



OFFICE OF THE
GENERAL COUNSEL

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

October 16, 2003

By Hand

Amy Comstock, Director
U.S. Office of Government Ethics
1201 New York Avenue, N.W., Suite 500
Washington, D.C. 20005

Re: Request for Waiver of 18 U.S.C. 207(c) and (f) Restrictions.

Dear Ms. Comstock:

On behalf of the Securities and Exchange Commission I hereby request, pursuant to 5 C.F.R. 2641.201, that the Office of Government Ethics exempt from the one-year appearance and communications restrictions of 18 U.S.C. 207(c) and (f), all of the positions at the SEC that are classified as being in pay grade SK-17 under the SEC's new pay system as well as all positions in which the incumbent is supervised by an employee in an SK-17 position.¹ In addition, I request a similar exemption for the position of Deputy Chief Litigation Counsel.

For the past several years, the SEC pursued "pay parity" with other financial regulators. In January 2002, Congress passed legislation giving the Commission authority to increase pay for its employees.² On May 19, 2002, a new pay plan was instituted for all employees that significantly raised Commission pay levels. As we previously informed you, this new pay system eliminated the Senior Executive Service ("SES"). Employees who had been members of the SES were placed into three new pay

¹ These positions currently include: Supervisory Staff Accountant, Supervisory General Attorney, Supervisory Trial Attorney, Supervisory Attorney-Adviser, Supervisory Financial Analyst, Supervisory Financial Economist, Supervisory Human Resources Specialist, Supervisory Information Technology Specialist, Supervisory Market Surveillance Specialist, Supervisory Program Analyst, Supervisory Administrative Management Specialist, Applications and Reports Services Officer, Support Services Manager, Equal Employment Manager, Senior Adviser, Director, Office of Legislative Affairs, Assistant Director (Planning and Budget) Assistant Director for Finance, Chief of Small Business Policy, Corporate Analysis and Examination Officer, Division of Corporation Finance. Although as explained in this letter, these positions are the only ones at the Commission where non-senior management personnel are potentially subject to the restrictions of section 207, other, even less senior employees might become so soon, particularly if SES salaries are not raised. Therefore, we request that the exemption for the stated positions be drafted to cover all employees supervised by someone in the supervisory positions discussed in this waiver request.

² Investor and Capital Markets Fee Relief Act, P.L. 107-123.

grades, each of which has a rate of basic pay that is higher than the basic rate pay for a member of the SES in grade ES-5 (currently \$134,000). Thus, under the definition of "senior employee" in section 207(c), which includes any employee whose basic rate of pay is equal to or greater than the ES-5 level, Commission former SES members became subject to the one-year "cooling off" ban. As you know, due to the lack of notice about this change in status, OGE granted a temporary waiver for these employees. A copy of my letter to you of August 2, 2002, along with the Federal Register releases granting the temporary waiver are enclosed with this letter as Attachment A.³

I am writing to you now, however, to seek permanent relief from the one-year cooling off ban for the positions of those Commission employees who were never part of the SES, but who now will be covered because, as a result of our new pay system, their basic rate of pay is either now greater than \$134,000, or soon will be as implementation of the new pay system continues.

In brief, the SEC's pay system replaced the GS schedule for SEC GS grades 1-15 employees with a 17-grade system and a pay-for-performance reward system. Under the new system, there are 31 steps within each grade and employees may obtain merit increases that are the equivalent of between one to three steps for meritorious accomplishments. Commission documents detailing the pay-for-performance system and the 2003 pay scales are enclosed as Attachment B. Employees with supervisory authority who were in grade GS-15 under the old system were placed into grade SK-17 under the new one. Former GS-15's without supervisory authority were placed into grade SK-16.

At the time the new system went into effect, the overwhelming impact was on the former members of the SES who found themselves covered by section 207(c) for the first time. At that time, only one SK employee was at a high enough step to be covered by the then statutory limit of \$130,000. At the end of 2002, however, the Commission instituted an across the board pay increase of 4.1%. This increase had the potential to convert almost all of the former GS-15's into senior employees within the ambit of sections 207(c) and (f). The late December hike in pay for ES-5 of the SES to \$134,000, however, resulted in only the top four steps of the SK-17 pay grade becoming covered.⁴ While this meant that only a handful of employees are currently subject to the cooling off ban, over 150 other employees are currently in grade SK-17, steps 26 and 27, and, as the Commission approaches the implementation of the pay-for-performance system as early as December of this year, those employees will face a difficult dilemma. The standard reward for exemplary service would be one or more performance award step increases. Yet acceptance of such a reward will result in the imposition of a post-employment

³ The Exhibits to the August 2, 2002, letter are not included in Attachment A.

⁴ In addition to the implementation of the merit pay system, current SK-17 employees are also at risk again this year (and subsequent years) of a cost-of-living increase in the basic rate of pay for Commission employees not being congruent with any potential increases to the basic rate of pay for the SES. A 2.15% increase in the basic rate of pay for the SEC, without a corresponding increase to the pay rate for an ES-5, would result in persons employed in pay grade SK-17, steps 26 and 27, being subjected to the restrictions of the statute.

restriction that will greatly affect middle managers' opportunities for employment in the private sector.

Pursuant to section 201(d) of Part 2641, a waiver of the 207(c) restrictions is available only if: a) the granting of the exemption will not create the potential for undue influence or unfair advantage; and b) the imposition of the restriction will create an undue hardship on the agency in filling the positions to be exempted. For the reasons discussed below, we believe that exempting these positions would not create the potential for abuse by former employees based on their past government service. The continued imposition of these restrictions, however, will create an undue hardship on the Commission in obtaining qualified personnel to fill these positions in the future.

Prior to the implementation of the pay parity legislation, the Commission had fifteen senior employees: the five Commissioners and ten employees in SES grades ES-5 and ES-6. With implementation of pay parity, 66 new positions were added to this category. At present there are over 150 grade SK-17 employees at risk of becoming senior employees due to performance awards, and a total of 225 grade SK-17 employees overall. As a result, roughly ten percent of the Commission staff will be subject to the one-year ban. The following chart illustrates the profound alteration of the number of employees defined or potentially defined as senior employees within the meaning of section 207(c).

	Executive Schedule Employees	Employees with basic pay equal to ES-5	Total	Approximate % of total agency
Pre 5/19/02	5	10	15	.5
As of 5/19/02	5	76	81	2.7
Potential today subject to Pay for Performance	5	303	308	10.3

Granting the Exemptions Will Not Create the Potential for Use by Former Senior Employees of Undue Influence or Unfair Advantage Based on Past Government Service.

One of the purposes of section 207(c)'s cooling-off ban is to create a period of adjustment when a senior official leaves an agency. It was designed to capture only the most important policy-making positions. One useful analog for determining which positions fell into this category was basic rate of pay. Generally speaking, the more money associated with a governmental position, the more influential the incumbent and the greater the danger of a former official wielding too much influence over his or her former agency. Thus, the Statute ties senior employee status to the rates of pay for the Executive Schedule and to the two highest grades of the SES. The premise behind this

linkage falters, however, when pay is increased across the board, as has happened at the Commission.

Scores of middle managers in non-policy making positions are now potentially subject to restrictions that were intended only for truly senior officials who actually have the authority to make agency policy. These employees are equivalent to GS-15's in other agencies. Congress clearly never intended the scope of the cooling-off bans to apply to this level of federal employee as the statutory salary amount is tied to the two highest levels of the SES. The positions in pay grade SK-17 are those of supervisory accountants, attorneys, economists, and various analysts and administrative specialists. Within the Commission these supervisory employees work in every office, division, and region. They do not make policy decisions affecting the Commission's overall operations. These employees generally have at least two levels of supervision above them within management,⁵ and, therefore, are not situated to influence overall Commission policy internally or externally once they leave. These employees must get through these levels of supervision before even getting to the Commissioners who have ultimate responsibility for agency policy. For example, a Supervisory General Attorney who acts as Assistant Director for one of the agency's operating divisions is supervised by: an Associate Director, often a Deputy Director, and a Director.

The potential for incumbents in these positions who leave the Commission to exert influence on their former colleagues and subordinates is not likely to be that of persons in senior policy-making positions. Nor do these employees have any degree of public influence or visibility. They do not ordinarily speak for the Commission, testify before Congress, or attend meetings of the Commission's senior staff. They are quintessential government middle managers.

Indeed, the intent of the statute is to allow the agency and the former employee to adjust to their respective new roles. This presupposes that employees left behind will recognize the former senior employees. With potentially ten percent of the agency in such positions, it is likely that many of the Commission employees with whom the departing SK-17 employees come into contact will not even be aware that the former employee had ever actually worked at the SEC.

Continued Imposition of the Restrictions Will Create an Undue Hardship on the Commission in Obtaining Qualified Personnel to Fill These Positions.

By contrast, however, not granting the waiver will create hardship in obtaining qualified personnel to fill these middle management positions. Extreme agency turnover was one of the primary reasons that Congress authorized the SEC to pay salaries outside of the GS pay schedule. Attached, as Exhibit C, is the documentation that was provided to Congress regarding the Commission's serious and unprecedented turnover problems.

⁵ One of the SK-17 positions is the head of the Commission's Office of Legislative Affairs, but, unlike most other office head positions, the Director of Legislative Affairs is not an SES equivalent ("SO") position, and, is in fact supervised by another SO official. This position was previously classified as a GS-15 position, so the incumbent was not covered by section 207(c) even before pay parity went into effect.

As noted above, employees in the positions for which we seek exemption do not exercise the sort of influence that forms the basis of the need for the cooling-off bans. Yet subjecting these lower-level officials to the restrictions intended for the most senior policy-making positions will impair greatly the willingness of existing employees to fill these slots and will greatly increase the difficulty of attracting new employees into government service.

The one-year restrictions of sections 207(c) and (f) make it exceptionally more difficult for such employees to seek work outside the Commission. Commission lawyers and accountants are attractive to outside employers due to the nature of the federal securities laws; this is a highly complex field in which Commission employees develop expertise. Unlike other areas of the law, these skills are not fungible. Issuers of securities, brokers, dealers, investment advisers and mutual funds have filing and other requirements that make it necessary for their lawyers and accountants to have regular contact with the Commission. An employee precluded from any contact with the Commission for one year after leaving Commission service would be unable to represent anyone in an enforcement or administrative proceeding, or file a request for an exemptive application, or seek no-action relief, or request interpretive advice from the Commission, or even explain a filing. A former Commission employee unable to do any of these activities for one year would, therefore, be of little value to a prospective employer.

SEC employees in truly senior positions have historically been able to pursue subsequent careers in part due to the public visibility and prestige of their positions. Middle managers have no such visibility or prestige. Thus, a prospective employer will be much more likely to hire an even lower-level employee (i.e., the employees supervised by the employees in the positions for which we seek exemption) than the supervisory lawyers and accountants and economists now subject or about to subject to the ban. As a result, the Commission will face the perverse effect that many of its most talented and ambitious employees will either not seek promotions, or will feel compelled, for future career considerations, to leave Government service before being promoted.

OGE regulations specifically acknowledge this point. Section 201(d)(ii)(A) of 5 C.F.R. Part 2641 specifically notes that OGE may, in evaluating whether to grant an exemption, take into consideration “the payment of a special rate of pay to the incumbent of the position pursuant to specific statutory authority.” All of the employees in pay grade SK-17 whose positions are covered by this request are subject to the statutory restriction due to the SEC’s special rate of pay authorized by the pay parity statute. Therefore, they should be granted an exemption.

Deputy Chief Litigation Counsel

In addition, as you are aware, the Commission currently has two positions that have been exempt from section 207(c) for many years: Solicitor and Chief Litigation Counsel. Under the new pay system, the Deputy Chief Litigation Counsel is in the Senior Official (“SO”) pay grade, which places the incumbent in the senior employee

status. We request exemption from sections 207(c) and (f) for the Deputy Chief Litigation Counsel because it is patently unfair to hold the Deputy to a higher level of post-employment restriction than the Chief. Rather than repeat the arguments that led the Commission to seek an exemption for these two positions, I am enclosing as Attachment D a copy of our October 15, 1991, letter seeking the exemptions and a copy of OGE's October 29, 1991, letter granting the exemptions. All of the reasons why the positions, particularly that of Chief Litigation Counsel, would not create the possibility of undue influence, and the hardship on the Commission in filling them, remain as true today as they were twelve years ago. The arguments apply with even greater force for the Deputy Chief Litigation Counsel. For these reasons, in addition to the inequity of having a subordinate employee subject to greater restrictions than his supervisor, we request an exemption for the position of Deputy Chief Litigation Counsel. In granting this relief, you will ensure the fair application of ethics rules.

Accordingly, we request that the positions classified as being in pay grade SK-17⁶, be exempted from the one-year appearance and communications restrictions of 18 U.S.C. 207(c) and (f).

Please let me know if you have any questions or seek any additional information. You may contact Assistant Ethics Counsel William Lenox or me at (202) 942-0970. Thank you for your consideration.

Sincerely



Barbara B. Hannigan
Ethics Counsel and
Designated Agency Ethics Official

Attachments

⁶ We seek as well exemptions for the positions of those employees who report to the employees in these supervisory positions.