



United States
Office of Government Ethics
Suite 500, 1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

October 29, 1991

James R. Doty
Designated Agency Ethics Official
Securities and Exchange Commission
450 5th Street, NW., Room 6063
Washington, DC 20549

Dear Mr. Doty:

This is in response to your letter of October 15, 1991, in which you request that two Senior Executive Service positions at the Securities and Exchange Commission be exempted from coverage by the one-year post-employment restriction set forth in 18 U.S.C. § 207(c). Both positions, the Office of General Counsel's Solicitor and the Division of Enforcement's Chief Litigation Counsel, are currently graded at ES 5. Both positions are eligible for exemption in accordance with 18 U.S.C. § 207(c)(2)(C) and the procedures outlined in an interim regulation issued by the Office of Government Ethics (OGE) on February 1, 1991 (56 Fed. Reg. 3961, to be codified at 5 C.F.R. Part 2641).

In order to exempt a senior employee position or category of positions from section 207(c), the Director of OGE must determine that --

(i) The granting of the exemption would not create the potential for use by former senior employees of undue influence or unfair advantage based on past Government service; and

(ii) The imposition of the restrictions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions

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5 C.F.R. § 2641.201(d)(5).

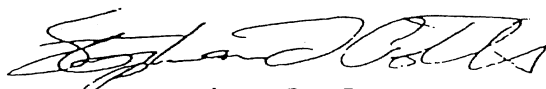
Your letter highlights a number of factors deemed relevant to these determinations in the case of the Solicitor and Chief Litigation Counsel positions. Noting first that the incumbents of these two positions were not subject to section 207(c) prior to 1991, you indicate that "the Solicitor is the Commission's top appellate lawyer, and the Chief Litigation Counsel is its top trial

lawyer." Both supervise a large staff and practice law in an area that is "technical, complex, and difficult." Nevertheless, you emphasize that "policy judgements are made by the incumbents' supervisors and ultimately by the Commissioners." Thus, while the Solicitor and the Chief Litigation Counsel are involved in "decision making with respect to litigation strategy in individual cases, and program strategy as to litigation generally ... [t]he Commission does not delegate to its staff the authority to determine when to institute or settle a law enforcement action or take an appeal or enter a private action as a friend of the court." In general, it is your opinion that the degree of influence potentially exercisable by former Commission employees "sharply diminishes" below the Commissioner and Division Director level.

In order to recruit for the Solicitor and Chief Litigation Counsel positions from among a pool of the most skilled and experienced lawyers in the country, you observe that the Government must compete against salaries offered by the private securities bar. In deciding between the public and private sectors, you believe that a potential Commission litigator will consider his post-Government service employment prospects. While it is your impression that the public visibility enjoyed by the Commission's policy makers means that they "usually have little difficulty in continuing their careers after leaving government," you suggest that even the most senior litigators "would have difficulty conducting a securities law litigation practice, since Commission litigation is a major component of such a practice." In your view, the limitations imposed by section 207(c) will discourage private sector employers from hiring former Commission litigators covered by that provision.

After reviewing the functions of the Securities and Exchange Commission, the relevant job descriptions, and the information presented in your letter of October 15, I have determined to exempt the Solicitor and Chief Litigation Counsel positions from 18 U.S.C. § 207(c). As explained in § 2641.201(d)(4), the two exemptions shall be effective as of the date of this letter and shall inure to the benefit of the individuals who currently hold those positions, but not to their predecessors.

Sincerely,



Stephen D. Potts
Director