it was not funded by appropriations until some time later. In pertinent part, the new pay plan replaced the General Schedule (GS) at your agency with a 17-grade SEC "K" (SK) system, with each grade having 31 steps, and a pay-for-performance reward program.

As explained in your letter, under the new system, supervisory SEC employees who had held GS-15 positions were placed into SK-17 positions; those who had encumbered GS-15 positions without supervisory authority were placed into SK-16 positions. Similarly, employees in old GS-14 supervisory and nonsupervisory positions were placed into SK-15 and SK-14 positions, respectively.

Currently, the rate of basic pay for positions at steps 28-31 of grade SK-17 exceeds the basic rate of pay for level 5 of the Senior Executive Service (SES). In the future, as the SEC continues to grant periodic cost-of-living increases to basic pay for SK positions and more employees receive step increases under the merit pay system, more SK position holders may exceed the basic pay rate payable for SES level 5. Consequently, a potentially ever-increasing number of SEC employees occupying such positions could, in the absence of a waiver and without any accretion in duties, become subject to the senior employee post-Government employment restrictions.

Your letter indicates that subjecting these lower-graded, less visible positions, which were previously GS positions, to the senior-level post-employment restrictions of 18 U.S.C. § 207(c) & (f) would exacerbate the very recruitment and retention difficulties the new pay system was intended to combat. You also note the decision of the Office of Government Ethics (OGE) last year to grant a temporary waiver under section 207(c)(2)(C) to certain senior positions at the SEC. The temporary waiver applied to SEC SES positions with a basic rate of pay less than that payable for level 5, which were converted into Senior Officer (SO) positions with a rate of basic pay greater than SES level 5 under the new pay system. This prior temporary waiver is relevant by way of analogy to your current request for permanent waiver relief for the much lower SK positions, which are by definition below the senior level and generally are subject to at least two levels of supervision above them within SEC management.

Based on the information you have provided, I agree that the two-part test for granting waivers under section 207(c)(2)(C) is satisfied in this instance. In order to grant a waiver, the Director of OGE must determine both that the imposition of the restrictions of section 207(c) "would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions" and that "granting the waiver would not create the potential for use of undue influence or unfair advantage." 18 U.S.C. § 207(c)(2)(C)(i) & (ii). I find the hardship requirement to be satisfied because your materials indicate that the very purpose of the new Congressionally authorized pay plan was to reverse your agency's historical difficulties in recruiting and retaining qualified experts in fields related to the mission of your agency. As indicated in our implementing regulations, hardship may be shown by the "payment of a special rate of pay to the incumbent of the position pursuant to specific statutory authority." 5 C.F.R. § 2641.201(d)(5)(ii)(A).

I also find that the granting of a permanent waiver would not create the potential for undue influence or unfair advantage. The new increase in pay is not accompanied by any accretion in duties or responsibilities, and there is no reason to expect that the incumbents at the present time would have any more potential for influence or advantage than they had immediately prior to the pay increase. This is particularly true for the potentially significant number of mid-level employees, both supervisors and nonsupervisors, who currently or could in the future have a basic rate of pay equal to or greater than that for level 5 of the SES.

Likewise, based on the statements in your letter, I find that granting a permanent waiver for the position of Deputy Litigation Chief Counsel, though it is an SO position equivalent to an SES position, is appropriate based on the tests both for hardship to the agency in obtaining qualified personnel, and for lack of potential for undue influence or unfair advantage. Moreover, it would be anomalous and unfair to have the Deputy Chief Litigation Counsel position subject to section 207(c), but to have the supervising Chief Litigation Counsel position exempt.

Having decided to grant the permanent waivers you have requested for the affected SK positions and the Deputy Chief Litigation Counsel position, I must note that the benefit of these waivers will not extend to any employees who terminated their positions, if covered after the new pay structure took effect, before the date of this letter granting the waivers. The OGE regulations implementing section 207(c)(2)(C) provide that the effective date of any waiver is the "date of the Director's written response to the designated agency ethics official indicating that the request for exemption has been granted." 5 C.F.R. § 2641.201(d)(4). Further, the regulations specifically state that any waiver "shall not benefit individuals who terminated senior service prior to the effective date of the exemption." Id. Thus, under these regulations, I cannot extend the benefit of the waivers granted in this letter to any individuals who terminated from covered SK positions or the Deputy Chief Litigation Counsel position prior to the date of this letter.

Finally, the new positions subject to these waivers will be added to a revised appendix A to part 2641 of 5 C.F.R. the next time that appendix is updated in the Federal Register.

If you have any questions, please contact OGE General Counsel Marilyn L. Glynn, at 202-482-9292, or OGE Senior Associate General Counsel William E. Gressman, at 202-482-9245.

Sincerely,

Amy L. Comstock

Amy L. Comstock
Director

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