

Federal Trade Commission
OFFICE OF INSPECTOR GENERAL

December 20, 2022



**SPECIAL
REPORT**

***Management of Post-FTC
Employment Matters***

INTRODUCTION

Both the media¹ and Congress² have given recent attention to how former federal employees—including those at the Federal Trade Commission (FTC)—may exert influence on agency-specific matters in their private sector capacity.

Given this level of interest and its potential impact on our office, this report shares the FTC Office of Inspector General's (OIG's) views on its jurisdiction and role in conducting oversight in this area.

¹ See, e.g., Cristiano Lima & Aaron Schaffer, *Watchdog Groups Call on FTC to Revisit Trump-era Ethics Calls*, WASHINGTON POST, Mar. 4, 2022, <https://www.washingtonpost.com/politics/2022/03/04/watchdog-groups-call-ftc-revisit-trump-era-ethics-calls/>; Cecilia Kang & David McCabe, *Boom Times for Lawyers as Washington Pursues Big Tech*, NEW YORK TIMES, June 29, 2021, <https://www.nytimes.com/2021/06/29/technology/boom-times-for-lawyers-as-washington-pursues-big-tech.html>; Aaron Schaffer, *The Technology 202: Biden Administration Full of Officials Who Worked for Prominent Tech Companies*, WASHINGTON POST, June 22, 2021, <https://www.washingtonpost.com/politics/2021/06/22/technology-202-biden-administration-full-officials-who-worked-prominent-tech-companies/>.

² See the June 21, 2022, letter to three Inspectors General, Warren, Porter, Sherman *Call on Inspector Generals of Treasury, IRS, FTC to Investigate Intuit's Use of the Revolving Door to Protect Taxpayer Scams*, at <https://www.warren.senate.gov/oversight/letters/warren-porter-sherman-call-on-inspector-generals-of-treasury-irs-ftc-to-investigate-intuits-use-of-the-revolving-door-to-protect-taxpayer-scams>.



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BACKGROUND

Former FTC employees must adhere to ethical restrictions contained in federal law, regulation, executive order, and agency policy.

Federal Law and Regulation

The federal criminal statute—18 U.S.C. § 207 (Section 207) and related regulations³—provide the framework for restrictions on former federal executive branch employees’ (“former employees”) interactions with the United States. Such restrictions include (a) bans on “switching sides” (i.e., making representational communications to the United States on behalf of another where the former employee worked—or supervised individuals who worked—on a specific party matter) and (b) “cooling off periods” for communicating with the former employee’s former federal agency and, in some cases, the entire executive branch.

Criminal and civil penalties may result from violating these restrictions.⁴ Additionally, the U.S. Department of Justice (DOJ) may pursue injunctive relief to prevent a former employee from violating the restrictions.⁵

Executive Order

Pursuant to President Biden’s January 20, 2021, “Executive Order on Ethics Commitments by Executive Branch Personnel” (the “Biden Pledge”), political employees appointed by President Biden’s administration must pledge to adhere to requirements even more stringent than Section 207’s.

For example, the Biden Pledge extends from 1 to 2 years the prohibition against former employees communicating with their former agencies, on behalf of others, with the intent to influence. The Biden Pledge also places a 2-year ban on former senior officials communicating, on behalf of others, with White House senior officials with the intent to influence official action. Additionally, the Biden Pledge prohibits “senior” and “very senior” appointees from shadow lobbying (i.e., “materially assist[ing]” others in making communications or appearances that they are prohibited from undertaking themselves).

³ 5 C.F.R. pt. 2641.

⁴ 18 U.S.C. §§ 207, 216(a) & (b); 5 C.F.R. § 2641.103(b).

⁵ 18 U.S.C. §§ 207, 216(c); 5 C.F.R. § 2641.103(b).

FTC Regulations and Policy

In addition to the requirements listed above, departing FTC employees and former employees must comply with FTC-specific restrictions. First, all FTC employees are required to meet with an FTC ethics official, prior to separating from the agency, for a post-government employment federal ethics briefing. During the briefing, the FTC's Office of the General Counsel (OGC) provides departing employees with the FTC Post-Employment Package (also available on the FTC's intranet site), which provides guidelines for the aforementioned post-employment activity restrictions.

With respect to former employees, the FTC is unique among federal agencies⁶ in requiring former FTC employees to seek "clearance" from the FTC before participating in FTC matters (a) that were pending—or which directly resulted from matters that were pending—during their time at the FTC or (b) where nonpublic documents or information pertaining to the matter "came to or would likely have come to the former employee's attention in the course of the employee's duties, where the employee had left within the previous three years."⁷

In addition to the ability to deny clearance where participation would violate Section 207, the FTC's "Clearance Rule" provides for the FTC to deny clearance in two situations not prohibited by Section 207: (a) where the former employee, who substantially participated in the matter while at the agency, only plans to participate "behind the scenes" in the matter; and (b) where "nonpublic documents or information pertaining to the matter came to, or were likely to have come to, the former employee's attention in the course of his or her duties"—and such information could confer a present advantage to the former employee.

The Clearance Rule also prohibits the former employee's organization and associates (e.g., law firm partners and associates) from participating in a matter in which the FTC denied "clearance" to the former employee, based on the employee's substantial participation in the matter, unless the organization and/or associates file an affidavit describing the measures taken to screen the former employee from the specific matter.

⁶ The OIG is unaware of another agency that requires its former employees to obtain "clearance" before representing parties in front of the agency. Both the U.S. Securities and Exchange Commission (SEC) and the Commodities Futures Trading Commission (CFTC) require former employees who have left the agency within the last 2 years to notify the agency where the former employee contemplates appearing or communicating with the agency in a representational capacity. See 17 C.F.R. §§ 140.735–6 (CFTC), 200.735-8 (SEC). However, both agencies merely require "notice," not clearance.

⁷ 16 C.F.R. § 4.1(b)(2).

OIG INVESTIGATION OF POST-EMPLOYMENT ETHICS MATTERS

OIG Jurisdiction

Pursuant to the Inspector General Act of 1978 (IG Act), as amended, federal inspectors general (IGs)⁸ have a “duty and responsibility” to “conduct, supervise, and coordinate audits and investigations relating to the programs and operations” of the agencies they oversee.⁹ To fulfill this mandate, the IG Act grants IGs broad, though not unlimited,¹⁰ authority to conduct investigations—specifically articulating that IGs have the authority to investigate “a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety” related to agency programs and operations.¹¹

Pursuant to the authority derived from the IG Act, the FTC OIG considers its jurisdiction to include investigating (a) crimes or misconduct by FTC employees; (b) crimes against the FTC; and (c) crimes related to fraud or the misuse of FTC funding by entities or individuals that receive such funding (e.g., contractors). Given these jurisdictional parameters, the FTC OIG typically would initiate an investigation related to post-employment ethics issues only where there is an allegation of a Section 207 violation and/or associated serious misconduct.

In conducting such investigations, the FTC OIG has authority to issue administrative subpoenas. However, such subpoenas are only enforceable if they are reasonably relevant to an investigation within the FTC OIG’s jurisdiction and not unduly burdensome.^{12 13}

⁸ In this context, IG refers to the IGs statutorily created by the IG Act and its amendments.

⁹ IG Act, 5 U.S.C. § 4(a)(1).

¹⁰ See e.g. *Truckers United for Safety v. Mead*, 251 F.3d 183 (D.C. Cir. 2001) (holding that, pursuant to IG Act Section 9, the Department of Transportation (DOT) OIG was not “authorized to conduct investigations as part of enforcing motor carrier safety regulations since that was a role which was central to the basic operations of [DOT]”); DOJ, Acting Deputy Attorney General William P. Barr letter to Deputy Director of the Office of Mgmt & Budget William M. Diefenderfer (July 18, 1990) (explaining the agreement that the presidentially appointed IGs and DOJ came to about the contours of IG investigative authority).

¹¹ 5 U.S.C. §§ 6(a)(2), (7)(a).

¹² *Id.* at § 6(a)(4); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *CFTC v. First State Depository Co., LLC*, 21-mc-048, 2021 WL 7448016, at *3 (D.D.C. June 23, 2021); *United States v. Inst. for Coll. Access & Success*, 27 F. Supp. 3d 106, 111 (D.D.C. 2014).

¹³ Notably, the OIG does not have testimonial subpoena authority.

FTC OIG Process

The FTC OIG would typically learn of potential post-employment ethics violations from whistleblowers or FTC staff. In determining whether delving into a complaint would be prudent, the FTC OIG considers whether the allegations seem credible and, if proven, would constitute evidence of a Section 207 violation or substantial misconduct.

The FTC OIG primarily focuses on allegations of criminal law violations, given the IG Act's requirement that "[i]n carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law."¹⁴

Notably, even when Section 207 violations are substantiated, federal prosecutors often only accept cases for prosecution where there is clear intent, and the conduct is egregious. Since 2016, the OIG has substantiated one of the two Section 207 matters that it has investigated.¹⁵ The OIG referred the substantiated matter to the DOJ, but it declined prosecution.

OTHER OIG OVERSIGHT

Currently, the FTC OIG does not view the ethics program generally—or any specific aspects of the program, such as those pertaining to current or post-employment matters—as a high-risk area necessitating oversight. As recently as 2016, the FTC OIG conducted a comprehensive review of the ethics program, issuing a management advisory with recommendations¹⁶ that the agency concurred with and implemented. Since the 2016 management advisory, the FTC OIG has frequently interacted with OGC ethics officials, given the intersection between agency ethics violations and OIG investigations. During this period, the FTC OIG has neither received an unusually high number of complaints about ethical violations nor identified control deficiencies compelling a review of FTC ethics program processes.

¹⁴ 5 U.S.C. Appx. 3 § 4(d).

¹⁵ The OIG has a more comprehensive history of investigating current employees for financial conflict of interest violations, pursuant to 18 U.S.C. § 208, *Acts Affecting a Personal Financial Interest*. Since fiscal year 2019, the FTC OIG has closed 8 investigations involving allegations of Section 208 violations by FTC employees. For those allegations that the OIG substantiated, DOJ declined prosecution in each instance.

¹⁶ OIG Formal Management Advisory, *Strengthening the FTC Ethics Program by Extending Mandatory Annual Ethics Training to Employees at or Below the GS-13 Grade Level Who Occupy High Risk Positions* (Sept. 27, 2016).

CONCLUSION

As discussed above, the FTC OIG views its role, with respect to reviewing post-employment matters, as confined by the IG Act. Per existing practice, we will continue to investigate credible allegations of ethics violations. Further, at this time, the FTC OIG does not view the agency's ethics program generally—and, more specifically, the post-employment restrictions component of the program—as a high-risk area necessitating review. We will update this assessment as necessary.