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The Failure of Congress to Disclose Future Employment Negotiations

*Defying the Spirit of the Law, Ethics Committee Guidance
Neuters Disclosure Requirement*

Acknowledgments

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In 2007, Congress responded to public outcry against the wave of lobbying and ethics scandals engulfing Capitol Hill by passing sweeping reform legislation known as the “Honest Leadership and Open Government Act” (HLOGA). The provisions of HLOGA that addressed negotiations for future employment by members of Congress and their staff comprised the first of a two-part regulatory regime over revolving door abuses. The second part of the regime addressed the scope and duration of the “cooling off period,” during which retired public officials are to avoid lobbying their former colleagues.

The revolving door restrictions grew out of what is commonly referred to as the “Billy Tauzin problem.” Former Rep. Billy Tauzin (R-La.) had been a chief architect of the 2003 prescription drug legislation, which gave the pharmaceutical industry most everything it had requested. Two months after passage of the legislation, Tauzin announced his surprise plan to retire from Congress and accept a \$2 million a year salary as head of PhRMA, the pharmaceutical industry’s lobbying organization.¹ The incident gave rise to suspicions that Tauzin was negotiating lucrative future employment with PhRMA at the same time he was writing and promoting legislation directly affecting the pharmaceutical industry.

Then-Sens. Russell Feingold (D-Wisc.) and Barack Obama (D-Ill.) proposed legislation to avoid a repeat of this revolving door abuse as part of HLOGA by: (1) requiring that members and senior congressional staff publicly disclose negotiations for future private sector employment; (2) extending the “cooling off” period banning former members from accepting lobbying jobs from one year to two; and (3) including “paid lobbying activity” as defined in LDA, rather than just “lobbying contacts,” as prohibited lobbying activity during the cooling off period.

A. NEW ETHICS RULES GOVERNING EMPLOYMENT NEGOTIATIONS

The final lobbying and ethics reform package signed into law September 14, 2007, included some but not all of the revolving door reforms proposed by Feingold and Obama. The House declined to extend the cooling off period to two years. The senate extended the period to two years but declined to expand the scope of prohibited lobbying activities beyond lobbying contacts.

Importantly, however, both chambers of Congress approved new restrictions on negotiations for future employment. Section 301 of the Act prohibits a House member from negotiating future employment until after election of a successor (or resignation from office), unless the member files a disclosure statement with the House Ethics Committee (as opposed to the Clerk of the House) within three days after “commencement of such negotiation or agreement of future employment or compensation.” Members must also recuse themselves from any matter in which there appears to be a conflict of interest, at which point the employment negotiations and recusal become public record. The

¹ See Public Citizen, Complaint to the House Committee on Standards of Official Conduct: Rep. W.J. “Billy” Tauzin (Jan. 28, 2004).

member is responsible for determining whether a conflict exists. Senior House staff making 75% or more of a member’s salary must also notify the House Ethics Committee of employment negotiations within three days and recuse themselves from potential conflicts of interest, though staff notifications are not released to the public.

Section 532 of the Act prohibits a Senator from negotiating future employment until after a successor is elected, unless the Senator in most cases notifies the Secretary of the Senate (as opposed to the Senate Ethics Committee) of such negotiations within three days. This notification immediately becomes public record. Unlike House members, Senators are not allowed to negotiate a “job involving lobbying activities” until after a successor has been elected (or resigned from office). Senior Senate staff making 75% or more of a senator’s salary must notify the Senate Ethics Committee within three days of employment negotiations and recuse themselves from any potential conflicts of interest, though there is no public notice of the negotiations or recusal. Senators are required to recuse themselves from potential conflicts of interest involving future employers.²

Restrictions on Negotiations for Future Employment in the House and Senate	
House	Senate
<ul style="list-style-type: none"> • Prior to the election of a successor, Representatives shall not negotiate future employment with a private entity unless notice is given to the ethics committee within 3 days of commencement of negotiations.³ • Representatives must recuse themselves from official matters in which a conflict of interest or appearance of a conflict exists with a potential employer, the basis of such recusal shall be publicly disclosed at that time by the House Clerk. • Senior staff must notify the ethics committee within 3 days of any negotiations of future employment and recuse themselves from any potential conflict of interest.⁴ 	<ul style="list-style-type: none"> • Prior to the election of a successor, Senators shall not negotiate future employment with a private entity unless notice is given to the Senate Secretary within 3 days of commencement of negotiations, which is disclosed to the public at that time.⁵ • Senators may not negotiate employment in a job that involves “lobbying activity” until after a successor is elected. • Senior staff must notify the ethics committee within three days of beginning negotiations for future employment, and to recuse themselves from any official action in which a conflict of interest or appearance of a conflict exists with a potential employer.⁶

² Senate Select Committee on Ethics, “Employment Negotiations and Recusal.” U.S. Senate. <https://www.ethics.senate.gov/public/index.cfm/conflictsofinterest>.

³ House Rule XXVII.

⁴ New Rules for Lobbyists and Lawmakers: A BNA Guide to the new “Honest and Leadership and Open Government Act” and other rules changes by the 110th Congress, Edison, NJ 2007; House Rule XXVII.

⁵ Senate Rule XXXVII.

⁶ New Rules for Lobbyists and Lawmakers: A BNA Guide to the new “Honest and Leadership and Open Government Act” and other rules changes by the 110th Congress, Edison, NJ 2007; House Rule XXVII, Senate Rule XXXVII(8).

B. AREA OF CONCERN IN IMPLEMENTATION OF THE RULES

Since negotiations of future employment are regulated according to congressional ethics rules, these restrictions are largely interpreted and implemented by the House and Senate ethics committees. Unfortunately, the recent guidance by the committees on the revolving door issue opened loopholes in the implementation of the law. These are discussed below.

1. Definition of “Negotiations for Future Employment”

Neither the House nor Senate ethics committee has provided an adequate definition as to when employment negotiations truly commence, subject to the disclosure and recusal requirements. In its guidance, the Senate Select Committee on Ethics simply states: “Negotiation in this context is the discussion of terms and conditions of employment after an offer has been made and the member or Senate staffer is considering accepting.”⁷ Senators are also barred from any negotiations regarding lobbying positions until after their successor is elected.⁸

The House Ethics Committee further elaborates on the definition. The Committee states that in defining “negotiations” it gives deference to court rulings interpreting the conflicts of interest statute (18 USC §208).⁹ In a 2012 memo, the Committee emphasizes a distinction between “preliminary or exploratory talks” and court-defined “negotiations” focused on reaching an agreement between two actively interested parties.¹⁰

However, additional guidance by the House Ethics Committee virtually guts the disclosure requirement for nearly all members. The gravest problem for disclosure of employment negotiations under House rules is that the House allows members to “privately disclose” their employment negotiations to the House Ethics Committee. These private disclosures only become public if a Representative personally decides that such employment negotiations entail a conflict of interest and mandate recusal from specific legislative affairs. Only if the member decides such recusal is appropriate, then the employment form is sent to the Clerk of the House for public disclosure.¹¹

While the Senate ethics committee provides a very narrow definition of “commencement of employment negotiations” to capture only after an offer has been made and discussion of salary and benefits commences, at least the senate disclosure forms are made public when filed with the Secretary of the Senate.

⁷ Senate Select Committee on Ethics, “Senior Staff: Employment Negotiations and Arrangements.” (Feb. 4, 2008).

⁸ Senate Select Committee on Ethics, “Employment Negotiations and Recusal.” U.S. Senate.
<https://www.ethics.senate.gov/public/index.cfm/conflictsofinterest>.

⁹ House Committee on Standards of Official Conduct, “Negotiating for Future Employment.” (March 28, 2008).

¹⁰ House Committee on Ethics, *Memorandum to all House Members, Officers, and Employees RE Negotiations for Future Employment*. (November 2012).
<http://ethics.house.gov/sites/ethics.house.gov/files/Members%20and%20Officers%20Post%20Employment.pdf>

¹¹ House Rule XXVII.

To its credit, the Office of Government Ethics (OGE) guidance follows the court definitions as to when employment negotiations begin.

In *United States v. Schaltenbrand*,¹² for example, the court determined that two-way communications about job prospects, in which active interest is expressed by both sides, passes the threshold of commencement of job negotiations. Further, the court rejected that any job offer need be made to meet this threshold. According to the court:

*Schaltenbrand initiated the dialogue, and TBE (the potential employer) invited him to its offices and pursued the matter further. To require that the statute does not apply until the moment when a formal offer is made is to read the statute too narrowly.*¹³

The Office of Government Ethics, which interprets 18 USC §208 for executive branch personnel, fully agrees with the court decisions and has issued clear and appropriate guidance as to when job negotiations commence. According to ethics rules promulgated by OGE, an executive branch official has begun seeking private-sector employment when that official:

(i) *Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a), the term negotiations means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position;*

(ii) *Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was:*

(A) *For the sole purpose of requesting a job application; or*

(B) *For the purpose of submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other discrete class. The employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions; or*

(iii) *Made a response other than rejection to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person.*¹⁴

¹² *United States v. Schaltenbrand*, 930 F. 2d 1554 (11th Cir. 1991). Other courts have also reached the conclusion that commencement of job negotiations under 18 USC §208 must be interpreted broadly beyond a formal job offer. See *United States v. Conlon*, 628 F. 2d 155 (D.C. Cir. 1980); *United States v. Hedges*, 912 F. 2d 1397 (11th Cir. 1990).

¹³ *Id.* at 1559.

¹⁴ 5 CFR 2635.603(b)(1).

In other words, while sending out a resume is not sufficient for triggering the threshold of commencement of negotiations under federal regulations, two-way communications between the official and a prospective employer, in which active interest in employment is expressed by both parties, marks the commencement of job negotiations.

2. Third Party Intermediaries as a Means to Avoid Triggering the Job Negotiations Threshold

When the Honest Leadership and Open Government Act was approved, some argued that disclosure and recusal requirements regarding negotiations for employment may be avoided if the negotiations are handled by a third party, such as a parent, friend, attorney or headhunter.

Retiring Reps. Tom Davis (R-Va.), Jim McCrery (R-La.) and Charles Pickering (R-Miss.) all hired intermediaries to manage their job negotiations, believing that this step released them from the disclosure and recusal obligations. When challenged that active two-way communications between a lawmaker's representative and a potential employer is in fact commencement of job negotiations for the lawmaker, all three responded that such an interpretation differs from the informal guidance they had been given from House ethics committee attorneys.¹⁵ The House has since updated its guidelines to clarify that using a third party intermediary does not allow members and staff to ignore the rules.¹⁶

3. Timing of Public Disclosure and Determination of a Conflict of Interest

The primary purpose of the disclosure requirement when job negotiations begin is to provide a reasonable means to determine when, and if, a conflict of interest or an appearance of a conflict of interest may occur. If there was indeed a conflict of interest when Billy Tauzin was negotiating the prescription drug bill, Congress and the public may have viewed the legislation very differently had they known. Whether a conflict of interest or an appearance of a conflict of interest exists, cannot be left to the sole judgment of the lawmaker who may stand to benefit personally.

The proposal to provide timely public disclosure of job negotiations – *after* active negotiations begin but *before* recusal is necessary – is the best means for lawmakers and senior staff to avoid a potential conflict of interest. A reasonable level of public scrutiny will help alert lawmakers as to when a potential problem may exist and help assure the public that formal actions of Congress are not being made on the basis of personal self-interest.

If public scrutiny is not allowed in determining whether there is a conflict of interest or an appearance of a conflict, as under the House rule, then it is incumbent upon the House Ethics Committee to play a proactive role to monitor and educate lawmakers as to when such a conflict may occur. However, there is no indication that the ethics committee is playing such a proactive role. In fact, the sheer absence of disclosures and recusals suggests the committee is paying little, if any, attention to the requirement.

¹⁵ Alan Ota, "No Disclosure on Departing Lawmakers' Job Search." CQ TODAY (Mar. 28, 2008).

¹⁶ House Committee on Ethics, *Memorandum to all House Members. Officers, and Employees RE Negotiations for Future Employment.* (December 2016).

Per OGE regulations, executive branch employees only need to provide written disclosure or recusal to the Office if they occupy positions requiring the advice and consent of the Senate.¹⁷ Otherwise, an employee who has become aware of conflicts warranting recusal must simply offer oral or written notification to the person responsible for his or her assignment. If the employee is responsible for his or her own assignment, the employee should take the steps necessary to avoid participating in the conflicting matter and notify coworkers or a superior.¹⁸

C. COMPLIANCE SHORTCOMINGS

The following table displays the disparity between the number of members leaving Congress (for reasons other than taking another government job or death or imprisonment) and the number of negotiation disclosure forms filed with the House Legislative Resource Center (Cannon House Office Building, 135) and the Senate Office of Public Records (Hart Senate Office Building, 232).

Election	House	Senate
2008	34 retired or resigned 22 lost reelection 2 member disclosures 3 member recusals	5 retired or resigned 5 lost reelection 1 member disclosure
2010	37 retired or resigned 56 lost reelection No member disclosures	12 retired or resigned 5 lost reelection 1 member disclosure
2012	40 retired or resigned 40 lost reelection 4 member disclosures	10 retired or resigned 2 lost reelection 4 member disclosures (7 in all)*
2014	41 retired or resigned 19 lost reelection 2 member disclosures (4 in all)* 1 member recusal	7 retired or resigned 6 lost reelection 1 member disclosure
2016	47 retired or resigned 13 lost reelection No member disclosures	5 Retired 2 Lost Reelection 1 Disclosures
Totals	349 retired, resigned, or lost reelection 8 member disclosures, 3 recusals	59 retired, resigned, or lost reelection 8 member disclosures

*Member filed multiple disclosures

¹⁷ 5 CFR 2634.804(a).

¹⁸ 5 CFR 2635.604(b).

These numbers represent a clear problem with compliance to the spirit, if not the letter, of the law. While every member leaving Congress may not seek private-sector employment, and thus need not file a negotiation disclosure form, the wide-spread absence of such disclosures across the board strongly indicates that compliance with the disclosure requirement is gravely lacking. From 2008 through 2016, just over 2 percent of House members disclosed any negotiations for future employment while fewer than 14 percent of senate members did so. An August 2017 article in *Roll Call* reveals that at least 24 members left Congress to pursue positions in law, lobbying, business, academia, or nonprofits during the 114th session alone.¹⁹ Public Citizen found only one disclosure of employment negotiations for this period, and it came from the Senate, the chamber which defines “negotiations” as the discussion that occurs after an offer has been made.

D. CONCLUSION AND RECOMMENDATIONS

The point of disclosing this information is to alert the ethics committees and the public to potential conflicts of interest arising from future employment negotiations. It is intended to prevent members from taking official actions while in office that may benefit their employment prospects at the public’s expense. Public disclosure of these job negotiations could prevent such self-dealing. But that public constraint is not likely to occur without public disclosure. With that in mind, there are steps the House and Senate should take toward improving compliance.

1. Define “Commencement of Employment Negotiations” in Accordance to Court-Established Standards

The definition of when a member has commenced employment negotiations that trigger disclosure is particularly weak on the senate side. The senate should adopt a threshold of when employment negotiations begin that is consistent with court-established standards.

The OGE and, for that matter, even the House Ethics Committee, have provided a reasonable interpretation, consistent with court standards. They define commencement of employment negotiations as “two-way communications between the official and a prospective employer, in which active interest in employment is expressed by both parties.” Both offices provide reasonable exceptions for “exploratory” employment activities. The House Ethics Committee specifies that circulating a résumé, for example, does not signal commencement of negotiations.²⁰ On the other hand, the Senate’s specification that negotiation starts after an offer has been made allows for potential conflicts prior to a formal offer of employment.

The “two-way communications with active interest” standard established in *Schaltenbrand and United States v. Hedge* allows for résumé circulation. Eliminating the exemption of exploratory talks, and holding the Senate to the same definition, would allow reasonable exceptions for preliminary, one-sided exploratory communications while providing the transparency the Honest Leadership and Open Government Act intended to foster.

¹⁹ Connolly, Griffin and Stewart, Kyle, “Where Are They Now?” *Roll Call* (August 1, 2017).

²⁰ House Committee on Ethics, *Memorandum to all House Members. Officers, and Employees RE Negotiations for Future Employment*. (December 2016).

2. Eliminate the House Standard that Disclosure Is Required Only When a Conflict of Interest Exists

The peculiar standard promulgated by House rules that members need only disclose their employment negotiations when they themselves determine a conflict of interest exists essentially guts the disclosure requirement. The House needs to eliminate this obstacle to disclosure.

First of all, the decision whether a conflict of interest exists must never be left to the member who may or may not be in an opportunity for self-dealing. Secondly, the law intended to call for disclosure of all employment negotiations in a timely fashion so that a member's colleagues and the public may be assured that no such conflict exists.²¹

The complete failure of the House implementation of the disclosure requirement is clearly demonstrated by the fact that only 2 percent of members leaving the House have disclosed any employment negotiations. According to House rules, members must report privately to the ethics committee any such negotiations, but given the obvious absence of compliance with the disclosure law, it is highly unlikely that members are even making such private reports to the ethics committee. This is a loophole that has swallowed the law on the House side.

3. Make Future Employment Negotiation Disclosures Available On-Line

Disclosures of employment negotiations should be made available on-line. This would be most easily achieved by having an electronic filing system for members, and a searchable, sortable and downloadable on-line database for the public.

Members already can, and do, submit many other disclosures online. Electronic filing is nothing new to members of Congress. More so, electronic filing is more convenient for members than paper filings and less costly.

Both the House and the Senate make certain records, like Lobbying Disclosure Forms and member Financial Disclosure Forms, available (and searchable) online. While allowing access to negotiation disclosures in the Legislative Resource Center and Office of Public Records is certainly better than nothing, it does limit access to people who can travel to the Capitol and, more to the point, limits the exposure of negotiation conflicts of interest as an issue in the public eye. Including Future Employment Negotiation Disclosures alongside the digital lobbying and financial disclosure databases would accomplish the spirit of the disclosure law.

²¹ House Rule XXVII.