



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

MEMORANDUM

December 5, 2017

TO: Joseph Mohorovic

THROUGH: Melissa Buford, Assistant General Counsel for General Law and Alternate Designated Agency Ethics Official

FROM: Monica L. Garcia, Attorney, General Law Division

SUBJECT: Follow Up to Memo on Post-Employment Ethics Restrictions

This memorandum responds to your request for additional guidance on post-employment restrictions that apply to your position with Dentons law firm. Specifically, you seek guidance on potential appearances before, or communications to, CPSC that are not “on behalf of” another. In addition, you request guidance on the possibility of your engaging with a voluntary standards committee and an industry group. This advice supplements and should be read in conjunction with the memorandum provided to you on October 26, 2017.

Executive Summary

- During the 2-year cooling-off period, you may communicate to CPSC employees if you are not communicating on behalf of another.
- You may communicate to, or appear before, non-CPSC members of the Underwriters Laboratory (UL) standards technical panel (STP) on portable generators.
- You may engage in public commentary, if the circumstances of the proposed public commentary meet the regulatory exception.
- You may engage in purely social communication with CPSC employees.

Facts

You served as a Commissioner at CPSC from August 2014 until October 20, 2017. On October 26, 2017, the Office of the General Counsel provided you with a detailed overview of the ethics restrictions applicable to your work outside of CPSC. You asked for additional advice on whether and how you can engage with CPSC given these restrictions.

Specifically, you asked for advice on whether you could communicate to CPSC employees personally. You also asked for advice on whether you might be permitted to speak at an International Consumer Product Health and Safety Organization (ICPHSO) conference, plus guidance on the parameters governing your potential communications with members of a voluntary standards committee.

Analysis on the Parameters of the Communications “Cooling-Off” Period

In the memorandum of October 26, 2017, we explained that you meet the definition of “senior employee” under 18 U.S.C. § 207 and we provided you with an overview of the 2-year communication restriction. In following up, we address whether you can communicate to, or appear before, CPSC employees, if you are doing so in your personal capacity, and not “on behalf of” another person. We also address additional scenarios you raised.

1. If You Are Not Acting on Behalf of Another Person, You May Communicate with or Appear Before CPSC Employees

The relevant post-employment communication restriction states that you must not “knowingly make, with the intent to influence, any communication to or appearance before any officer or employee of [CPSC] . . . **on behalf of any other person** (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency”¹

You will make a communication or appearance on behalf of another person² if you are acting:

- as the other person’s agent
- as the other person’s attorney
- with the consent of the other person and the other person exercises some degree of control over you in relation to the communication or appearance.³

The specific facts determine whether you are acting on behalf of another person. OGE cautions that “if you make a communication or appearance regarding a matter in which your new employer has an interest, you may be considered to be representing your employer’s interest as opposed to your own.”⁴

If you are authorized to act in any manner that will advance the interests of Dentons or its clients and you send written communication to CPSC urging agency action using Dentons’ letterhead, you are likely acting on behalf of another person.⁵ To illustrate, you may be invited to speak at the upcoming ICPHSO Annual Meeting & Training Symposium in February 2018. If your employer asks you to attend to represent the law firm, you are identified as a Dentons’

¹ 18 U.S.C. § 207 (c)(1) (emphasis added).

² The term “person” “includes an individual, corporation, company, association, firm, partnership, society, joint stock company, or any other organization, institution, or entity, including any officer, employee, or agent of such person or entity. Unless otherwise indicated, the term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State and local governments. The term includes the “United States.” 5 C.F.R. § 2641.104.

³ 5 C.F.R. §§ 2641.204 (h), 2641.201(g)(1)(i).

⁴ Office of Government Ethics Legal Advisory, LA-16-08, *Subject: Introduction to the Primary Post-Government Employment Restrictions Applicable to Former Executive Branch Employees*, Q6 (Sept. 23, 2016).

⁵ See, 5 C.F.R. § 2641.201(g), Example 2.

representative in your speaker biography and on your name tag, and Dentons pays for your travel to Orlando, FL, you would be acting on behalf of Dentons.

By the express terms of the statute, you are free to communicate information, as long as you speak on your own behalf, rather than at the behest and for the benefit of another.⁶ If you would like to speak at ICPHSO to present your personal views, the facts must strongly support that you are not acting on behalf of another. Facts that could support the conclusion that you are acting on your own behalf would be if you took leave from Dentons to attend ICPHSO, are not identified as a Dentons representative, you personally pay for your travel, accommodations, and associated costs, and your remarks are limited to your personal views.⁷

You should note that you are not acting on behalf of another merely because your communication or appearance “is consistent with the interests of the other person, is in support of the other person, or may cause the other person to derive a benefit as a consequence” of your communication or appearance.⁸ Please note that we must conduct a separate analysis if a third party sponsors your appearance or pays for your travel.

a. *You May Engage with Members of Voluntary Standards Committees Who Are Not CPSC Employees*

The relevant post-employment communication restriction states that you must not “knowingly make, with the intent to influence, any communication **to or appearance before any officer or employee of [CPSC]** . . . on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency. . . .”⁹

You anticipate that the Portable Generator Manufacturers Association (PGMA) will hire you to communicate with members of an Underwriters Laboratory (UL) standards technical panel (STP) on portable generators, UL 2201 Standard for Portable Engine-Generator Assemblies. After consultation with CPSC management, we determined that CPSC Mechanical Engineer Janet Buyer is a voting member of the STP.¹⁰

Based on the information you provided, you plan to communicate or appear before members of the STP on behalf of the PGMA with the intent to influence the members to take an official action. Ms. Buyer is the only CPSC employee assigned to this STP. You may speak to the non-CPSC STP members, but you must not communicate to or appear before Ms. Buyer in an effort to influence her to take official action.

⁶ Application of 18 U.S.C. § 207(C) to Proposed Communications Between Retired navy Flag Officer and Marine Corps Commanders in Iraq Regarding Security Issues, 29 Op. Att’y Gen. 159, 163 (2005).

⁷ See, 5 C.F.R. § 2641.201(g), Examples 1 and 3; see also, Letter to a Former Federal Employee dated November 20, 2003, OGE 03 x 8.

⁸ 5 C.F.R. § 2641.201(g)(1)(ii).

⁹ 18 U.S.C. § 207 (c)(1) (emphasis added).

¹⁰ UL.com, STP Roster, at <https://csds.ul.com/CWA/PrintRoster.aspx?GroupId=694&StpNumber=2201> (accessed Nov. 30, 2017).

You are permitted to have direct one-on-one contact with the STP members, whether in person, by phone, in writing, or by other means. You may also speak, appear, or write to STP members in a group setting, so long as Ms. Buyer is not in attendance. Please remain aware that you should never use another individual as an intermediary to communicate with Ms. Buyer or other CPSC employees; you would have violated the communications ban if you communicate through another person with the intent that the communication is attributed to you.¹¹

b. *You May Engage in Certain Public Commentary if CPSC Employees Are Present*

You have indicated an interest in addressing groups of individuals that may include CPSC employees. There are certain narrowly defined exceptions that permit you to engage in public speaking if you have knowledge that CPSC employees will be present. In general, the post-employment communication restriction states that you must not “knowingly make, with the intent to influence, any communication **to or appearance before any officer or employee of [CPSC]** . . . on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency. . . .”¹²

i. *Oral Public Commentary*

OGE regulations permit you to engage in certain public commentary, if your communication meets the specified regulatory exception. The public commentary exception allows you to address a “public gathering or a conference, seminar, or similar forum as a speaker or panel participant” if the event:

- is not sponsored or co-sponsored by CPSC
- is attended by a large number of people, and
- a “significant proportion” of attendees are not CPSC employees.¹³

OGE has held that the public commentary exception was intended to permit former employees to address public forums and permit the participants to have exchanges with one another, outside the context of official decision-making.¹⁴ OGE has not provided a bright line rule on the amount of attendees necessary to constitute a “large number of people,” but has held that a conference attended by 100 individuals is a large number of people.¹⁵ Likewise, OGE has not determined what percentage constitutes a “significant proportion,” but held that a conference with 50 percent non-government employees is a “significant proportion” to satisfy the public commentary exception.¹⁶

¹¹ 5 C.F.R. § 2641.201(f)(3), Example 7 to paragraph (f).

¹² 18 U.S.C. § 207 (c)(1) (emphasis added).

¹³ *Id.*

¹⁴ Post-Employment Conflict of Interest Restrictions, 68 Fed. Reg. 7844, 7852 (Feb. 18, 2003).

¹⁵ 5 C.F.R. § 2641.201(f), Example 5.

¹⁶ *Id.*

1. *The STP Does Not Qualify for the Public Commentary Exception*

The UL 2201 STP is open to the public, and is not sponsored or co-sponsored by CPSC. However, the STP is comprised of voting members who form a deliberative body. After consultation with OGE, we determined that the UL 2201 STP meetings are not the types of public gatherings, conferences, or seminars that were envisioned by the public commentary exception. You must not communicate to the entire STP group if CPSC employees are present.

In addition, UL's roster indicates that the STP is comprised of 45 people. An event attended by 45 people is likely not "attended by a large number of people" and cannot qualify for the public commentary exception. As stated above, you may speak to or appear to individual members of the UL 2201 STP and address groups of the STP that convene without CPSC employees.

2. *ICPHSO May Qualify for the Public Commentary Exception*

ICPHSO is a public gathering or conference and, at this time, it does not appear that the ICPHSO meeting is sponsored or co-sponsored by CPSC.¹⁷ We must conduct an additional fact inquiry to determine the number of attendees to determine if the ICPHSO symposium is attended by a "large number of people" and whether the proportion of attendees that would be CPSC employees would be "significant." With that additional information, your participation in the ICPHSO symposium may be permissible public commentary.

If your proposed activities meet the requirements for the public commentary exception, you "may engage in exchanges with any other speaker or with any member of the audience," even if these persons are CPSC employees.¹⁸

ii. *Written Public Commentary*

You may engage in written public commentary provided that your written remarks appear in "a newspaper, periodical, or similarly widely-available publication."¹⁹ You may write and permit publication of an op-ed piece in a metropolitan newspaper supporting or opposing a particular CPSC activity.²⁰

iii. *You May Attend Purely Social Events*

The post-employment ethics restrictions do not prohibit you from attending purely social events or engaging in purely social communications with CPSC employees.²¹ For example, you may attend a celebration for a retiring CPSC employee held at CPSC, so long as you limit your

¹⁷ ICPHSO Web Page, Events, 2018 Annual Meeting and Training Symposium Orlando, Florida, Sponsors, at <https://www.icphso.org/events/2018-annual-meeting-and-training-symposium-orlando-florida/sponsors#sthash.jPzVwC3N.dpbs> (accessed Nov. 24, 2017).

¹⁸ 5 C.F.R. § 2641.204(g)(4).

¹⁹ 5 C.F.R. § 2641.204(b)(4)(iii).

²⁰ 5 C.F.R. § 2641.201(f)(3), Example 6 to paragraph (f).

²¹ Office of Government Ethics Legal Advisory, LA-16-08, *Subject: Introduction to the Primary Post-Government Employment Restrictions Applicable to Former Executive Branch Employees*, Q13.

communications to purely social exchanges; you will have committed a violation if you attend a social event to make a communication or appearance with the intent to influence any CPSC matter.²²

We remain available to provide advice to you in the future. Please contact me or the CPSC's DAEO for specific guidance on any questions.

²² 5 C.F.R. § 2641.201(f)(3), Example 4 to paragraph (f).