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AGENCY "CAPTURE": THE "REVOLVING DOOR" BETWEEN REGULATED INDUSTRIES AND THEIR REGULATING AGENCIES

*Edna Earle Vass Johnson**

I. INTRODUCTION

Public confidence in the integrity of our public officials is necessary for effective government.¹ The independence of the federal regulatory process is a crucial element of that confidence. When this independence is examined, however, a major concern arises about the inherent appearance of impropriety and conflict of interest in the "revolving door" practice of federal agencies.

The term "revolving door" is popularly used to describe the interchange of personnel between the government and the private sector. There is not only a long history of concern over the free flow of individuals passing through the revolving door to and from the federal government, but there is also a long history of restrictions on that interchange of personnel.²

With respect to the federal regulatory agencies, the concern is that the "revolving door" between the agencies and the industries they regulate could hinder the agencies' effectiveness and independence. Regulatory agencies might become "captured" by the exchange of personnel with the industries they are responsible for regulating.³ The impartiality of the agency's exercise of its regula-

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1. See, e.g., Exec. Order No. 11,222, 3 C.F.R. 382 (1970), reprinted in 18 U.S.C. § 201 app. at 1025-27 (1976) (President Johnson prescribed ethical standards of conduct for government officers and employees in response to his recognition that a citizen is "entitled to have complete confidence in the integrity of his government."); see also II PUB. PAPERS 1854, 1855 (Oct. 26, 1978) (President Carter expressed similar concerns when he signed the Ethics in Government Act of 1978.).

2. Morgan, *Appropriate Limits on Participation by Former Agency Officials in Matters Before the Agency*, 1980 DUKE L.J. 1, 5-25; Mundheim, *Conflicts of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON L. REV. 707, 711-15 (1981); see generally COMPTROLLER GEN., GEN. ACCT. OFF., *WHAT RULES SHOULD APPLY TO POST-FEDERAL EMPLOYMENT AND HOW SHOULD THEY BE ENFORCED?*, REP. B-103987 (1978) [hereinafter cited as GAO STUDY].

3. See, e.g., J. GOULDEN, *THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS* (1972); M. GREEN, *THE OTHER GOVERNMENT: THE UNSEEN*

tory independence could be compromised when its significant policymakers come from the regulated industry.⁴ When an industry employs former government officials of its regulating agency, the industry might anticipate special treatment from the agency, access to the agency, or influence in the agency.⁵ There has been much debate over the issues raised by the revolving door practice,⁶ particularly as it relates to the legal profession.⁷

Due to the scarcity of available empirical or concrete data, it is difficult to assess the actual significance of the revolving door phenomenon. While this elusive area has not been studied in depth since the Government Accounting Office study of 1978,⁸ specific aspects of the subject are occasionally brought to public attention by the media.⁹ First amendment protections, the difficulty in monitoring the activities of citizens, and the numbers of individuals involved in the revolving door practice make the compilation of specific and conclusive data nearly impossible. Accordingly, public perceptions of the phenomenon and its corresponding effect on public confidence in the government is critical and cyclical.¹⁰

The post-Watergate and Vietnam era provided a climate for cynical skepticism concerning the revolving door phenomenon which was reflected in a speech to Congress by President Carter urging

POWER OF WASHINGTON LAWYERS (1978); A. KNEIER, *SERVING TWO MASTERS: A COMMON CAUSE STUDY OF CONFLICTS OF INTEREST IN THE EXECUTIVE BRANCH* (1976) [hereinafter cited as *COMMON CAUSE STUDY*].

4. *COMMON CAUSE STUDY*, *supra* note 3, at iii.

5. *Id.*

6. See, e.g., Allen, *The "Revolving Door"—Should It Be Stopped?*, 32 *AD. L. REV.* 383 (1980) (ABA National Conference on Federal Regulation Panel Discussion).

7. E.g., Lacovara, *Restricting the Private Practice of Former Government Lawyers*, 20 *ARIZ. L. REV.* 369 (1978). See generally Morgan, *supra* note 2, at 29-35; Mundheim, *supra* note 2, at 715-20.

8. GAO *STUDY*, *supra* note 2.

Common Cause is currently engaged in a related study [hereinafter cited as *New Study*] which is expected to be completed by July of 1984. The purpose of the study is to evaluate the adequacy and effectiveness of existing agency ethics programs. Particular attention will be focused on the method utilized by designated agency officials to inform employees of the existing ethical restrictions on current and future activities as well as the employees' responsibilities to identify and report potential violations.

9. See G. ADAMS, *THE POLITICS OF DEFENSE CONTRACTING: THE IRON TRIANGLE* (1982) (description of a mutually beneficial triangle which exists between Congress, the Pentagon and defense contractors and to which the "revolving door" contributes); see also *The New Revolving Door*, 108 *FORTUNE*, Oct. 17, 1983, at 58 (discussion of the impact of "deregulation" on the "revolving door" phenomenon, concluding that deregulation has resulted in a new "revolving door" for deregulators).

10. See, e.g., Morgan, *supra* note 2, at 5-25; Mundheim, *supra* note 2, at 711-15.

the enactment of ethics in government legislation.¹¹ President Carter expressed his concern that "[a]ll too often officials have come into government for a short time and then left to accept a job in private industry, where one of their primary responsibilities is to handle contracts with their former employer."¹² The President did not wish to "place unfair restrictions on the jobs former government officials may choose," but he was concerned about preventing misuse of the influence acquired through public service.¹³ Thereafter, Congress enacted the Ethics in Government Act of 1978¹⁴ (Ethics Act) in order to provide statutory restraints on the practice and to enhance public confidence in the system.¹⁵

This article will identify some of the benefits and dangers of the revolving door phenomenon and then concentrate on an analysis of the agency "capture" issue. Due to the lack of empirical data needed to address the agency capture issue directly, a review of existing statutory and other restrictions on revolving door participants and potential conflicts of interest will provide a framework for the analysis. The significance of the potential for abuse under the existing restrictions can be balanced against the value gained from the revolving door practice. In all candor, any conclusions drawn concerning the capture of regulatory agencies will necessarily be subjective due to the elusiveness of the subject matter.

II. BENEFITS AND DANGERS OF THE "REVOLVING DOOR" PHENOMENON

Consideration should be given to both sides of the revolving door issue in order to appreciate the value of the process as well as its potential for abuse. The need for relevant restrictions is obvious, but the difficulty in drafting restrictions to satisfy all concerns must also be recognized.

The revolving door between regulatory agencies and their regulated industries poses potential dangers and gives rise to questions which need to be focused upon. For example:

11. I PUB. PAPERS 786 (May 3, 1977).

12. *Id.* at 787.

13. *Id.*

14. Pub. L. No. 95-521, 92 Stat. 1824 (1978). The Ethics in Government Act was originally codified in Titles 2, 5, 18, 28, and 39 of the United States Code and was amended in 1979, 1980, 1981, 1982, and 1983.

15. II PUB. PAPERS 1854 (Oct. 26, 1978) (President Carter's remarks when signing the Ethics Act into law).

1. Can the regulatory agency be unduly influenced by former government officials or employees in the performance of its regulatory functions? Do former agency employees seek and receive special favors from their former friends and colleagues in the agency that are not available to others?

2. Will former government employees utilize information they obtained while in government service to the benefit of their private employer and to the detriment of the public? What about confidential information?

3. What of the potential for disloyalty if the "revolving door" is perceived as an opportunity for future gratification? Has government service become a training ground for insincere and self-serving government employees? Are current agency employees disloyal to their public trust if, in anticipation of personal gain, they cultivate potential private employment opportunities?

4. Will former industry employees who have entered agency employment through political appointment, or otherwise, unduly influence the activities of the regulatory agency for the benefit of their former private employer? Do their former colleagues seek and receive special treatment or favors unavailable to others?

Despite the dangers, there are many benefits which accrue to the regulatory agencies and to the public resulting from the revolving door practice.¹⁶ For example:

1. It is significant to our political system that each new Administration appoints top level officials in accordance with its philosophy. In order to recruit high quality individuals for government service, temporary or otherwise, there must not be undue restrictions on their movement back into the private sector.

2. New blood is infused into the agencies when former industry personnel enter government service. Former industry employees bring new perspectives, ideas, and knowledge to the agency allowing the regulatory process to be more respon-

16. H.R. REP. NO. 115, 96th Cong., 1st Sess., *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 328, 329-33 [hereinafter cited as HOUSE REPORT].

sive to the real world of industry.

3. The efficiency and quality of the relationship between industry and its regulatory agency can be enhanced when former agency employees are employed by or represent private organizations or corporations. Former agency employees can serve to educate and inform their private employers and the public as to the workings of the agency. As private citizens they can communicate with the agency with knowledge and understanding of the system. Additionally, informed criticism of the system by former employees could provide a public service.

4. Agencies serve as training grounds for attorneys and other professionals in specialty areas such as securities, tax, and communications. Understanding the agency procedures, policies, and regulations provides a climate for more effective communication between an industry and its regulatory agency. In order to competently represent a client before an agency, a professional must be knowledgeable in his or her specialty area.

If the revolving door between the regulated industry and its regulating agency is significantly inhibited, an elite core of government servants, isolated and unresponsive to the legitimate concerns of industry, could result. Inhibiting free movement could undermine government recruitment and run counter to our concept of a free society. A well-reasoned and cautious approach to regulating the flow of individuals through the revolving door is necessary since overreacting to actual or potential abuses could hamper the regulatory process. In the shadow of Watergate, and in light of the current suspicion of big government, the possibility of overreaction exists.

III. THE ETHICS IN GOVERNMENT ACT OF 1978

The Ethics in Government Act of 1978 was enacted by Congress in order to "preserve and promote the integrity of public officials and institutions"¹⁷ and to restore public confidence in the govern-

17. CONFERENCE REPORT, ETHICS IN GOVERNMENT ACT OF 1978, S. Doc. No. 127, 95th Cong., 2d Sess. 1 (1978).

ment.¹⁸ The statute established the Office of Government Ethics within the Office of Personnel Management,¹⁹ required certain financial disclosure and reporting responsibilities for certain specified public officials and employees,²⁰ and amended the existing law concerning post-employment conflict restrictions (Section 207).²¹

Section 207 provides administrative²² and criminal²³ penalties for certain prohibited appearances before or communications with an agency by a former agency official or employee with respect to specific matters.²⁴ The administrative penalties, such as a prohibition against communications with or appearances before the agency for a period of up to five years,²⁵ are utilized to enforce the statute by the agencies with the primary responsibility of enforcing the statute.²⁶ Interpretations and applications of the statute are found in the implementing regulations²⁷ and interpretations, or opinions are furnished by the Office of Government Ethics.²⁸ Few cases reach the courtroom,²⁹ and there appears to be a reluctance to enforce the criminal sanctions imposed by the statute.³⁰

Because it was the product of compromise, the statute as enacted was not as stringent as the concept that Common Cause³¹ and other groups advocated.³² Moreover, within months Congress amended Section 207, further relaxing and clarifying its restric-

18. S. REP. NO. 170, 95th Cong., 2d Sess. 32-34 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4216 [hereinafter cited as SENATE REPORT].

19. Pub. L. No. 95-521 §§ 401-405, 92 Stat. 1824 (1978) (codified at 5 U.S.C. app. §§ 401-405 (1982)).

20. Pub. L. No. 95-521 §§ 201-211, 92 Stat. 1836-50 (1978) (codified at 5 U.S.C. app. §§ 201-211 (1982)).

21. Pub. L. No. 95-521 § 501(a), 92 Stat. 1864 (1978) (codified at 18 U.S.C. § 207 (1982)).

22. 18 U.S.C. § 207(j) (1982); *see also* 5 C.F.R. § 737.27(a)(9)(i)-(ii) (1983).

23. 18 U.S.C. § 207(c) (1982) (maximum penalty: \$10,000 fine, 2 years imprisonment, or both).

24. 18 U.S.C. § 207(a)-(c) (1982). The prohibitions vary in substance and length depending upon the former employees' involvement with the particular matter in the past and present and his or her prior grade level.

25. *Id.* § 207(j); *see* 5 C.F.R. § 737.27(a)(9)(i) (1983).

26. 5 C.F.R. § 737.1(c)(6) (1983).

27. 18 C.F.R. § 737 (1983).

28. 5 U.S.C. app. § 402(b)(8) (1982); 18 C.F.R. § 737.1(c)(8) (1983).

29. *See infra* note 70 and accompanying text.

30. *See* SENATE REPORT, *supra* note 18, at 4250.

31. COMMON CAUSE STUDY, *supra* note 3, at 67-74.

32. *See, e.g.,* Morgan, *supra* note 2, at 18-21.

Signing the Ethics Act into law, President Carter explained that "[t]here was a great deal of pressure from many sources to weaken the provisions of this ethics legislation." II PUB. PAPERS 1854, 1855 (Oct. 26, 1978).

tions.³³ To date, the post-employment restrictions placed on a former government official or employee in subsections (a) and (b) of Section 207 prohibit only very limited and specific activities. Section 207 does not bar a former government official from employment with any private or public employer. Further, with some exceptions, Section 207 does not effectively bar the public official from employment on a particular matter with which he or she was involved while employed by the government.³⁴

A. *Prohibited Activities*

The basic lifetime prohibition of subsection (a) of Section 207 bars the former government employee from "knowingly" acting as an agent, attorney, or representative of a person in a formal or informal "appearance"³⁵ before his or her former agency and certain other agencies. Section 207 further bars former government employees from representing a person by making oral or written communications on behalf of that person with an "intent to influence"³⁶ his or her agency and certain other agencies. In order for subsection (a) to apply, the subject must concern a "particular matter"³⁷ involving "specific parties" in which the former employee "participated personally and substantially"³⁸ while employed by the agency. Moreover, only appearances and communications with the former agency are prohibited by subsection (a).

33. HOUSE REPORT, *supra* note 16.

34. 5 C.F.R. § 737.1(c)(5) (1983).

35. *See id.* § 737.5(b)(3) (an appearance requires physical presence).

36. *See id.* § 737.5(a). The regulations require a potential controversy as a necessary element to establish an intent to influence. Routine communications are not prohibited. *Id.* § 737.5(b)(5).

37. *Id.* § 737.3(a)(7). "Particular matter" includes specific proceedings, contracts, claims, applications, charges, etc., involving specific parties in which the United States has a direct and substantial interest. Rulemaking is not included. 18 U.S.C. § 207(a)(2) (1982).

In 1980, the Office of Government Ethics advised a former government attorney that he may represent before his former agency a private contractor whose specific contracts the attorney had been personally and substantially involved with during his government service when those contracts are renewed changing compensation or services. Thus, the renewed contract would constitute a new "particular matter" for purposes of subsection (a) of Section 207. OFFICE OF GOVERNMENT ETHICS, 1979-82 DIGEST OF SELECTED OGE LETTERS 3, case no. 80x1 (Feb. 4 & Oct. 21, 1980) [hereinafter cited as OPINIONS].

38. 18 U.S.C. § 207(a) (1982). The statute requires that "personal and substantial participation" be exercised "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." *Id.* § 207(a)(3). According to the regulations, "substantially" means that the employees' involvement must be significant to the matter. Emphasis is placed on the importance of the effort and more than involvement in a peripheral issue is required. 5 C.F.R. § 737.5(d)(1) (1983).

In-house assistance is not prohibited even though all of the other conditions of the subsection are met.³⁹ For example, the regulations provide that an individual who administers a research contract for a regulatory agency with X company can leave government service to work for X company. Thereafter, he or she can advise X company about whom to see, what to say, how to increase the scope of fundings, or how to resolve a contract dispute with respect to the same research contract he or she was responsible for administering while in government service.⁴⁰

Subsection (b)(i) of Section 207 bars acts by all former agency employees for two years after their government employment ceases in connection with matters that were pending under their "official responsibility"⁴¹ within one year prior to termination of that responsibility.

Subsection (b)(ii) of Section 207 bars only former high-ranking officials, designated in subsection (d),⁴² from "aiding and assisting" in the representation of another person by "personal presence"⁴³ before his or her former agency and certain other governmental entities. The prohibited appearance applies to matters which he or she substantially participated in while employed by the agency. Subsection (b)(ii) was amended in 1979 in order to make it clear that the "aiding and assisting" restrictions on former high-ranking officials applied only to representation by personal physical presence. The subsection amendment also made it clear that the prohibition applied only to matters the former official was personally and substantially involved with, not to matters merely under his official responsibility.⁴⁴

At the time the amendment was enacted some concern was expressed over the narrowing of the focus of subsection (b)(ii).⁴⁵

39. 5 C.F.R. § 737.5(b)(6) (1983).

40. *Id.*, example 1.

41. 18 U.S.C. § 202(b) (1982). The term "official responsibility" is defined as "the direct administrative or operating authority whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." *Id.*

42. *Id.* § 207(d) (1982); 5 C.F.R. § 737.25(a) (1983). These individuals include: those paid at least the same as those in the Federal Executive Salary Schedule, 5 U.S.C. §§ 5311-5317 (1982); those paid at least the same as a GS-17, 5 *id.* § 5532; active duty commissioned officers paid at least the same as level 0-9, 37 *id.* § 201; and those with "substantial decision-making authority" as designated by the Director of the Office of Government Ethics.

43. 18 U.S.C. § 207(b)(ii) (1982).

44. HOUSE REPORT, *supra* note 16, at 333.

45. STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE

Many felt that personal presence before the agency or governmental entity was less objectionable than behind the scenes assistance and use of information on matters the former official had been personally involved with while in government service.⁴⁶ It was further argued that the prohibition on "aiding and assisting" in representation on matters that the former official was substantially involved with should extend to all former government employees as do subsections (a) and (b)(i), not just to high-ranking employees.⁴⁷

The 1979 amendment made it clear that, unlike subsection (a) of Section 207, the personal appearance required in subsection (b)(ii) does not include telephone calls or written correspondence with the agency concerning the matter⁴⁸ even if the intent of the communication is to influence the agency in a matter⁴⁹ on which the former senior official had switched sides. As long as he is not personally present before the agency, the former official can assist in drafting documents to be presented to the agency regarding the same matter he or she handled while a public servant.⁵⁰

Subsections (a) and (b) of Section 207 focus on restricting activities in particular matters which involve specific parties. Thus the prohibitions of these subsections do not cover the former rulemaking activities of former government employees. In regulated industries the exercise of the rulemaking authority of regulatory agencies is of paramount importance. Furthermore, the regulations which govern the industry might be of greater importance to the private employer than the outcome of a particular contract or case.⁵¹ Yet the former government employee can switch sides and

AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., IMPACT OF THE ETHICS IN GOVERNMENT ACT 6-9 (Comm. Print 1979) [hereinafter cited as IMPACT REPORT]. This report preceded the adoption of the 1979 amendments to Section 207 by approximately six weeks.

46. *Id.* at 8. The report argues:

This modification opens an extremely large loophole, especially given that subsection (b)(ii) is to be made applicable only to matters in which the former employee was personally involved. If anything, assistance by personal presence at an appearance is *less* objectionable than "back room" counsel precisely because it occurs in public. It makes no sense to prohibit former employees from "switching sides" by personally representing private clients or counseling them at hearings, but to allow confidences gleaned from government service to be disclosed as long as the communication occurs behind closed doors.

Id.

47. *Id.* at 9.

48. HOUSE REPORT, *supra* note 16, at 333.

49. 5 C.F.R. § 737.9(b) (1983).

50. *Id.*

51. IMPACT REPORT, *supra* note 45, at 10.

appear before his former agency, if he is not constrained by subsection (c),⁵² and, with all of the knowledge and information gleaned from his government service regarding that particular matter, influence the outcome of the rulemaking procedure.

Subsection (c) of Section 207 contains the most controversial of the Section 207 restrictions placed on former high-ranking officials. Those individuals, identified in subsection (d),⁵³ are prohibited from representing another person before their former agency in a formal or informal appearance and from making oral or written communications intended to influence the agency for one year after leaving government service. The restriction covers all "particular matters"⁵⁴ pending before the agency whether or not the former employee had any involvement in them or whether they began after his or her employment terminated.⁵⁵ However, the prohibition only bans direct agency contacts. Indirect communications or non-representational assistance are not banned.⁵⁶

Subsection (g) of Section 207 prohibits a partner of current government employees from acting as an agent or attorney before the employing agency under specific circumstances. The restriction only extends to partners of present government employees, not former ones.⁵⁷ No statute imputes a disqualification of a former government employee to his new partners.⁵⁸

In 1981, the Office of Government Ethics issued an opinion in-

52. See *infra* note 54 and accompanying text.

53. See *supra* note 42.

54. 18 U.S.C. § 207(c)(2) (1983). "Particular matters" are defined to include "any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest. . . ." *Id.* Matters not considered "particular matter" include "broad technical areas and policy issues and conceptual work done before a program has become particularized into one or more specific projects. The particular matter must be pending before the agency or be one in which the agency has a direct and substantial interest." 5 C.F.R. § 737.11(d) (1983). See also OPINIONS, *supra* note 37, at 7, case no. 81x1 (Jan. 9, 1981) (advising that legislation is a "particular matter" and therefore a former senior official should be prohibited from lobbying her former agency on the matter for one year).

55. 5 C.F.R. § 737.11(c) (1983).

56. IMPACT REPORT, *supra* note 45, at 9-10. The report proposes that new associates of the former high-ranking official could use his name and reputation to accomplish indirectly that which he could not do directly.

57. See OPINIONS, *supra* note 37, at 1, case no. 79x03 (Aug. 3, 1979). A former government attorney's law firm was not required by subsection (g) of Section 207 to resign from representation in a matter the employee had participated in while in government service. The attorney was advised to consult his professional ethics restrictions on the matter. *Id.*

58. *Id.*

terpreting subsection (g).⁵⁹ In that opinion, the Office advised general partners of an agency commissioner, who was their sole limited partner, that they were prohibited by subsection (g) from representing clients before the commissioner's agency at any level since all agency activities are under the "official responsibility" of the agency's commissioners.⁶⁰

The aim of Section 207 is to protect the regulatory agency decision-makers from the potential undue influence of their former colleagues.⁶¹ Concerns regarding the misuse of confidential or inside information obtained while in government service,⁶² divided loyalties, or the appearance of impropriety appear to be peripheral. Several commentators have argued that the fiduciary duty of former government employees to preserve the confidentiality of privileged, non-public or confidential information should be enforced as a supplement to Section 207.⁶³

B. *Disclosure Requirements*

Title IV of the Ethics in Government Act requires disclosure by specified high-ranking government officials of certain personal financial information in a detailed report filed annually with specified ethics officials.⁶⁴ Potential conflicts of interest resulting from financial holdings in a specific company or industry would be available for public scrutiny. Willfull or knowing failure to file the re-

59. *Id.* at 16, case no. 81x34 (Nov. 23, 1981).

60. *Id.*

61. SENATE REPORT, *supra* note 18, at 4247-50.

62. *Id.* The potential misuse of inside governmental information was a concern of Congress when it enacted the Ethics Act.

63. *E.g.*, Kalo, *Deterring Misuse of Confidential Government Information: A Proposed Citizens' Action*, 72 MICH. L. REV. 1577 (1974) (supporting citizen suits on behalf of the government to recover profits obtained by present and former government employees through the utilization of confidential government information); *see also* Note, *The Fiduciary Duty of Former Government Employees*, 90 YALE L.J. 189, 191 (1980). The Note encourages the enforcement of the fiduciary responsibilities of former government employees to protect confidential information. The advantages of such an approach were presented:

[L]egal actions to enforce a fiduciary duty could reach all instances of use of confidential or inaccessible information by former officials. In addition, suit could be brought either by government or by certain private parties, and could seek relief through an injunction, through recovery of a delinquent fiduciary's profits, or through damages if appropriate. Because enforcement of a general fiduciary duty would be more comprehensive and more effective than Title V's [Section 207] system of rule and sanctions, it would better serve the public interest in governmental efficiency, fairness, and integrity.

Id.

64. 5 U.S.C. app. § 201 (1982); 5 C.F.R. § 734 (1983).

port could result in administrative or civil remedies.⁶⁵ Knowingly and willfully falsifying the required information could subject the official to a felony prosecution.⁶⁶

C. *The Office of Government Ethics*

The Office of Government Ethics was established in order to provide universal ethics leadership and direction for the executive branch and to provide assistance to agency heads who have the primary responsibility for their agency's ethics program.⁶⁷ Each agency has a designated agency ethics official⁶⁸ who is responsible for the administration of the ethics program in that agency.⁶⁹

The effectiveness of the agency ethics programs and the restrictions and requirements under the Ethics Act are difficult to quantify. The applicable regulations have narrowed the already focused statutory scope of the Ethics Act to the point that very few cases have reached the courtroom.⁷⁰ The regulations require only "substantial allegations" of violations to be referred to the Department of Justice⁷¹ which may prosecute aggravated cases.⁷²

The key to the success of the Ethics Act as a deterrent appears to be in the hands of each agency's designated ethics official. Thus the adequacy and effectiveness of an agency's ethics program is critical.⁷³ How capable are the ethics officials of monitoring the activities of former agency employees or current employees' involvement with former employers? How well are current employees being educated so that they can identify and report potential violations?⁷⁴ Is the scarcity of convictions under the Act a testa-

65. 5 C.F.R. § 734.701 (1983).

66. 18 U.S.C. § 1001 (1976).

67. 5 C.F.R. § 738.102(a) (1983).

68. *Id.* § 738.201.

69. *Id.* § 738.203.

70. The cases that do reach the courts have primarily involved government prosecutors rather than regulatory bureaucrats. *See, e.g.,* United States v. Dorfman, 542 F. Supp. 402 (N.D. Ill. 1982) (former United States attorney was disqualified under § 207(b) from representing an individual who was subsequently indicted as the result of an investigation which occurred during his term of office); *In re Asbestos Cases*, 514 F. Supp. 914 (E.D. Va. 1981) (former government attorney and his law firm were disqualified from representing a private party in litigation against the government in a matter in which he previously represented the government).

71. 5 C.F.R. § 737.1(c)(6) (1983).

72. *Id.*

73. *See generally* New Study, *supra* note 8.

74. There is no statute which directly requires that an agency employee report such statu-

ment to the success of the programs? These questions are difficult, the answers elusive, and the effectiveness of the Ethics Act in meeting its stated goal of "preserv[ing] and promot[ing] the integrity of public officials and institutions"⁷⁵ is uncertain.

Whether or not restrictions imposed by the Ethics Act significantly deter recruitment of potential candidates for high government positions who might otherwise be willing to enter the "revolving door" is debatable.⁷⁶ There are no studies on point. The only available statistics support the contention that ethics obligations or restrictions are not a primary reason for high-ranking presidential appointees leaving government service.⁷⁷

IV. PROFESSIONAL ETHICS RESTRICTIONS ON LAWYERS

Professional responsibilities provide additional considerations for attorneys, who comprise a substantial portion of the "revolving door" participants. Government attorneys who have previously represented industrial clients, as well as attorneys who leave regulatory agencies to represent industrial clients, have potential professional conflicts of interest restrictions to consider when dealing with their former employers or clients. These attorneys are usually in a position of influence in their representational capacity on either side. Many commentators have explored this area;⁷⁸ therefore, this article will explore concerns raised by a recent development of

tory or regulatory violations to his or her designated ethics official, although 28 U.S.C. § 535(b) (1982) provides for the processing of such a report.

75. Pub. L. No. 95-521, 92 Stat. 1824, 1824 (1978).

76. James, *Lifting Barriers to Government Service*, Bus. Wk., Apr. 19, 1982, at 19. The Assistant to President Reagan for Presidential Personnel contended that "disappointing numbers of outstanding candidates for high government positions declined to serve." *Id.* Although no statistics were provided, he apparently believes the provisions of the Ethics Act are responsible for the candidates' decisions not to serve and calls for a modification of the statute. *Id.*

77. Letter from David H. Martin, Director, Office of Government Ethics, to Edna Johnson (Dec. 13, 1983). Mr. Martin included the results of several studies involving the impact of the Ethics Act on presidential appointees' attitudes or decisions to leave government service. Although the results of the studies were "inconclusive" generally, according to Mr. Martin "[t]he trends indicate that the ethics requirements over time were judged to be not as harsh or stringent as initially perceived." *Id.* enclosure A. The studies cited were conducted by the Office of Personnel Management, Kansas State University and the Office of Government Ethics. See generally *FAA Chief Quits As Stories Spur Ethics Inquiry*, Wash. Post, Dec. 24, 1983, at 1, col. 1.

78. See generally Lacovara, *supra* note 7; Morgan, *supra* note 2; Note, *Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification?*, 1977 DUKE L.J. 512; Comment, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. 1025 (1977).

particular interest to attorneys involved in this process: the American Bar Association's adoption of the *Model Rules of Professional Conduct* (Model Rules).⁷⁹

On August 2, 1983, the House of Delegates of the American Bar Association adopted the Model Rules which supersede the *Model Code of Professional Responsibility*⁸⁰ (CPR) as the recommended guidelines for ethical, professional conduct. The Model Rules differ significantly in form and substance from the CPR. Although state bars and state supreme courts are considering the adoption of the Model Rules, in whole or in part, to date no states have adopted them. Until those state by state decisions are made, the impact of the new rules is conjectural. Interesting questions are raised, however.

The CPR format, which contains canons, ethical considerations, and disciplinary rules as interrelated parts, was restructured in the Model Rules where the format provides black letter authoritative rules. Comments intended to serve as interpretive guidelines⁸¹ supplement the new rules rather than the ethical goals and aspirations provided by the CPR.⁸² Ethical opinions and case law were incorporated into the Model Rules in an effort to simplify and clarify the CPR.⁸³ This commentator does not support the format change,⁸⁴ and this position is shared by others who have expressed

79. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited MODEL RULES].

80. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) [hereinafter cited as MODEL CODE].

81. MODEL RULES, *supra* note 79, preamble.

82. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981) [hereinafter cited as Proposed Final Draft]. Robert J. Kutak, Chairman of the American Bar Association Commission on Evaluation of Professional Standards (Kutak Commission) which was responsible for the Model Rules, explained the reasons for the format change in his introduction to the Proposed Final Draft. The general maxims, such as the avoidance of the "appearance of impropriety," MODEL CODE, *supra* note 80, Canon 9, and the ethical aspirations, such as a lawyer's "temperate and dignified" conduct, *id.* EC 1-5, have been used by the courts for disciplinary purposes. The Kutak Commission contended that such standards were unacceptably vague and removed them from the new proposed rules of professional conduct.

83. Proposed Final Draft, *supra* note 82, chairman's introductory note.

84. The complete removal of ethical goals and aspirations, such as avoiding the "appearance of impropriety," from the ethical responsibilities of the profession will neither enhance the public image or confidence in the profession nor provide sufficient ethical guidance to attorneys. Public confidence in the law, lawyers, and the legal system should be promoted by the profession. *United States v. Dorfman*, 542 F. Supp. 402, 410 (N.D. Ill. 1982). Additionally, ethical precepts cannot be reduced to self-limiting black letter rules without the loss of substance. Ethics is a complicated, multi-faceted subject which is over-simplified by a comprehensive list of rules.

significant criticism and concerns.⁸⁵

The Model Rules include a new rule entitled *Successive Government and Private Employment*⁸⁶ which addresses the government attorney's professional and ethical responsibilities directly. Thereby the emphasis of the Model Rules was shifted to the "former" government attorney rather than the lawyer "in" government who is the focus of the CPR's disciplinary rule entitled *Action of a Public Official*.⁸⁷ Without explanation certain significant CPR disciplinary rules which relate to the lawyer "in" government were not included in the Model Rules.⁸⁸ The self-limiting nature of black letter rules absent general ethical precepts and considerations presumably excludes those disciplinary rules. Are the actions prohibited by those disciplinary rules now considered ethical in all cases?

Model Rule 1.7 prohibiting the representation of adverse interests and Model Rule 1.9 providing specific protections which are available to former clients are both intended to include lawyers in the government.⁸⁹ Yet the "directly adverse" requirement of Model Rule 1.7 and the "materially adverse" language of Model Rule 1.9 do not address the public concern addressed by the CPR in DR 8-101(A)(1). This disciplinary rule prohibited a government attorney from utilizing his government position for a "special advantage" to benefit his client (or arguably his former client) contrary to the public interest. That concern is recognized in the Comment to Rule 1.11, but it is not addressed.⁹⁰ This void is of particular con-

85. See, e.g., T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY 281 (Selected Standards Supplement 1983). A revised draft, dated May, 1982, of *The American Lawyer's Code of Conduct* was offered as a proposed revision to the CPR. Co-Chairman Theodore Koskoff indicated in the preface that the debate over the Model Rules was

not just a squabble over form. It was a serious disagreement over substance. . . . We regard the proposed Kutak Rules as fundamentally flawed, and we intend to force Kutak & Co. to debate the issues before the state courts and bar bodies that will really decide what the law of lawyers' ethics is to be.

Id. (quoting THE AMERICAN LAWYERS CODE OF CONDUCT preface (Revised Draft 1982)).

86. MODEL RULES, *supra* note 79, Rule 1.11.

87. See MODEL CODE, *supra* note 80, DR 8-101.

88. See, e.g., MODEL CODE, *supra* note 80, DR 8-101(A)(1) ("A lawyer who holds public office shall not: . . . use his public position to obtain . . . a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest."); *id.* DR 7-105(A) ("A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.").

89. MODEL RULES, *supra* note 79, Rule 1.11 comment.

90. *Id.* ("A lawyer should not be in a position where benefit to a private client might

cern when addressing the potential "capture" of a regulatory agency by former industry attorneys. Absent mandatory restrictions, the Model Rules have effectively sidestepped that public concern.

Many additional questions are raised by the self-limiting black letter rule approach to legal ethics. For instance, Rule 1.11(a) provides that an attorney shall "not represent" a private client, absent the appropriate agency's consent, regarding a matter in which he personally and substantially participated while a public employee. This language appears to track Section 207 which also prohibits "representation," but which distinguishes it from "aiding and assisting" in representation behind the scenes.⁹¹ The admonishment in DR 9-101(B) is against the acceptance of "private employment" in a matter in which the attorney, as a former public employee, had substantial responsibility. No explanation is given for the change of the acceptance of "private employment" in the disciplinary rule to the more narrow prohibition against "representation" in the model rule. Under the Model Rules would a former government attorney from a regulatory agency without agency consent be able to "consult" with or "aid and assist" an attorney who is formally representing a private client in the restricted matter as provided for in Section 207?

Model Rule 1.11(b) addresses the situation that exists when a former government attorney has knowledge of narrowly defined confidential government information⁹² concerning a person (no reference to an organization) obtained while in government service. According to the rule, he or she "may" not represent a private client or entity if the confidential government information could be utilized to the material disadvantage or adverse interest of that person. The term "may" in the Model Rules is relevant since that term is permissive and makes the conduct discretionary, not imperative, and not subject to disciplinary action.⁹³ The voluntary

affect performance of the lawyer's professional functions on behalf of public authority."). This comment serves as a guideline only, whereas DR 8-101(A)(1) of the Model Code is mandatory.

91. See *supra* notes 39-56 and accompanying text.

92. MODEL RULES, *supra* note 79, Rule 1.11(e). The term "confidential government information" is defined as "information which has been obtained under government authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public." *Id.*

93. *Id.*, Scope. The explanation is given that "[s]ome of the Rules are imperatives, cast in

and unenforceable nature of this rule provides substantial latitude to the former government attorney who has knowledge of highly confidential government secrets. Abuses of even the most confidential government inside information by the regulatory agency's former attorney is not effectively prohibited by the proposed ethical standards of the profession advocated by the American Bar Association.

Rule 1.11(a) provides that if an agency waives a lawyer's disqualification, as a former government employee, from representation in a matter in which he personally and substantially participated, he may represent a private client in that matter. Yet such a personal representation could be a criminal act, if specific parties are involved, under subsection (a) of Section 207 which does not provide for a waiver.

The controversial imputed disqualification of the law firm of a former government employee⁹⁴ in matters in which he or she has been disqualified is addressed in subsections (a) and (b) of Model Rule 1.11. Law firms which specialize in agency practices (such as securities, communications, transportation, etc.) frequently recruit agency attorneys with specialized industry knowledge, experience, and contacts. The areas in which disqualification occurs are narrowly defined; therefore, former agency lawyers are valuable in the private sector. Should a disqualification occur, Model Rule 1.11 (a) and (b) provides for the "screening" of the disqualified former government employee from any participation in the matter or sharing in the fee derived therefrom and subsection (a)(2) provides for written notification of the screening to the affected agency.

Under the CPR, DR 9-101(B) prohibits a lawyer from "accepting employment in a matter in which he had substantial responsibility while he was a public employee." Additionally, DR 5-105(D) requires that lawyers who are affiliated with a disqualified lawyer be vicariously disqualified as well. On November 2, 1975, American Bar Association Formal Opinion 342⁹⁵ was issued which provided

the terms 'shall' or 'shall not'. These define proper conduct for purpose of professional discipline. Others, generally cast in the term 'may' are permissive and define areas under the Rules in which the lawyer has professional discretion." *Id.*

94. Disqualification restrictions are founded upon employment as a government "employee" rather than employment as a government "attorney". 18 U.S.C. § 207 (1982); MODEL RULES, *supra* note 79, Rule 1.11; MODEL CODE, *supra* note 80, DR 9-101(B).

95. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975), reprinted in 62 A.B.A. J. 517 (1976).

for a waiver, under certain conditions, of the firm's disqualification by the affected government agency. According to Formal Opinion 342

whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and there is no appearance of significant impropriety affecting the interest of the government, the government may waive the disqualification of the firm under DR 5-105(D).⁹⁶

The restrictions placed on "screened" lawyers are popularly referred to as a "Chinese wall" and have been the subject of considerable attention.⁹⁷ The agency's discretion in granting the waiver has been a subject of controversy⁹⁸ as has the appropriateness of the screening technique advanced by Opinion 342.⁹⁹

However, under the Model Rules, Rule 1.11(a)(2) does not provide the agency with discretion in granting the firm a waiver since no consent is necessary, only a procedure verification. Nor does the rule require that there be a finding of "no appearance of significant impropriety affecting the interests of the government" as was required in Formal Opinion 342. Subsection (b) only requires screening of the potentially disqualified attorney and does not even require that anyone be notified. Thus, the screening of a disqualified former government attorney and the potential imputed disqualification of his or her law firm have been fertile grounds for a contro-

96. *Id.*

97. See generally Merrick, *Government Service and the Chinese Wall: An Accommodation Founded on Practicality*, 52 U. COLO. L. REV. 499 (1981); Note, *The Future of the Chinese Wall Defense to Vicarious Disqualification of a Former Government Attorney's Law Firm*, 38 WASH. & LEE L. REV. 151 (1981); Comment, *The Chinese Wall Defense to Law Firm Disqualification*, 128 U. PA. L. REV. 677 (1980).

98. See e.g., *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977) (ABA Formal Opinion 342 was adopted and the Court of Claims opined that the agency could not withhold its waiver arbitrarily); see also *Sierra Vista Hosp. v. United States*, 639 F.2d 739 (Ct. Cl. 1981) (supporting the *Kesselhaut* holding in substance).

99. *Armstrong v. McAlpin*, 461 F. Supp. 622 (S.D.N.Y. 1978), *rev'd*, 606 F.2d 28 (2d Cir. 1979), *vacated*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated*, 449 U.S. 1106 (1981). (The Second Circuit en banc reversed the earlier Second Circuit panel decision which rejected ABA Formal Opinion 342. The Supreme Court held that motions to disqualify counsel are not appealable final decisions.); *In re Asbestos Cases*, 514 F. Supp. 914 (E.D. Va. 1981) (The firm and the former government attorney were disqualified. The court held that an agency waiver is not binding on a court which has an independent duty to evaluate a disqualification.). See generally T. MORGAN & R. ROTUNDA, *supra* note 85, at 198-201; Murphy, *Vicarious Disqualification of Government Lawyers*, 69 A.B.A. J. 299 (1983).

versy that will not be remedied by Model Rule 1.11.

One of the relevant prohibitions on "revolving door" attorneys is not located in Rule 1.11 but is found in Rule 8.4(e). That rule prohibits a lawyer from stating or implying that he or she has "an ability to influence improperly a government agency or official." This is an important restriction on former agency attorneys who represent industry clients before their former agency.

It is the purpose of this article to identify certain potential concerns which the Model Rules present for the attorney passing through the "revolving door" between regulated industries and their regulatory agencies. The concerns expressed herein are not intended to be all inclusive but to focus attention on the weaknesses of Model Rule 1.11 as it relates to the ethical considerations and restrictions on "revolving door" attorneys. Until the state bars and state supreme courts decide whether to adopt all or a portion of the Model Rules in their states, the effect of Model Rule 1.11 is only conjecture. It is submitted, however, that the rule deserves further consideration. The quality of ethical self-regulation by the profession is under scrutiny.¹⁰⁰ It behooves the legal profession to regulate itself with the public interest as its priority.

The Supreme Court of Virginia adopted a new Virginia Code of Professional Responsibility, effective October 1, 1983,¹⁰¹ which maintained the format of the CPR and did not include Model Rule 1.11. Time will tell whether the other states do the same.

V. FEDERAL EMPLOYEE STANDARDS OF CONDUCT

The regulatory agencies themselves have regulations prescribing specific standards of conduct for current employees and high-ranking officials and requiring the filing of certain financial statements reflecting financial interests and employment.¹⁰² These regulations are enforced by the agency's designated ethics official.¹⁰³ These standards of conduct were established under various authorities, including President Johnson's Executive Order 11,222 of 1965.¹⁰⁴

100. See, e.g., S. REP. NO. 215, 98th Cong., 1st Sess. 4-5, 10-12 (Sept. 1, 1983) (Federal Trade Commission Act Amendments of 1983); see also Bierig, *Whatever Happened to Professional Self-Regulation?*, 69 A.B.A. J. 616 (1983); *FTC Attempts to Gain Authority Over Bars*, 32 VA. B. NEWS No. 5, at 1, col. 1 (1983).

101. VA. SUP. CT. R. 6:2 (Oct. 1, 1983).

102. 5 C.F.R. § 735.101 (1983).

103. *Id.* § 738.201.

104. Exec. Order No. 11,222, 3 C.F.R. 382 (1970), reprinted in 18 U.S.C. § 201 note at 274

The standards vary by agency and generally relate to the conduct of the employee "in" government. Certain minimum standards are set by the Office of Personnel Management.¹⁰⁵

At a minimum, a special government employee¹⁰⁶ is prohibited from utilizing his government position in such a manner as to appear motivated by the desire for personal gain or the desire to benefit one with whom he has financial, business, or family ties.¹⁰⁷ Nor can he utilize non-public, inside information obtained in his government position for the benefit of himself or one with whom he has financial, business, or family ties.¹⁰⁸ Since the regulations vary by agency and are enforced by the agency's designated ethics official, there is a variation in form, substance, and enforcement among the agencies.

For example, the Federal Trade Commission provides its current employees with extensive standards of conduct¹⁰⁹ as well as regulations concerning post-employment disciplinary actions involving conflicts of interest.¹¹⁰ In these standards, employees are admonished to avoid any actions which might result in even the appearance of preferential treatment, loss of independence, or partiality.¹¹¹ An employee should bring potential enumerated statutory violations¹¹² to the attention of the agency's chairman,¹¹³ although the language is not mandatory. The responsibility for identifying and reporting potential personal violation of the standards rests primarily on the employee.¹¹⁴ In specified instances,¹¹⁵ unless authorization is obtained,¹¹⁶ former agency employees are prohibited for three years from professionally consulting or assisting private individuals. A detailed "screening" procedure is provided for business and law partners of disqualified former employees.¹¹⁷ Even

(1982).

105. 5 C.F.R. § 735.202-210 (1983).

106. 18 U.S.C. § 202 (1982); 5 C.F.R. § 735.102(e) (1983) (executive branch employees who are not members of the Armed Services).

107. 5 C.F.R. § 735.302 (1983).

108. *Id.* § 735.303.

109. 16 C.F.R. § 5.1-43 (1983).

110. *Id.* § 5.51-.68.

111. *Id.* § 5.10(b), (d).

112. *Id.* § 5.19(a).

113. *Id.* § 5.19(b).

114. *Id.* § 5.6(a).

115. *Id.* § 4.1(b)(1) (higher standard than 18 U.S.C. § 207 (1982)).

116. 16 C.F.R. § 4.1(b)(3)-(4) (1983) (stricter than MODEL RULES, *see supra* note 79, Rule 1.11).

117. 16 C.F.R. § 4.1(b)(8) (1983) (stricter than MODEL RULES, *see supra* note 79, Rule

certain *ex parte* conversations with agency officials are prohibited.¹¹⁸

The Federal Trade Commission's standards of employee conduct substantially exceed, supplement, and cure some of the statutory weaknesses. However, such regulations vary significantly by agency. Some agencies do not specifically require that an employee report statutory violations¹¹⁹ and generally agency regulations do not exceed the statutory or Office of Government Ethics mandatory requirements.

VI. ADDITIONAL STATUTORY AND OTHER RESTRICTIONS ON "REVOLVING DOOR" PARTICIPANTS

This article does not purport to enumerate every statutory requirement, prohibition, or regulation which relates to the interchange of personnel between the government and the private sector; however, some of the significant statutory and other restrictions which restrain activities of revolving door participants include:

1. A government employee cannot personally and substantially participate in certain prohibited activities in which he knows he, his family, certain of his affiliates or a "person or organization with whom he is negotiating or has any arrangement concerning prospective employment," has a financial interest.¹²⁰ The criminal sanctions for a violation of this statute include up to a \$10,000 fine, two years imprisonment, or both.¹²¹ Congress intended to disqualify government employees from involvement in matters in which they have a financial interest or in which they are negotiating for future employment.¹²²

2. A public official or former official cannot directly or indirectly seek or accept anything of value (which could include employment), nor can such be offered or given by another for

1.11).

118. 16 C.F.R. § 4.7 (1983).

119. *E.g.*, 17 C.F.R. § 200.735-10 (1983) (Securities and Exchange Commission); 47 C.F.R. § 19.735-210 (1983) (Federal Communications Commission).

120. 18 U.S.C. § 208 (1982).

121. *Id.*

122. S. REP. NO. 2213, 87th Cong. 2d Sess., *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 3852, 3862.

or because of an official act¹²³ or with an intent to influence an official act.¹²⁴ The criminal sanctions for these forms of bribery vary and include a fine of up to \$20,000 or three times the value offered or given, whichever is greater, or up to fifteen years imprisonment, or both.¹²⁵

3. An individual cannot compensate another or an entity in exchange for influence in order to obtain appointive office.¹²⁶ Nor may one solicitor receive anything of value for such influence.¹²⁷ Further, an individual cannot receive a fee for referring another to a government agency or department for employment purposes.¹²⁸ Sanctions for these violations could include up to a \$1,000 fine, one year imprisonment, or both.¹²⁹

4. Government employees are prohibited from disclosing certain confidential or inside government information obtained during the course of their employment or official duties.¹³⁰ The protected information generally includes trade or process secrets or inside, corporate, financial, and commercial information.¹³¹ Criminal sanctions of up to \$1,000, one year imprisonment, or both and the removal of the government employee from employment are the potential penalties for disclosure of the protected information.¹³² This prohibition has been held¹³³ not related to information which is reachable under the Freedom of Information Act,¹³⁴ which does not cover confidential trade secrets and commercial and financial information.¹³⁵ As a general proposition, the non-disclosure laws, such as the Privacy Act,¹³⁶ and the Freedom of Informa-

123. 18 U.S.C. § 201(f)-(g) (1982).

124. *Id.* § 201(b)-(c).

125. *Id.* § 201.

126. *Id.* § 210.

127. *Id.* § 211.

128. *Id.*

129. *Id.* §§ 210-211.

130. *Id.* § 1905.

131. *Id.*

132. *Id.*

133. *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. (D.D.C. 1972) (involving the disclosure of confidential agency information).

134. 5 U.S.C. § 552 (1982).

135. *Id.* § 552(b)(4). *See also Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir.), *cert. denied*, 431 U.S. 924 (1976).

136. 5 U.S.C. § 552(a) (1982).

tion Act¹³⁷ relate to current government activities and employees rather than former ones.¹³⁸

Most of the statutory prohibitions restrain current government employees rather than former or prospective ones and violations are difficult to detect or to enforce.

VII. CONCLUSION

Absent the empirical data needed to conclusively address the elusive issue of whether or not agencies are "captured" by the exchange of personnel through the "revolving door," a review of existing restrictions has provided a framework for analysis. The cross-fertilization derived from the free flow of personnel between the regulatory agencies and their regulated industries is not unduly hampered by restrictions. As a general rule, individuals may take positions with the employer of their choice carrying with them the knowledge, experience, and contacts derived from their prior government or private employment. Generally, the prohibitions on most former government employees relate to very specific matters involving specific parties and restrict only representational communications or appearances before the governmental body relating to those matters. If prohibitions were extended to side-switching or "aiding and assisting" in those limited situations, the potential for abuse of inside government information would be reduced. On the other hand, enforcement difficulties, the restraint on the employment freedom of former government employees, as well as the po-

137. *Id.* § 552.

138. See generally Note, *The Fiduciary Duty of Former Government Employees*, 90 YALE L.J. 189 (1980). The Note contends that former government employees are under a fiduciary duty to maintain the confidentiality of government information. If that duty is breached to the benefit of third parties, the third parties should be held accountable for their profits and appropriate damages. According to the author the utilization of this approach would provide equal access to, and treatment by, the government.

The issue of abuse of classified government information by current and former government employees is being debated at this time. The Administration has supported greater use of polygraph examinations and prepublication review agreements in order to preserve classified government information. Under the Administration's proposed policy, individuals with access to classified information would be required to sign an agreement for life to submit all writings and speeches which relate to intelligence matters to the government for review prior to publication. H.R. REP. No. 578, 98th Cong., 1st Sess. 1-2, 13-21 (1983) (Committee on Government Operations). See also *Snepp v. United States*, 444 U.S. 507 (1979) (A former Central Intelligence Agency employee, who had signed a prepublication review agreement, published a book without review. The proceeds therefrom were impressed by a constructive trust for the government's benefit.).

tential negative effects of an additional prohibition on government recruitment need to be weighed against the public benefit which would be derived.

With the free flow of individuals and information between the industry and its regulating agency, there is potential for abuse. Absent classified information involving national security interests,¹³⁹ there are few restrictions upon the information that a former government employee may share with his or her new employer. In fact, keeping information confidential while in government hands is even difficult.¹⁴⁰ Vast amounts of government information are available to the public through various means, including Freedom of Information Act requests and the employment of former government employees. This free flow of information contributes to open government and to the freedom of speech which is cherished in this nation.¹⁴¹ The free speech of our public employees is an essential part of that openness.¹⁴²

The potential for undue influence being exerted on regulatory agencies by their former employees still exists due to the narrow restrictions placed upon most former government employees. Former high-ranking government officials face additional restrictions in that area. Nevertheless, most agency contacts by former employees are not restricted. The extent to which they can and do influence their former colleagues as a result of those contacts is probably impossible to determine.

The effectiveness of the existing prohibitions and restrictions as a deterrent, the education of current government employees as to their present and future obligations, and the enforcement of those obligations are primarily the responsibility of designated agency ethics officials. But the effectiveness of these internal ethics programs needs study and is difficult at present to determine.¹⁴³ Legislation and regulations specifically requiring that current government employees identify and report all potential violations of

139. 18 U.S.C. § 798 (1982); 50 U.S.C. § 783 (1982) (penalty section).

140. *E.g.*, Comment, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. U.L. REV. 995 (1976).

141. Even the Administration's efforts to increase use of polygraph examinations and pre-publication review agreements in order to control leaks of classified government information was recently criticized by the House of Representative's Committee on Operations. H.R. REP. No. 578, 98th Cong., 1st Sess. (1983).

142. Coven, *First Amendment Rights of Policymaking Public Employees*, 12 HARV. C.R.-C.L. L. REV. 559 (1977).

143. See New Study, *supra* note 8.

statutory or regulatory prohibitions, including those in Section 207, to the designated ethics officials in their agencies could assist in the enforcement of existing restrictions. However, employees need to be educated about the ethics programs and how to identify violations in order for the system to work.

Since presidential appointees occupy the upper echelons of agencies and are thus in a position to formulate significant federal policy, the Administration has substantial power in this area. Presidential appointees of regulatory agencies generally are appointed for a specific term and then rotate out into the private sector. If they leave and return to the same regulated industry, there could be the appearance or potential for the agency "capture" argument on a case-by-case basis.

Even with the absence of proof that the regulatory agencies have been "captured" by the "revolving door" phenomenon, it is reasonable to conclude that they are being influenced. The extent of that influence and the value judgments made from the results of that influence are debatable. Future study, debate, or even scandal may provide more concrete data or evidence of abuses for analysis at a later date.

