

PART 2637 -- REGULATIONS CONCERNING POST EMPLOYMENT CONFLICT OF INTEREST Subpart A -- General Provisions
Sec.

2637.101 Purpose and policy.

2637.102 Definitions.

Subpart B -- Substantive Provisions

2637.201 Restrictions on any former Government employee's acting as representative as to a particular matter in which the employee personally and substantially participated.

2637.202 Two-year restriction on any former Government employee's acting as representative as to a particular matter for which the employee had official responsibility.

2637.203 Two-year restriction on a former senior employee's assisting in representing as to a matter in which the employee participated personally and substantially.

2637.204 One-year restriction on a former senior employee's transactions with former agency on a particular matter, regardless of prior involvement. 2637.205 Limitation of restrictions of 18 U.S.C. 207(c) to less than the whole of a department or agency.

2637.206 Exemption for scientific and technological information.

2637.207 Exemption for persons with special qualification in a technical discipline.

2637.208 Testimony and statements under oath or subject to penalty of perjury.

2637.209 Partners of present or former Government employees.

2637.210 Officials of a State; officials of corporations created by an Act of Congress and public international organizations.

2637.211 Standards and procedures for designating senior employee positions pursuant to 18 U.S.C. 207(d).

2637.212 Administrative enforcement proceedings.

2637.213 Effective date of restrictions.

2637.214 Separate statutory agencies: Designations.

2637.215 Separate components of agencies or bureaus:

Designations.

2637.216 ``Senior Employee'' designations.

Authority: 5 U.S.C. appendixes; 18 U.S.C. 207 (1988).

Source: 45 FR 7406, Feb. 1, 1980; 45 FR 9253, Feb. 12, 1980, unless otherwise noted. Redesignated at 54 FR 50231, Dec. 5, 1989.

Note: The post-employment conflict of interest restrictions of 18 U.S.C. 207 were substantially revised effective January 1, 1991, by the Ethics Reform Act of 1989, Pub. L. 101 - 194, 103 Stat. 1716, with technical amendments enacted by Pub. L. 101 - 280, 104 Stat. 149 (1990). The Office of Government Ethics has published substantive guidance for the executive branch concerning the amended version of 18 U.S.C. 207 in part 2641 of this subchapter. This part 2637 will continue to provide guidance concerning the previous version of section 207, which will continue to apply to individuals terminating Government service prior to January 1, 1991.

Editorial Note: The following index of paragraphs is provided for the convenience of the reader:

Subpart A -- General Provisions

Sec.

2637.101 Purpose and policy.

- (a) Authority.
- (b) Consultation with the Attorney General.
- (c) Policy and limitations.

2637.102 Definitions.

- (a) Statutory definitions.
- (b) Interpretative definitions.

Subpart B -- Substantive Provisions

2637.201 Restrictions on any former government employee's acting as representative as to a particular matter in which the employee personally and substantially participated.

- (a) 18 U.S.C. 207(a).
- (b) Representation.
 - (1) Attorneys and agents.
 - (2) Others.
 - (3) Appearances; communications made with intent to influence.
 - (4) Government visits to other premises.
 - (5) Elements of ``influence'' and potential controversy required.
 - (6) Assistance.
 - (7) Project responses not included.
- (c) ``Particular matter involving a specific party or parties''.
 - (1) Specific matters vs. policy matters.
 - (2) Technical matters.
 - (3) Relationship of personal participation to specificity.
 - (4) The same particular matter must be involved.
 - (5) United States must be a party or have an interest.
- (d) ``Participate personally and substantially''.
 - (1) Basic requirements.
 - (2) Participation on ancillary matters.
 - (3) Role of official responsibility in determining substantial participation.
- (e) Agency responsibility in complex cases.

2637.202 Two-year restriction on any former government employee's acting as representative as to a particular matter for which the employee had official responsibility.

- (a) 18 U.S.C. 207(b)(i).
- (b) Official responsibility.
 - (1) Definition.
 - (2) Determining official responsibility.
 - (3) Ancillary matters and official responsibility.
 - (4) Knowledge of matter pending required.
 - (5) Self-disqualification.
- (c) ``Actually pending.''
- (d) Other essential requirements.
- (e) Measurement of two-year restriction period.

2637.203 Two-year restriction on a former senior employee's assisting in representing as to a matter in which the employee participated personally and substantially.

- (a) 18 U.S.C. 207(b)(ii).
- (b) Limitation to ``representational'' assistance by ``personal presence'' at an appearance.
- (c) Managerial and other off-scene assistance.
- (d) Representational assistance.
- (e) Measurement of restriction period.
- (f) Other essential requirements.

(g) General examples.

2637.204 One-year restriction on a former senior employee's transactions with former agency on a particular matter, regardless of prior involvement.

(a) 18 U.S.C. 207(c).

(b) Transactions exempted from 18 U.S.C. 207(c).

(c) No prior involvement required.

(d) Specific parties unnecessary.

(e) Element of controversy or influence required.

(f) Agency activity or interest in matter.

(g) Application or proposals for funding of research.

(h) Personal matters.

(i) Statements based on special knowledge.

(j) Measurement of one-year restriction period.

2637.205 Limitation of restrictions of 18 U.S.C. 207(c) to less than the

whole of a department or agency.

(a) Authority.

(b) Distinctions between 18 U.S.C. 207(e) and 207(d)(1)(C).

(c) Separate Statutory Components.

(1) Procedure.

(2) Standards.

(3) Effect of designation.

(d) Separate nonstatutory components.

(1) Procedure.

(2) Standards.

(3) Effect of determination.

2637.206 Exemption for scientific and technological information.

(a) Exemption.

(b) Necessary information.

(c) Intent to influence.

(d) Expert testimony.

(e) Agency responsibility for procedures.

2637.207 Exemption for persons with special qualifications in a technical discipline.

(a) Applicability.

(b) When appropriate.

(c) Certification authority.

(d) Agency registry.

2637.208 Testimony and statements under oath or subject to penalty of perjury.

(a) Statutory basis.

(b) Applicability.

(c) Statements under penalty of perjury.

2637.209 Partners of present or former government employees.

(a) Scope.

(b) Imputation.

2637.210 Officials of a state; officials of corporations created by an act of

Congress and public international organizations.

2637.211 Senior employee designations.

(a) Definitions.

(b) Designation procedures.

(1) Positions at GS - 17 and 18 level, SES and pay grades 0 - 7 and 0 - 8.

(2) Standards for designation and exemption.

(3) Senior Executive Service.

(4) ``Rate of pay''.

(c) Differential designation.

(d) Fair notice of designation.

(e) ``Acting'' or temporary positions.

(f) Special Government Employee.

(g) Publication.

(h) Computation of time.

(i) Position Shifting.

(j) Revocation of designations.

2637.212 Administrative enforcement proceedings.

(a) Basic Procedures.

(1) Delegation.

(2) Initiation of administrative disciplinary hearing.

(3) Adequate notice.

(4) Presiding official.

(5) Time, date and place.

(6) Hearing rights.

(7) Burden of proof.

(8) Hearing decision

(9) Administrative sanctions.

(10) Judicial review.

(11) Consultation and review.

2637.213 Effective date of restrictions.

(a) Persons affected.

(b) Fair notice of substantive changes.

2637.214 Separate statutory agencies: Designations.

2637.215 Separate components of agencies or bureaus:

Designations.

2637.216 ``Senior Employee'' designations.

Subpart A -- General Provisions

2637.101 Purpose and policy.

(a) Authority. Section 401(a) of the Ethics in Government Act of 1978 (the ``Act''), as amended by Public Law 100 - 598 (Nov. 3, 1988), established the Office of Government Ethics (``OGE'') as a separate agency in the executive branch, effective October 1, 1989. (OGE was formerly a part of the Office of Personnel Management (``OPM'')). Sections 402 (a) and (b) of the Act, as amended, provide that the Director of the Office of Government Ethics (``the Director'') shall provide, in consultation with OPM, overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency as defined in section 105 of title 5, United State Code, and shall propose, in consultation with the Attorney General and OPM, rules and regulations to be promulgated by the President or by OGE pertaining to conflicts of interest and ethics in the executive branch. The purpose of this part is to issue regulations prepared by the Director which give content to the restrictions on post employment activity established by title V of the Act (18 U.S.C. 207) for administrative enforcement with respect to former officers and employees of the executive branch; generally to guide agencies in

exercising the administrative enforcement authority reflected in section 18 U.S.C. 207(j); to set forth the procedures to be employed in making certain determinations and designations pursuant to the Act; and to provide guidance to individuals who must conform to the law. Criminal enforcement of the provisions of 18 U.S.C. 207 remains the exclusive responsibility of the Attorney General.

(b) Consultation with the Attorney General. In proposing these regulations, the Director consulted with the Attorney General as to the content of regulations governing substantive prohibitions as well as other matters. The Attorney General has advised that such regulations are consistent with his opinion as to the interpretation of the Act.

(c) Policy and limitations. These regulations bar certain acts by former Government employees which may reasonably give the appearance of making unfair use of prior Government employment and affiliations.

(1) When a former Government employee who has been involved with a particular matter decides to act as the representative for another person on that matter, such ``switching of sides'' undermines confidence in the fairness of proceedings and creates the impression that personal influence, gained by Government affiliation, is decisive.

(2) Similarly, when a former high-level employee assists in representing another by personal presence at an appearance before the Government regarding a matter which is in dispute, such assistance suggests an attempt to use personal influence and the possible unfair use of information unavailable to others. Different considerations are involved, however, with respect to assistance given as part of customary supervisory participation in a project funded by a Government contract or grant, since a former employee's knowledge may benefit the project and thus the Government, and regular communications with associates may properly be regarded as inherent in managerial responsibility. Such assistance, when not rendered by personal presence during an appearance, is not covered by the statute.

(3) When a former Senior Employee returns to argue a particular matter to the employee's former agency in the period immediately following the termination of official employment, it appears that Government-based relationships are being used for private ends.

(4) Former officers and employees may fairly be required to avoid such activities in the circumstances specified by statute and in these regulations.

(5) The provisions of 18 U.S.C. 207 do not, however, bar any former Government employee, regardless of rank, from employment with any private or public employer after Government service. Nor do they effectively bar employment even on a particular matter in which the former Government employee had major official involvement except in certain circumstances involving persons engaged in professional advocacy. Former Government employees may be fully active in high-level supervisory positions whether or not the work is funded by the United States and includes matters in which the employee was involved while employed by the Government. The statutory provisions are not intended to discourage the movement of skilled professionals in Government,

to and from positions in industry, research institutions, law and accounting firms, universities and other major sources of expertise. Such a flow of skills can promote efficiency and communication between the Government and private activities, and it is essential to the success of many Government programs. Instead, only certain acts which are detrimental to public confidence in the Government are prohibited.

(6) Departments and agencies have primary responsibility for the administrative enforcement of the post employment restrictions found in the Act. The Department of Justice may initiate criminal enforcement in cases involving aggravated circumstances; agency heads are required to report substantiated allegations of violations of 18 U.S.C. 207 to the Department of Justice and the Director, OGE. It is essential that title V of the Act be enforced so as to advance its objectives, which include improvement in government efficiency, equal treatment for equal claims, greater public confidence in the integrity of their government, elimination of the use of public office for private gain, and securing the integrity of the government's policy-making processes. Departments and agencies should avoid enforcement actions that do not advance these objectives but instead frustrate the Government's ability to employ the skilled persons who are needed to make the programs of the Federal Government succeed. Special attention should be given to the need to preserve the free flow of expertise, especially in scientific, technological and other technical areas, from private activities to the government.

(7) The examples contained in these regulations are intended to give guidance, but are illustrative, not comprehensive. Each agency may provide additional illustration and guidance in its own regulations, consistent with that contained herein, in order to address specific problems arising in the context of a particular agency's operations.

(8) Agencies have the responsibility to provide assistance promptly to former Government employees who seek advice on specific problems. The Office of Government Ethics will provide advice, promptly, upon request, to designated agency ethics officials in such situations, but will first coordinate with the Department of Justice on unresolved or difficult issues.

(9) These regulations do not supplant restrictions that may be contained in laws other than 18 U.S.C. 207 and do not incorporate restrictions contained in the code of conduct of a profession of which an employee may be a member.

[45 FR 7406, Feb. 1, 1980; 45 FR 9253, Feb. 12, 1980, as amended at 49 FR 33118, Aug. 21, 1984; 50 FR 1203, Jan. 10, 1985. Redesignated at 54 FR 50230, Dec. 5, 1989; 55 FR 27179, July 2, 1990; 55 FR 27933, July 6, 1990] 2637.102 Definitions.

(a) Statutory definitions. The following are defined terms which largely repeat portions of the text of the statute. They are set out here to permit a simplified presentation of statutory requirements in the regulations which follow. Other definitions, which supplement the statutory language, are listed in paragraph (b) of this section and are set forth in detail in the substantive regulations.

(1) United States or Government means any department, agency, court, court-martial, or any civil, military or naval commission of the United States, the District of Columbia, or any officer or employee thereof.

(2) Agency includes an Executive Department, a Government corporation and an independent establishment of the executive branch, which includes an independent commission. (See 18 U.S.C. 6.)

(3) Government Employee includes any officer or employee of the Executive Branch (as defined in 18 U.S.C. 202 and, e.g., 5 U.S.C. 2104 and 2105); those appointed or detailed under 5 U.S.C. 3374, and a Special Government Employee, but shall not include an individual performing services for the United States as an independent contractor under a personal service contract.

(4) Former Government Employee means one who was, and is no longer, a Government employee.

(5) Special Government Employee means an officer or employee of an agency who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed 130 days during any period of three hundred and sixty five consecutive days, temporary duties either on a full time or intermittent basis (18 U.S.C. 202).

(6) Senior Employee means an officer or employee named in, or designated by the Director pursuant to, section 207(d) of title 18 U.S.C. to whom 207(b)(ii) and (c) shall apply (See 2637.211 of this part.)

(7) Particular Government matter involving a specific party means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest.

(b) Interpretative definitions. T1 Other terms defined and interpreted in the substantive regulations are:

- (1) Acting as Agent or Attorney: (See 2637.201(b).)
- (2) Actually Pending: (See 2637.202(c).)
- (3) Communicating with Intent to Influence: (See 2637.201(b).)
- (4) Direct and Substantial Interest: (See 2637.204(f).)
- (5) Participate Personally and Substantially: (See 2637.201(d).)

(6) Particular Matter Involving a Specific Party or Parties: (See 2637.201(c).)

(7) Particular Matter (without parties): (See 2637.204(d).)

(8) Official Responsibility: (See 2637.202(b).)

(9) Rate of Pay: (See 2637.211(b)(4).)

Subpart B -- Substantive Provisions

2637.201 Restrictions on any former Government employee's acting as representative as to a particular matter in which the employee personally and substantially participated.

(a) Basic prohibition of 18 U.S.C. 207(a). No former Government employee, after terminating Government employment, shall knowingly act as agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person (1) to the United

States, (2) in connection with any particular Government matter involving a specific party, (3) in which matter such employee participated personally and substantially as a Government employee.

(b) Representation: Acting as agent or attorney, or other representative in an appearance, or communicating with intent to influence --

(1) Attorneys and agents. The target of this provision is the former employee who participates in a particular matter while employed by the Government and later ``switches sides'' by representing another person on the same matter.

[NOTE: The examples in these regulations do not incorporate the special statutory restrictions on Senior Employees, except where the terms ``Senior Employee'' or ``Senior'' are expressly used.]

Example 1: A lawyer in the Department of Justice personally works on an antitrust case involving Q Company. After leaving the Department, he is asked by Q Company to represent it in that case. He may not do so.

(2) Others. The statutory prohibition covers any other former employee, including managerial and technical personnel, who represents another person in an appearance or, by other communication, attempts to influence the Government concerning a particular matter in which he or she was involved. For example, a former technical employee may not act as a manufacturer's promotional or contract representative to the Government on a particular matter in which he or she participated. Nor could such employee appear as an expert witness against the Government in connection with such a matter. (See 2637.208 for specific rules relating to expert witnesses.)

(3) Appearances; communications made with intent to influence. An appearance occurs when an individual is physically present before the United States in either a formal or informal setting or conveys material to the United States in connection with a formal proceeding or application. A communication is broader than an appearance and includes for example, correspondence, or telephone calls.

Example 1: An appearance occurs when a former employee meets with an agency employee personally to discuss a matter; or when he submits a brief in an agency administrative proceeding in his own name.

Example 2: A former employee makes a telephone call to a present employee to discuss a particular matter that is not the subject of a formal proceeding. She has made a communication.

(4) Government visits to others premises. Neither a prohibited appearance nor communication occurs when a former Government employee communicates with a Government employee who, at the instance of the United States, visits or is assigned to premises leased to, or owned or occupied by, a person other than the United States which are or may be used for performance under an actual or proposed contract or grant, when such communication concerns work performed or to be performed and occurs in the ordinary course of evaluation, administration, or performance of the actual or proposed contract or grant.

(5) Elements of ``influence'' and potential controversy required. Communications which do not include an ``intent to

influence'' are not prohibited. Moreover, acting as agent or attorney in connection with a routine request not involving a potential controversy is not prohibited. For example, the following are not prohibited: a question by an attorney as to the status of a particular matter; a request for publicly available documents; or a communication by a former employee, not in connection with an adversary proceeding, imparting purely factual information. (See also 2637.204(d) of this part.)

Example 1: A Government employee, who participated in writing the specifications of a contract awarded to Q Company for the design of certain education testing programs, joins Q Company and does work under the contract. She is asked to accompany a company vice-president to a meeting to state the results of a series of trial tests, and does so. No violation occurs when she provides the information to her former agency. During the meeting a dispute arises as to some terms of the contract, and she is called upon to support Q Company's position. She may not do so. If she had reason to believe that the contractual dispute would be a subject of the meeting, she should not have attended.

(6) Assistance. A former employee is not prohibited from providing in-house assistance in connection with the representation of another person.

Example 1: A Government employee administered a particular contract for agricultural research with Q Company. Upon termination of her Government employment, she is hired by Q Company. She works on the matter covered by the contract, but has no direct contact with the Government. At the request of a company vice-president, she prepares a paper describing the persons at her former agency who should be contacted and what should be said to them in an effort to increase the scope of funding of the contract and to resolve favorably a dispute over a contract clause. She may do so.

(7) Project responses not included. In a context not involving a potential controversy involving the United States no finding of a ``intent to influence'' shall be based upon whatever influential effect inheres in an attempt to formulate a meritorious proposal or program.

Example 1: The employee of Q Company in the previous example is asked to design an educational testing program, which she does and transmits it to the Government. This is not prohibited despite the fact that her well-designed program may be inherently influential on a question of additional funding under the contract. She may not argue for its acceptance.

(c) ``Particular matter involving a specific party or parties''

--

(1) Specific matters vs. policy matters. The prohibitions of subsections (a) and (b) of 18 U.S.C. 207, are based on the former Government employee's prior participation in or responsibility for a ``judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties'' in which the United States is a party or has a direct and substantial interest. Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable

transaction or related set of transactions between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. Therefore, a former Government employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding.

Example 1: A Government employee formulated the policy objectives of an energy conservation program. He is not restricted from later representing a university which seeks a grant or contract for work emerging from such a program.

Example 2: A Government employee reviews and approves a specific city's application for Federal assistance for a renewal project. After leaving Government service, she may not represent the city in relation to that project.

Example 3: An employee is regularly involved in the formulation of policy, procedures and regulations governing departmental procurement and acquisition functions. Participation in such activities does not restrict the employee after leaving the Government as to particular cases involving the application of such policies, procedures, or regulations.

Example 4: An employee of the Office of Management and Budget participates substantially on the merits of a decision to reduce the funding level of a program, which has the effect of reducing the amount of money which certain cities receive to conduct youth work programs. After leaving the Government she may represent any of the cities in securing funds for its youth program, since her participation was in connection with a program, not a particular matter involving specific parties.

Example 5: An agency attorney participates in drafting a standard form contract and certain ``standard terms and clauses'' for use in future contracts. He is not thereafter barred from representing a person in a dispute involving the application of such a ``standard term or clause'' in a particular contract in which he did not participate as a Government employee.

(2) Technical matters. In connection with technical work, participation in projects generally involving one or more scientific or engineering concepts, in feasibility studies, or in proposed programs prior to the formulation of a contract will not restrict former Government employees with respect to a contract or specific programs entered into at a later date.

Example 1: A Government employee participates significantly in formulating the ``mission need'' of a project pursuant to OMB Circular No. A

- 109, and the award of a contract to Z Company, the purpose of which is to propose alternative technical approaches. He is not barred, after leaving Government service, from representing Q Company which later seeks a contract to manufacture one of the systems suggested by the Z Company.

Example 2: A Government employee, who has worked for years on the design of a new satellite communications system, joins C Company. Later, the Government issues a ``request for proposals'' (``rfp'') to construct the new system, which is circulated generally to industry. The employee proposes to act as C

Company's representative in connection with its anticipated proposals for the contract. He may do so. The satellite contract became a particular matter when the rfp was being formulated; it would ordinarily not become one involving a specific party or parties until initial proposals or indications of interest therein by contractors were first received. Moreover, if the employee's work for C Company were limited to the formulation and communication of a proposal in response to the rfp, it would not be prohibited to the extent it involved a communication for the purpose of furnishing scientific or technological information to the Government, exempt under 18 U.S.C. 207(f). See 2637.206 below. (See paragraph (3) below as to a case where the employee's own participation may cause a different result.)

(3) Relationship of personal participation to specificity. In certain cases, whether a matter should be treated as a ``particular matter involving specific parties'' may depend on the employee's own participation in events which give particularity and specificity to the matter in question. For example, if a Government employee (i) personally participated in that stage of the formulation of a proposed contract where significant requirements were discussed and one or more persons was identified to perform services thereunder and (ii) actively urged that such a contract be awarded, but the contract was actually awarded only after the employee left, the contract may nevertheless be a particular matter involving a specific party as to such former Government employee.

Example 1: A Government employee advises her agency that it needs certain work done and meets with private firm X to discuss and develop requirements and operating procedures. Thereafter, the employee meets with agency officials and persuades them of the need for a project along the lines discussed with X. She leaves the Government and the project is awarded by other employees to firm X. The employee is asked by X to represent it on the contract. She may not do so.

(4) The same particular matter must be involved. The requirement of a ``particular matter involving a specific party'' applies both at the time that the Government employee acts in an official capacity and at the time in question after Government service. The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

Example 1: A Government employee was substantially involved in the award of a long-term contract to Z Company for the development of alternative energy sources. Six years after he terminates Government employment, the contract is still in effect, but much of the technology has changed as have many of the personnel. The Government proposes to award a ``follow on'' contract, involving the same objective, after competitive bidding. The employee may represent Q Company in its proposals for the follow-on contract, since Q Company's proposed contract is a different matter from the contract with Z Company. He may also represent Z Company in its efforts to continue as

contractor, if the agency determines on the basis of facts referred to above, that the new contract is significantly different in its particulars from the old. The former employee should first consult his agency and request a written determination before undertaking any representation in the matter.

Example 2: A Government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the initial wiretap application. The reason is that the validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved. Other examples: See 2637.201(b)(1), Example 1, and (c), Example 2.

(5) United States must be a party or have an interest. The particular matter must be one in which the United States is a party, such as in a judicial or administrative proceeding or a contract, or in which it has a direct and substantial interest. The importance of the Federal interest in a matter can play a role in determining whether two matters are the same particular matter.

Example 1: An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. Nor may she represent X Company in that matter. The interest of the United States in preventing both inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if the Government's antitrust investigation or case is closed, the United States no longer has a direct and substantial interest in the case.

Example 2: A member of a Government team providing technical assistance to a foreign country leaves and seeks to represent a private contractor in making arrangements with the Government to perform the same service. The proposed new contract may or may not be considered a separate matter, depending upon whether the United States has a national interest in maintaining the original contract. The agency involved must be consulted by the former employee before the representation can be undertaken.

(d) ``Participate personally and substantially'' -- (1) Basic requirements. The restrictions of section 207(a) apply only to those matters in which a former Government employee had ``personal and substantial participation,'' exercised ``through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise.'' To participate ``personally'' means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. ``Substantially,'' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not

only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. It is essential that the participation be related to a ``particular matter involving a specific party.'' (See paragraph (c) of this section.) (See also 2637.203(f) of this part.)

Example 1: If an officer personally approves the departmental budget, he does not participate substantially in the approval of all items contained in the budget. His participation is substantial only in those cases where a budget item is actually put in issue. Even then, the former Government employee is not disqualified with respect to an item if it is a general program rather than a particular matter involving a specific party. The former Government employee may, however, have official responsibility for such matters. (See 2637.202(b).)

Example 2: A Government lawyer is not in charge of, nor has official responsibility for a particular case, but is frequently consulted as to filings, discovery, and strategy. Such an individual has personally and substantially participated in the matter.

(2) Participation on ancillary matters. An employee's participation on subjects not directly involving the substantive merits of a matter may not be ``substantial,' even if it is time-consuming. An employee whose responsibility is the review of a matter solely for compliance with administrative control or budgetary considerations and who reviews a particular matter for such a purpose should not be regarded as having participated substantially in the matter, except when such considerations also are the subject of the employee's proposed representation. (See 2637.202(b)(3) of this part.) Such an employee could theoretically cause a halt in a program for noncompliance with standards under his or her jurisdiction, but lacks authority to initiate a program or to disapprove it on the basis of its substance.

(3) Role of official responsibility in determining substantial participation. ``Official responsibility'' is defined in 2637.202(b)(1). ``Personal and substantial participation'' is different from ``official responsibility.'' One's responsibility may, however, play a role in determining the ``substantiality'' of an employee's participation. For example, ordinarily an employee's forbearance on a matter is not substantial participation. If, however, an employee is charged with responsibility for review of a matter and action cannot be undertaken over his or her objection, the result may be different. If the employee reviews a matter and passes it on, his or her participation may be regarded as ``substantial'' even if he or she claims merely to have engaged in inaction.

(e) Agency responsibility in complex cases. In certain complex factual cases, the agency with which the former Government employee was associated is likely to be in the best position to make a determination as to certain issues, for example, the identity or existence of a particular matter. Designated agency ethics officials should provide advice promptly to former

Government employees who make inquiry on any matter arising under these regulations.

2637.202 Two-year restriction on any former Government employee's acting as representative as to a particular matter for which the employee had official responsibility.

(a) Basic prohibition of 18 U.S.C. 207(b)(i). No former Government employee, within two years after terminating employment by the United States, shall knowingly act as agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person (1) to the United States, (2) in connection with any particular Government matter involving a specific party (3) if such matter was actually pending under the employee's responsibility as an officer or employee within period of one year prior to the termination of such responsibility.

(b) ``Official responsibility'' -- (1) Definition. ``Official responsibility'' is defined in 18 U.S.C. 202 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 actions.''

(2) Determining official responsibility. Ordinarily, the scope of an employee's ``official responsibility'' is determined by those areas assigned by statute, regulation, Executive Order, job description or delegation of authority. All particular matters under consideration in an agency are under the ``official responsibility'' of the agency head, and each is under that of any intermediate supervisor having responsibility for an employee who actually participates in the matter within the scope of his or her duties.

(3) Ancillary matters and official responsibility. ``Administrative'' authority as used in the foregoing definition means authority for planning, organizing and controlling matters rather than authority to review or make decisions on ancillary aspects of a matter such as the regularity of budgeting procedures, public or community relations aspects, or equal employment opportunity considerations. Responsibility for such an ancillary consideration does not constitute responsibility for the particular matter, except when such a consideration is also the subject of the employee's proposed representation.

Example 1: An agency's comptroller would not have official responsibility for all programs in the agency, even though she must review the budget, and all such programs are contained in the budget.

Example 2: Within two years after terminating employment, an agency's former comptroller is asked to represent Q Company in a dispute arising under a contract which was in effect during the comptroller's tenure. The dispute concerns an accounting formula, under the contract, a matter as to which a subordinate division of the comptroller's office was consulted. She may not represent Q Company on this matter.

(4) Knowledge of matter pending required. In order for a former employee to be barred from representing another as to a particular matter, he or she need not have known, while employed

by the Government, that the matter was pending under his or her official responsibility. However, the former employee is not subject to the restriction unless at the time of the proposed representation of another, he or she knows or learns that the matter had been under his or her responsibility. Ordinarily, a former employee who is asked to represent another on a matter will become aware of facts sufficient to suggest the relationship of the prior matter to his or her former agency. If so, he or she is under a duty to make further inquiry, including direct contact with an agency's designated ethics official where the matter is in doubt.

(5) Self-disqualification. A former employee cannot avoid the restrictions of this section on the ground by self-disqualification with respect to a matter for which he or she otherwise had official responsibility. However, self-disqualification is effective to eliminate the restriction of section 207(a).

(c) ``Actually pending.'' ``Actually pending'' means that the matter was in fact referred to or under consideration by persons within the employee's area of responsibility, not that it merely could have been.

Example 1: A staff lawyer in a department's Office of General Counsel is consulted by procurement officers on the correct resolution of a contractual matter involving Q Company. The lawyer renders an opinion resolving the question. The same legal question arises later in several contracts with other companies, but none of the disputes with such companies is referred to the Office of the General Counsel. The General Counsel has official responsibility for the determination of the Q Company matter. The other matters were never ``actually pending'' under that responsibility, although as a theoretical matter, such responsibility extended to all legal matters within the department.

(d) Other essential requirements. All other requirements of the statute must be met before the restriction on representation applies. The same considerations apply in determining the existence of a ``particular matter involving a specific party,' ' a representation in an ``appearance,' ' or ``intent to influence,' ' and so forth as set forth under 2637.201 of this part.

Example 1: During her tenure as head of an agency, an officer's subordinates undertook major changes in agency enforcement standards involving occupational safety. Eighteen months after terminating Government employment, she is asked to represent Z Company which believes it is being unfairly treated under the enforcement program. The Z Company matter first arose on a complaint filed after the agency head terminated her employment. She may represent Z Company because the matter pending under her official responsibility was not one involving ``a specific party.' ' (Moreover, the time-period covered by 18 U.S.C. 207(c) has elapsed.)

(e) Measurement of two-year restriction period. The statutory two-year period is measured from the date when the employee's responsibility in a particular area ends, not from the termination of Government service, unless the two occur simultaneously. The prohibition applies to all particular matters

subject to such responsibility in the one-year period before termination of such responsibility.

Example 1: The Director, Import/Export Division of A Agency retires after 26 years of service and enters private industry as a consultant. He will be restricted for two years with respect to all matters which were actually pending under his official responsibility in the year before his retirement.

Example 2: An employee transfers from a position in A Agency to a position in B Agency, and she leaves B Agency for private employment 9 months later. In 15 months she will be free of restriction insofar as matters which were pending under her responsibility in A Agency in the year before her transfer. She will be restricted for two years in respect of B Agency matters which were pending in the year before her departure for private employment. 2637.203 Two-year restriction on a former senior employee's assisting in representing as to a matter in which the employee participated personally and substantially.

(a) Basic prohibition of 18 U.S.C. 207(b)(ii). No former Senior Employee (see 2637.102(a)(6)), within two years after terminating employment by the United States, shall knowingly represent or aid, counsel, advise, consult, or assist in representing any other person by personal presence at any formal or informal appearance, (1) before the United States, (2) in connection with any particular Government matter involving a specific party, (3) in which matter he or she participated personally and substantially.

(b) Limitation to ``representational'' assistance by ``personal presence'' at an appearance. Section 207(b)(ii) is limited to assistance ``in representing'' another person by ``personal presence'' at an ``appearance'' before the United States. Different in scope from sections 207(a) and 207(b)(i), it does not apply to assistance in connection with an oral or written communication made with an intent to influence which does not involve an appearance. Nor does it bar assistance in preparation for either a formal or informal personal appearance or an appearance by written submission in a formal proceeding where the former employee is not personally present before the Government or a Government employee. The provision is designed to prevent the former Senior Employee from playing any auxiliary role during a negotiation proceeding or similar transaction with the Government so that he or she does not appear to be lending personal influence to the resolution of a matter and cannot do so in fact.

Example 1: A former Senior Employee makes suggestions as to the content of a letter to be sent to the Government on a matter in which he had participated. No violation occurs.

(c) Managerial and other off-scene assistance. The statute does not prohibit a former Senior Employee's advice and assistance to his or her organization's representatives which does not involve his or her personal presence at an appearance before the Government. The former Senior Employee's preparation of documents to be presented in any formal or informal proceeding does not constitute personal presence at an appearance, even where submission of such a document might technically constitute an appearance.

Example 1: A former Senior Employee attends a hearing on a matter in which she had participated personally and substantially while in the Government. She speaks with the representative of a private party during the hearing. A violation occurs if the former Senior Employee lends assistance to the representative in that conversation.

Example 2: A Senior Justice Department lawyer personally works on an antitrust case against Z Company. After leaving the Department, she is asked to discuss legal strategy with lawyers representing Z Company on that same antitrust case, to write portions of a brief and to direct the research of the staff working on the case. Any such aid would not be prohibited by the statute, but would likely be prohibited by professional disciplinary rules.

(d) Representational assistance. The statute seeks to prevent a former Senior Employee from making unfair use of his or her prior governmental position by prohibiting all forms of assistance in the representation of another when personally present at an appearance, including giving advice as to how the representation in an appearance should be conducted, supplying information, participating in drafting materials, or dealing with forensic or argumentative matters (such as testimony, methods of persuasion, or strategy of presentation).

(e) Measurement of restriction period. The statutory two-year period is measured from the date of termination of employment in the Senior Employee position held by the former employee when he or she participated personally and substantially in the matter involved. (cf. 2637.202(e))

(f) Other Essential Requirements. All conditions of the statutory prohibition must be met. Specifically, the former employee, (1) must have been a ``Senior Employee,'' (2) who ``participated personally and substantially'' (See 2637.201(d) of this part) in (3) a ``particular matter involving a specific party.'' (See subpart 2637.201(c) of this part.)

(g) General Examples:

Example 1: A Senior Federal Trade Commission Employee, an economist by profession, participates in an investigation involving X Company, and a proceeding is commenced against X Company based on the investigation. After leaving the Commission, he offers to serve as a consultant to the lawyers for X Company on certain economic matters involved in the proceeding. He attends the proceeding and at the close of each day, meets in the lawyers' office to advise them. Such conduct violates the statute.