



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

October 15, 1991

Stephen D. Potts, Director
Office of Government Ethics
1201 New York Avenue, N.W., Room 500
Washington, D.C. 20005

Dear Mr. Potts:

On behalf of the Securities and Exchange Commission, I hereby request that the Office of Government Ethics exempt two senior litigating positions -- the Office of General Counsel's Solicitor and the Division of Enforcement's Chief Litigation Counsel -- from the one year restrictions of 18 U.S.C. 207(c) pursuant to the waiver provisions set forth in 56 Fed. Reg. 3964 (1991) (to be codified at 5 CFR 2641.201(d)). Both are in the Senior Executive Service and their positions currently are each graded at ES 5, greater than the rate of basic pay payable for Level V of the Executive Schedule. They are, therefore, "senior employees" as defined in Section 2641.101 at 56 Fed. Reg. 3963 (1991) (to be codified at 5 CFR 2641.101). Both positions were previously exempted (i.e. not "designated") by the Director of the Office of Government Ethics under former 18 U.S.C. 207(c) as not "involv[ing] significant decisionmaking or supervisory responsibility." ^{1/} The duties and responsibilities of neither position has changed.

For the reasons discussed below, we believe that exempting these positions would not create potential for abuse by former employees based on past government service. The continued imposition of the restrictions, however, will create an undue hardship on the Commission in obtaining qualified personnel to fill these positions in the future.

REASONS FOR GRANTING THE EXEMPTIONS

- A. The granting of exemptions would not create the potential for use by former senior employees of undue influence or unfair advantage based on past government service.

The incumbents of both positions are important supervisors of litigation but exercise their duties and responsibilities in

^{1/} 20 SES positions currently are graded at ES 5 and ES 6 at this agency and thus are "senior employees" subject to the one year restrictions of section 207(c). Of this number, nine were exempted by your predecessor from former 207(c) and two are new positions.

narrow areas. The Commission, unlike many agencies and departments, handles virtually all of its litigation with its own lawyers, the most significant exception being cases in the U.S. Supreme Court, as to which the Commission must appear through the Solicitor General, an official within the Department of Justice. In general, the Solicitor is the Commission's top appellate lawyer, and the Chief Litigation Counsel is its top trial lawyer.

The Solicitor reports to the Commission's General Counsel. 2/ Under the direction of that person, the Solicitor oversees those responsibilities of the General Counsel that involve representation of the Commission in litigation as a party or as *amicus curiae*, principally in federal appellate courts; defense of actions brought against the agency and its officials and employees; Bankruptcy Code matters; and other occasional litigation. The Solicitor also oversees the Commission's ethical conduct program. The Solicitor supervises 63 persons (professional and support staff) of the 116 persons in the General Counsel's Office.

The Division of Enforcement's Chief Litigation Counsel reports to that Division's Director. 3/ Under the supervision of the Director, the Chief Litigation Counsel heads the Division's Trial Unit. The Trial Unit is charged with conducting, supervising, coordinating and evaluating district court litigation and administrative proceedings conducted by the Commission that are brought as a result of law enforcement investigations. The Chief Litigation Counsel supervises 25 persons (professional and support) of the 288 persons in the Division of Enforcement and the several hundred more persons who have law enforcement duties or responsibilities in the Commission's field offices. In 1990, he supervised a caseload of 65 cases, 9 of which went to trial, out of a total of 304 cases initiated by the Commission that year.

Both the Solicitor and Chief Litigation Counsel positions encompass decision making with respect to litigation strategy in individual cases, and program strategy as to litigation generally, but not usually with respect to Commission policy decisions. The Commission does not delegate to its staff the authority to determine when to institute or settle a law

2/ The General Counsel is the chief legal officer of the Commission and has a broad array of duties. See 17 CFR 200.21.

3/ The Director of Enforcement is responsible for the overall supervision and conduct of all law enforcement investigations, litigation and other activities under each of the acts administered by the Commission. See 17 CFR 200.196.

enforcement action or take an appeal or enter a private action as a friend of the court. Thus, the staff must seek specific authorization from the five presidentially-appointed Commissioners in each case. The views of the Solicitor and the Chief Litigation Counsel are carefully considered by their supervisors or the agency heads as cases and litigating positions are considered, but the policy judgments are made by the incumbents' supervisors and ultimately by the Commissioners.

The potential of the Solicitor and Chief Litigation Counsel for influence on former colleagues and subordinates is not likely to be that of persons in senior policy making positions. Nor do they enjoy the same degree of public visibility or influence that those in senior policy making positions do. As a practical matter, their influence is more akin to their colleagues in the Office of General Counsel and in the Division of Enforcement whose grades range from ES 2 to ES 4 in the Senior Executive Service. 4/ None of these persons is subject to the one year restrictions of Section 207(c), See 56 Fed. Reg. 3963 (1991) (to be codified at 5 CFR 2641.101), and all were previously exempted by your office under former Section 207(c), as were the Solicitor and Chief Litigation Counsel.

- B. The continued imposition of the restrictions will create an undue hardship on the Commission in obtaining qualified personnel to fill these positions.

The grades of the Solicitor and the Chief Litigation Counsel reflect the outstanding qualifications in highly technical, complex and difficult areas of the law required by both positions. Both positions require thorough familiarity with securities and corporate laws and finance and, in the case of the Solicitor, also government ethics codes and bankruptcy laws. As the Commission has become more involved with international securities fraud, the Chief Litigation Counsel position has also come to require thorough familiarity with the highly technical procedures for obtaining evidence from abroad. In addition to these substantive areas, the Solicitor and the Chief Litigation Counsel must be skilled and experienced litigators, able to supervise complex litigation involving in many cases very important issues and large companies represented by attorneys who are often the most skilled, experienced and highest paid in the country.

It is from this pool of lawyers that the most likely candidates for the two positions would be recruited if either position became vacant. This already small pool is further

4/ The Chief Litigation Counsel is one of six senior officials who stand on a co-equal basis in dealing with one another and reporting to the Director of Enforcement.

diminished when potential candidates compare the lower salaries offered by the Commission to those offered by the private securities bar. When potential earning power is also limited by the one year restrictions of 18 U.S.C. 207(c), which in practice reduces their earning power even after they leave the Commission's employ by making them less attractive to potential employers, it makes it far more likely that highly qualified future candidates will accept competing offers in the private sector rather than with the Commission.

The Commission is certainly not an exception to the general proposition that the highest-ranking officials, those who set policy and enjoy public visibility, usually have little difficulty in continuing their careers after leaving government. Thus, the one-year ban of Section 207(c) on senior officials appearing before the agency, although undoubtedly an impairment to future employment, does not significantly deter aspirants to the most senior Commission positions. Below the Commissioner and Division Director level, however, the degree of influence sharply diminishes, and the impact of post-employment restrictions becomes more acute.

Because of the nature of the federal securities laws, it is difficult to pursue a legal career in the securities field after government service without regular contact with the Commission. The filing with the Commission of registration statements, periodic reports, and applications for exemptive relief, and requesting interpretive advice is the essence of a securities law office practice. An employee precluded from any contact with the Commission for one year would have difficulty conducting a securities law litigation practice, since Commission litigation is a major component of such a practice. A bar against contacting the agency would, for example, prevent such a litigator from submitting the traditional brief (a "Wells submission") to the agency urging, for reasons stated in that brief, that the lawyer's client not be sued, or from making an offer of settlement, if the client is sued. Government post-employment restrictions in Sections 207(c) therefore adversely affect Commission employees by discouraging potential employers in the securities field from hiring them because the statute's restrictions limit their ability to perform meaningful services during the period of the restrictions.

It is for all of the above reasons that we believe exemptions from the restrictions of 18 U.S.C. 207(c) are appropriate for the Office of General Counsel's Solicitor and the Division of Enforcement's Chief Litigation Counsel. I have enclosed, for your information, copies of the position

descriptions for these positions. Please let me know if you have any questions or wish additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Doty', with a long horizontal stroke extending to the right.

James R. Doty
General Counsel
and
Designated Agency
Ethics Official