

## Office of Government Ethics

84 x 16 -- 12/17/84

### Letter to a DAEO dated December 17, 1984

In your letter of November 26, 1984, you requested an opinion as to whether [a] former [attorney with your agency], now in private practice, would violate the post-employment conflict of interest provisions of 18 U.S.C. § 207(a) by representing [a corporation] in the remand from an earlier proceeding in which he served as [an attorney] for the [agency]. We have reviewed your letter and the accompanying documents and, for the reasons stated below, we are of the opinion that 18 U.S.C. § 207(a) prevents [the former employee] from representing [the corporation] in the upcoming proceeding before the [agency].

#### Facts

From [mid] 1978 through [mid] 1981, [the individual in question] served as [a supervisory attorney in your agency]. During his tenure, [he] participated in an action brought before the [agency] by [two] petitioners, [Petitioner 1] and [Petitioner 2]. In that action, the petitioners argued that [the corporation in question's] commercial paper activities violated the Glass-Steagall Act and requested that the [agency] prohibit [the corporation] from selling third party commercial paper. The petitioners based their argument on sections 161 and 212 of the Glass-Steagall Act. In essence, section 16 forbids a bank to "underwrite any issue of securities or stock," and section 21 prohibits banks from "issuing, underwriting, selling, or distributing . . . stocks, bonds, debentures, notes or other securities." (Emphasis added.) Based upon these sections of the Act, the petitioners viewed the [corporation's] commercial paper activities as raising two principal legal issues: (1) whether commercial paper is a security, and (2) whether [the corporation's] activities with respect to commercial paper constitute underwriting, distributing, or selling.

In their submissions to the [agency], the petitioners provided legal and policy arguments on both the "security" issue and the "underwriting" issue. They also discussed the specific methods and procedures used by [the corporation] in selling commercial paper in order to determine whether the Glass-Steagall Act covered the activities in question. [In his

position with the agency, this individual] assisted in the review of [the corporation's] activities and in the preparation and presentation of the Legal Division's opinion to the [agency].

[In the Fall of] 1980, based upon the report from its Legal Division, the [agency] found the stronger legal argument in the case to be that the financing instrument commonly referred to as commercial paper is not a "security" within the meaning of the Glass-Steagall Act and is thereby not subject to the prohibitions of the Act. Therefore, the [agency] found it unnecessary to determine whether the selling method employed by [the corporation] constitutes "underwriting" or some other prohibited activity under the Glass-Steagall Act.

Following the [agency's] decision, [the two petitioners] filed requests to stay and to reconsider the decision, but the [agency] denied those requests. Then [the petitioners] brought separate actions in the district court against the [agency] seeking declaratory and injunctive relief with respect to the [agency's] determination that commercial paper sold by [the corporation] is not a security for purposes of the Glass-Steagall Act. Uncertain as to the proper forum for judicial review, [the two petitioners] simultaneously filed petitions for review in the Court of Appeals for the District of Columbia. The court of appeals stayed the direct review proceedings pending resolution of the district court actions.

[In] 1981, the district court issued a declaratory judgment that the [agency's] determination was null and void and rejected the [agency's] findings that notes representing commercial transactions are not securities under the Glass-Steagall Act. From the judgment of the district court, the [agency] appealed, and [Petitioner 2] cross-appealed. The court of appeals overturned the district court decision and upheld the [agency's] determination.

Based on the petition of [the two initial petitioners], the Supreme Court granted certiorari. [In] 1984, the Court rejected the opinion of the court of appeals and remanded the case to the district court for a decision on the issue of whether [the corporation's] activities constitute underwriting. By order dated October 19, 1984, the district court remanded the case to the [agency] where future action is imminent.

[The individual] who served as [an attorney] for the [agency]

in the aforementioned case, now seeks to represent [the corporation] in the upcoming [agency] proceeding resulting from the Court's remand of that case. The initial case and the remand have the same factual basis, but the upcoming proceeding will center around the issue of "underwriting" which was raised but not decided in the first case.

## **Discussion**

In order to determine whether [the individual] is barred from representing [the corporation] before the [agency] in upcoming proceedings on the issue of whether [the corporation's] commercial paper activities constitute "underwriting," we must analyze the situation under 18 U.S.C. § 207(a) and 5 C.F.R. § 737.5. One should note that the above-cited provisions do not prohibit [the individual] from accepting employment with or from providing in-house assistance to any organization regardless of dealings with that organization while a Government employee. 5 C.F.R. § 737.5(b)(6). The provisions of 18 U.S.C. § 207 will, however, restrict [his] representational activities on behalf of [the corporation] to the Government, in this case the [agency].

Section 207(a) provides, in part, that a former officer or employee of the Government may not knowingly act as agent or attorney for anyone, except the United States,

(2) in connection with 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, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed . . . . (Emphasis added.)

In analyzing this case, we will consider the following four issues set forth in the above-cited provisions:

1. Whether [the individual] participated personally and substantially as [in his official position] in the

initial [agency] proceedings brought by [the two petitioners] involving [the corporation];

2. Whether the United States is a party or has a direct and substantial interest in the matter;
3. Whether the proceeding was a particular matter involving a specific party; and
4. Whether the remand on the issue of underwriting is the same particular matter as the initial proceeding.

First, based upon the information contained in the background statement provided by the Office of General Counsel of the [agency], this Office concludes that [the individual] participated "personally and substantially" in the [agency's] proceeding. As stated in section 207(a)(3), personal and substantial participation occurs through "decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed." In light of that definition, [he] participated personally and substantially by rendering legal advice and recommendations to the [agency].

Second, the Federal Government, although not a party, maintains an interest in both proceedings because the issues revolve around the application of the Glass-Steagall Act. The Government has a direct and substantial interest in the consistent application of the Act in the area of commercial paper so that the ultimate decision serves the public policies behind the Act.

Third, the phrase "particular matter" as used in 18 U.S.C. § 207 typically means a particular contract, a particular case, or particular proceeding.<sup>3</sup> The [agency] proceeding in this situation clearly meets the "particular matter" standard as it is a particular case or proceeding and not merely a matter of general application.

As used in section 207(a), the phrase "particular matter" is restricted by the modifying phrase "involving a specific party or parties." 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.<sup>4</sup> In the present case, [the two petitioners] and [the corporation] are identified as parties to

the initial proceeding. Therefore, the proceeding before the [agency] constituted a "particular matter involving a specific party" during the time of [the individual's] Government service and continues as such now when [the individual] seeks to represent [the corporation] in the case on remand.

The key in determining [the individual's] ability to represent [the corporation] in the upcoming proceeding on the issue of underwriting is whether it constitutes the same particular matter as that in which he had participated with the [agency]. Our regulations at 5 C.F.R. § 737.5(c)(4) explain this concept as follows:

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. (Emphasis added.)

The background information provided to us by the Office of General Counsel indicates that the upcoming proceeding on the issue of "underwriting" is the result of the Supreme Court's remand of the first proceeding. As a result, the issues in the two proceedings are closely related. In the first proceeding, the petitioners alleged that [the corporation's] commercial paper activities violated the Glass-Steagall Act. In asserting that claim, the petitioners set forth two decisive issues: (1) whether commercial paper is a "security" and thereby subject to the Act's coverage, and (2) whether [the corporation's] activities with respect to commercial paper constitute underwriting, distributing, or selling securities. Although the [agency] ultimately based its decision that [the corporation] was not violating the Act on its view that commercial paper did not fall within the Act's definition of security, the arguments before the [agency] covered both of the stated issues and the public policy behind limiting the role of banks in commercial paper activities.

As demonstrated in the above summary of the issues involved in the two cases, the second proceeding is merely a continuation "in another form or in part" of the particular matter involved in the first case: the determination of whether the commercial

paper activities conducted by [the corporation] violate the Glass-Steagall Act. Each stage of this case before the [agency] revolves around the same particular matter for the purposes of 18 U.S.C. § 207(a). Under the standards of paragraph (c)(4) of 5 C.F.R. § 737.5, this particular matter involving the commercial paper activities of [the corporation] concerns the continuing existence of an important Federal interest involving the same party in the same underlying factual and adjudicatory context.

Because of the significant overlap in facts, issues, and parties, the two proceedings constitute the same particular matter as described in 5 C.F.R. § 737.5(c)(4). As a result, [the individual] should not represent [the corporation] in the upcoming proceeding before the [agency].

Since this Office does not have jurisdiction to render opinions on the specific application of codes of professional conduct which may pertain to [the individual] or counsel with whom he is associated, this Office suggests that he consult the appropriate bar association office with any further questions along these lines.

We hope you find this information helpful.

Sincerely,

David H. Martin  
Director

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**1** 12 U.S.C. § 24 Seventh.

**2** 12 U.S.C. § 378.

**3** B. Manning, Federal Conflict of Interest Law 55 (1964).

**4** 5 C.F.R. § 737.5(c)(4).