

Berry, David P.

From: [REDACTED]
Sent: Thursday, June 23, 2011 7:19 AM
To: Flynn, Terence F.
Cc: Joseph, Gloria; [REDACTED]
Subject: RE: Question
Sensitivity: Confidential

Terry,

I apologize for not getting back to you yesterday, but I did want to confer with Gloria before responding as I thought she needed to be aware of your situation. You are right in that there are probably no ethical prohibitions under the Standards of Conduct that would prevent you from speaking to anyone who called you with these mechanical or technical questions as the rulemaking is public information, but it is one that could have appearance implications for you in light of your pending nomination. This could be especially true if it became publicly-known that any information someone might use to submit comments came from you. It is a fairly thin line between offering up factual information and offering up a personal opinion, and one that can easily be crossed without meaning to. As innocent as your comments may be to these individuals, they could be misconstrued. As you know, this is a high profile issue for the Board and, while these individuals are friends, acquaintances, and former colleagues, you should probably start with the assumption that anything you say might make into the press, which could give the appearance that these folks are trying to curry favor with you because of your pending nomination, or that you are providing these individuals with inside information that is not available to the general public. It is just the kind of situation that the HELP Committee or a Senator could latch on to and use to block your nomination.

It is probably in your best interests, and the agency's as well, to refer these individuals to the Office of the Executive Secretary or the Office of Public Affairs and let them respond. They are the public face of the agency in this matter and should be answering these types of questions or responding to comments.

If you feel you need to speak to Gloria or I, please feel free to contact us. We are available to discuss it at anytime and we appreciate your sensitivity to the issue.

From: Flynn, Terence F.
Sent: Wednesday, June 22, 2011 12:40 PM
To: [REDACTED]
Subject: Question

[REDACTED]: As you can probably imagine, I have been receiving telephone calls from a number of people who want to discuss the recently issued election procedures Notice of Proposed Rulemaking (NPR). Some of these folks are friends and/or former colleagues or people I know from ABA and other bar functions. Some are likely to be advocates for clients in connection with submitting comments on the NPR. I have been deferring returning these calls for now. I'm sure most of them just want to ask technical questions about what the proposed rules mean and how they change or differ from existing procedures. I cannot think of any specific ethical constraint that would prohibit me from discussing the mechanics of the proposed rule, to the extent I even understand them, but I'm a bit uncomfortable about the appearance of any sort of ex parte contacts regarding a pending rulemaking, particularly in light of my pending nomination. Do you have a view on the propriety – and as importantly the advisability – of such contacts?

Thanks much for your assistance and guidance,

Terry