

# Rules and Regulations

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 730

RIN 3206-AK60

#### Notification of Post-Employment Restrictions

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Personnel Management is issuing interim regulations requiring agencies to notify members of the Senior Executive Service (SES) and other employees in senior positions of certain post-employment conflict-of-interest restrictions. Agencies must provide written notification to affected employees of the new salary-based threshold for determining the applicability of the post-employment conflict-of-interest restrictions.

**DATES:** *Effective Date:* January 1, 2004.

*Applicability Date:* The regulations apply on the first day of the first applicable pay period beginning on or after October 15, 2004.

*Comment Date:* Comments must be received on or before December 14, 2004.

**ADDRESSES:** Send or deliver comments to Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415-8200; by FAX at (202) 606-0824; or by e-mail at [pay-performance-policy@opm.gov](mailto:pay-performance-policy@opm.gov).

**FOR FURTHER INFORMATION CONTACT:** For information, please contact Jo Ann Perrini by telephone at (202) 606-2858; by FAX at (202) 606-0824; or by e-mail at [pay-performance-policy@opm.gov](mailto:pay-performance-policy@opm.gov).

**SUPPLEMENTARY INFORMATION:** Section 1125(b) of Public Law 108-136

established a new salary-based threshold for determining the applicability of certain post-employment conflict-of-interest restrictions under 18 U.S.C. 207(c). The new salary-based threshold became effective on the first day of the first applicable pay period beginning on or after January 1, 2004 (January 11, 2004, for most employees). As a result of the higher rates of basic pay established for members of the Senior Executive Service (SES) upon conversion to the new performance-based SES pay system in January 2004, the vast majority of SES members are now subject to the post-employment restrictions in 18 U.S.C. 207(c).

#### SES Performance-Based Pay System

Section 1125(a) of Public Law 108-136 (November 24, 2003) amended 5 U.S.C. 5382 to establish a new performance-based pay system for the SES that became effective on the first day of the first pay period beginning on or after January 1, 2004 (January 11, 2004, for most employees). On January 13, 2004, the Office of Personnel Management (OPM) issued interim regulations (69 FR 2048) to establish the new SES performance-based pay system, prescribe the rules for conversion to the new SES pay system, and outline the criteria for providing pay adjustments to SES members on or after the first applicable pay period beginning on or after January 1, 2004 (January 11, 2004, for most employees). Generally, the employee's newly converted SES rate of basic pay is equal to the rate of basic pay plus any applicable locality payment to which the employee was entitled on January 10, 2004. (In cases where the SES member's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 to which the employee was entitled on November 24, 2003, was higher, the employee was entitled to that higher rate upon conversion to the new SES pay system.)

#### Post-Employment Restrictions

Section 1125(b)(1) amended 18 U.S.C. 207(c)(2)(A)(ii) to require SES members and other individuals who are paid at a rate of basic pay that is equal to or greater than 86.5 percent of the rate for level II of the Executive Schedule (*i.e.*, equal to or greater than \$136,757 in 2004) to be subject to the post-

employment restrictions in 18 U.S.C. 207(c). In addition, a grandfather provision in section 1125(b)(1) applies to certain SES members and other individuals for a period of 2 years, through November 24, 2005. If such individuals, on November 23, 2003, were subject to 18 U.S.C. 207(c) and were employed in positions whose rate of basic pay, exclusive of locality payments under 5 U.S.C. 5304, was equal to or greater than the rate of basic pay payable for level 5 of the SES (*i.e.*, \$134,000), they will be subject to the 1-year post-employment restrictions in 18 U.S.C. 207(c) until November 24, 2005, without regard to any subsequent changes in position or pay. If at the end of the extended coverage period (November 24, 2005), a covered employee is paid at a rate of basic pay that is equal to or greater than 86.5 percent of the rate for level II of the Executive Schedule, he or she will continue to be subject to the post-employment restrictions in 18 U.S.C. 207(c).

The post-employment restrictions in 18 U.S.C. 207(c) require that for 1 year after service in a covered position ends, no former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of a department or agency in which he or she served in any capacity during the 1-year period prior to ending service in that position, if that communication or appearance is made on behalf of any other person (except the United States) in connection with any matter concerning which he or she seeks official action by that employee. Employees subject to 18 U.S.C. 207(c) also are subject to 18 U.S.C. 207(f), which imposes additional restrictions on representing, aiding, or advising certain foreign entities with the intent to influence any officer or employee of any department or agency of the United States.

#### Agency Notification Requirements

Section 1125(b) also added a new section 7302 to chapter 73 of title 5, United States Code, to require OPM, in consultation with the Attorney General and the Office of Government Ethics, to promulgate regulations requiring each executive branch agency to provide written notification to an employee of that agency who is subject to the post-employment conflict-of-interest

restrictions in 18 U.S.C. 207(c)(1) as a result of the amendment to 18 U.S.C. 207(c)(2)(A)(ii).

On January 6, 2004, OPM issued a memorandum providing additional guidance on the new salary-based threshold for determining the applicability of certain post-employment conflict-of-interest restrictions to SES members. (See "Notification of Changes in Post-Employment Restrictions Coverage for Members of the Senior Executive Service (SES)" at <http://www.opm.gov/oca/compmemo/2004/2004-01.asp>.) In that memorandum, OPM encouraged agencies to identify and notify those SES members who would be covered by the post-employment restrictions as of January 11, 2004. We also provided written sample notices that agencies could use to notify their employees.

In these interim regulations, we have added a new 5 CFR part 730, which requires agencies to provide written notice to affected employees before, or as part of, any action that affects the employee's coverage under 18 U.S.C. 207(c)(1), including when employment or service in a covered position is terminated. A copy of the written notice must be provided simultaneously to the Designated Agency Ethics Official (or a delegate) for the agency involved. The notices are to be retained for the particular individual as part of the OGE/GOVT-1 Governmentwide System of Records. (See 68 FR 3098 (January 22, 2003) (Privacy Act system notice).) However, post-employment restrictions apply to covered employees whether or not they receive a written notice from their agencies.

#### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

#### Waiver of Notice of Proposed Rulemaking

Pursuant to sections 553(b)(3)(B) and (d)(3), of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking and for making this rule effective in less than 30 days. These regulations implement section 1125(b) of Public Law 108-136, which requires OPM, in consultation with the Attorney General and the Office of Government Ethics, to promulgate regulations no later than 180 days after the law's effective date (by May 24, 2004). The waiver of the two requirements in sections 553(b)(3)(B) and (d)(3) is necessary in order for OPM to comply

with the law by consulting with the designated officials and promulgating regulations by the deadline imposed by Congress.

#### E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

#### List of Subjects in 5 CFR Part 730

Government employees.  
Office of Personnel Management.  
**Kay Coles James,**  
*Director.*

■ Accordingly, OPM is adding a new part 730 to read as follows:

#### PART 730—NOTIFICATION OF POST-EMPLOYMENT RESTRICTIONS

Sec.

730.101 Purpose.  
730.102 Definitions.  
730.103 Coverage.  
730.104 Notification.  
730.105 Savings provision.

**Authority:** 5 U.S.C. 7302 and sec. 1125(b) of the National Defense Authorization Act for FY 2004, Pub. L. 108-136, 117 Stat. 1392.

##### § 730.101 Purpose.

This part implements 5 U.S.C. 7302, which requires agencies to provide written notice to senior executives and other individuals covered by 18 U.S.C. 207(c)(2)(A)(ii) that they are subject to certain post-employment conflict-of-interest restrictions in 18 U.S.C. 207(c).

##### § 730.102 Definitions.

*Agency* means an Executive agency as defined in 5 U.S.C. 105, but does not include the General Accounting Office.

*Senior executive* means a member of the Senior Executive Service (SES).

##### § 730.103 Coverage.

(a) The following individuals are subject to the post-employment conflict-of-interest restrictions in 18 U.S.C. 207(c), as amended by section 1125(b)(1) of the National Defense Authorization Act for FY 2004:

(1) Any individual, including a senior executive, who is paid at a rate of basic pay equal to or greater than 86.5 percent of the rate for level II of the Executive Schedule; and

(2) Any individual, including a senior executive, who as of November 23, 2003, was paid at a rate of basic pay, exclusive of any locality-based comparability payments under 5 U.S.C. 5304, equal to or greater than the rate of basic pay for level 5 of the Senior Executive Service on that date (*i.e.*, \$134,000). These employees are subject to the post-employment restrictions through November 24, 2005, without

regard to any subsequent changes in position or pay.

(b) Nothing in this part affects individuals serving in positions described in 18 U.S.C. 207(c)(2)(A)(i), (iii), (iv), or (v).

#### § 730.104 Notification.

(a) Agencies must provide written notification to senior executives and other individuals covered by the amendment to 18 U.S.C. 207(c)(2)(A)(ii) that they are subject to the post-employment conflict-of-interest restrictions in 18 U.S.C. 207(c), before, or as part of, any personnel action that affects the employee's coverage under 18 U.S.C. 207(c)(1), including when employment or service in a covered position is terminated. A copy of the written notice must be provided simultaneously to the Designated Agency Ethics Official (or his or her delegate). The written notice must include information on the applicable penalties or injunctions that may be imposed under 18 U.S.C. 216(a), (b), and (c) for violations of the post-employment restrictions in 18 U.S.C. 207(c). The notice also must indicate that employees covered by 18 U.S.C. 207(c) are subject to 18 U.S.C. 207(f), which imposes additional post-employment restrictions on representing, aiding, or advising certain foreign entities.

(b) Notwithstanding paragraph (a) of this section, the post-employment restrictions in 18 U.S.C. 207(c) apply to covered employees without regard to whether they receive written notice from their employing agency.

#### § 730.105 Savings provision.

Any post-employment restrictions established under 18 U.S.C. 207 and applicable prior to the first day of the first pay period beginning on or after January 1, 2004, remain in effect.

[FR Doc. 04-23194 Filed 10-14-04; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 2003-NE-68-AD; Amendment 39-13825; AD 2004-21-04]

RIN 2120-AA64

#### Airworthiness Directives; Becker Flugfunkwerk GmbH AR 4201 VHF AM Transceivers

**AGENCY:** Federal Aviation Administration (FAA), DOT.