

Office of Government Ethics
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Letter to an Agency General Counsel
dated February 18, 1981

This is in response to your request of February 4, 1981, for our opinion on the question whether section 210 of Title II of the Ethics in Government Act of 1978¹ applies to a commissioned Class 2 member of the Foreign Service.

You have indicated that the affected officials are promoted from class to class upon nomination by the President, by and with the advice and consent of the Senate. Appointments and promotions are not to individual positions but to a class. Appointments and promotions are routinely handled by the Senate, and confirmation hearings are not held except in the most rare instances. The affected officials are compensated at the rate of GS-16 or above. The Foreign Service pay rate equivalent of GS-16 is Class 2.

For the reasons advanced below, we have concluded that section 210 of Title II of the Ethics in Government Act of 1978 does not apply to career commissioned Class 2 officers of the Foreign Service.

As originally proposed, the so-called "Ashbrook Amendment" would have extended the coverage of the 15 percent outside earned income rule to all employees of the executive branch who are compensated at a pay grade in the General Schedule of Grade 16 and above.² The original amendment, however, was further narrowed by a modification offered by Congressman Frenzel. Under the Frenzel modification the outside earned income limitation would apply only to executive branch employees who are subject to appointment by the President on the advice and consent of the Senate.

At the time he offered the modification, Congressman Frenzel indicated that the effect of the modification would restrict coverage of the Ashbrook Amendment from about 14,000, as it was originally offered, to about 750 of the key presidentially appointed policymakers. Congressman Frenzel's modification was enacted without change.

It can be discerned from this dialogue, which occurred on the

floor of the House of Representatives, that it was the intent of the Congress to limit the outside earned income rule to those key presidentially appointed policymakers whose positions appear in the Presidential Personnel Appointments File maintained by the Executive Office of the President.³ Clearly, if career commissioned Class 2 officers of the Foreign Service were to be included in the class, a figure much larger than 750 would have been mentioned by Congressman Frenzel at the time that he introduced his modification to the amendment.

Our opinion does not address any limitations to outside earned income which may be included in current Standards of Conduct Regulations which are uniquely applicable to [your agency].

Sincerely,

J. Jackson Walter
Director

1 Section 210 of the Ethics Act reads as follows:

Except where the employee's agency or department shall have more restrictive limitations on outside earned income, all employees covered by this Title who are compensated at a pay grade on the General Schedule of Grade 16 or above and who occupy non-judicial, full-time positions, appointment to which is required to be made by the President by and with the advice and consent of the Senate, may not have in any calendar year outside earned income attributable to such calendar year which is in excess of 15 percent of their salary.

2 95 Cong. Rec. H10896 (daily ed. Sept. 27, 1978).

3 Id. at H10897.

4 Current Presidential Personnel Appointment File (Oct. 1980) reflects 767 key presidentially appointed policymaker positions.