

Office of Government Ethics

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Letter to an Alternate Designated Agency Ethics Official
dated November 12, 1999

You have requested the Office of Government Ethics' (OGE) advice on whether 18 U.S.C. § 207(a)(1) and (a)(2) would restrict certain post-employment activities of [the] former [head of your agency] and another former [agency official], in connection with [a specific] Program. In particular, you have asked whether the [Program] was a particular matter involving specific parties at the time [the former agency head] and [the former official] worked on the program as employees of the [agency]; whether their involvement in the [Program] was personal and substantial; and whether the [Program] was under the "official responsibility" of [the former agency head] during his last year [in that position].

[The former agency head] and [the former official] have become directors of [Company A], a company that has recently obtained approval for public distribution of products from the [agency] under the [Program], as discussed in more detail below. Although neither [the former agency head] nor [the formal official] has requested advice as to the propriety of specified representative activity in connection with the [Program], you anticipate that they may seek your advice.

As no particular proposed representative activity has been identified, you have not presented the issue of whether the matter in which representational activity would occur is the same particular matter involving specific parties that the employees may have worked on personally and substantially while they were employees of the [agency]. As a result, when an actual inquiry materializes, you will need to consider whether the matter in which proposed representational activity is to occur is the same particular matter involving specific parties the employees worked on while employees.

Determinations of whether section 207 would apply to representative activity of a former employee depends on the facts in each instance. Because each agency is familiar with its own programs, the agency typically is in the best position to make a prospective determination on matters such as whether

a particular matter is one that involves specific parties or whether an employee's involvement in that matter is personal and substantial.

Your submission, including the various enclosures, describes a scenario which is complex for purposes of giving section 207 advice. The [agency] was developing and implementing the [Program], a regulatory program, with the involvement of the private sector; at the same time, certain companies were developing and seeking approval of products that would be subject to the [Program's] regulatory program. In response to your request, we offer our views to assist you in your provision of section 207 advice to your former employees.

BACKGROUND

From the materials you provided, it appears that the [agency] has for several years been working on the development of electronic [products] using personal computers. Discussions with potential providers of [information-based] products date back as far as early 1993. The [Program] did not congeal into a specific agency program until late 1994 or early 1995. The [agency] has described the [Program] as an initiative supporting the development and implementation of a new form of [the product]. [Particulars of the program omitted.] Associated with the [Program] project has been the issuance by the [agency] of a number of performance criteria for the [product] itself and for several other aspects of the [Program], [particulars omitted].

The goal for [the Program] is to provide an environment in which customers can apply [the product] through new technologies that improve [product] revenue security. The [Program product] is expected eventually to replace all [products] that rely on [a certain] technology. This requires a new form of [product] and the adoption of standards to facilitate industry investment and product development.

In addition to specifications, the [agency] has issued a proposed rule concerning possible changes to [a] Manual and [a] title of the Code of Federal Regulations to reflect policies and regulations pertaining to the [Program]. The [Manual] pertains to customer requirements (including the licensing of [Program] products to customers) and the changes to the Code of Federal Regulations involve requirements such as authorization to manufacture and distribute products, product testing and approval, security standards and financial arrangements. The

[agency] has published in the Federal Register several notices pertaining to the [Program], including notices for: (1) proposed [Program] specifications, (2) a proposed rule on the Manufacture, Distribution, and Use of [Product] Security Devices and Information-Based [Product], and (3) public meetings regarding [the Program].

The [agency] is the regulator for products that will deliver [products] through personal computers. As you stated in your submission, "[i]t is important to note that the [agency's] role in the [Program] has been, and continues to be, as the regulator for, NOT as a procurer of, [specific] products for [agency] use." It is, however, possible that the [agency] could procure [information-based] products at some future date.

In its capacity as regulator, the [agency] has been in close contact with the private sector throughout the development of the various policies and specifications concerning [the Program]. And as the private sector has been developing the technology, it has had a substantial interest in the generation of the [agency's Program] regulatory framework. Part of the [agency's] strategy in developing the [Program] regulatory parameters was to engage the private sector in discussions about the developing technology and to use the private development and submission of products to assist in the development of the parameters.

From the outset of the [Program], various companies participated in discussions with [agency] employees about the concept of [the] electronic [product], especially concerning general security and authenticity concerns. Also, potential product service providers have been in contact with the [agency] with respect to the development of technologies to implement [an information-based product] and how the product submission process will work. In response to the [agency's] suggestion to submit products and designs to the [agency] for review, one potential provider, [Company B], submitted a device design in January 1995 and submitted a device for testing in September 1995.

By the end of 1998, the [agency] had approved for testing the products of four companies, [Company B], [Company X], (which subsequently became [Company A]), [Company C] and [Company D]. In May 1999, the [agency] approved [Company B] and [Company A] for the final stages of testing, the last step before [specific] products become commercially available to the public. On August

9, 1999, the [agency] approved [Company B] and [Company A] for national distribution.

You have focused on the involvement of [the former official] and [the former agency head] in [Program] matters while they were employed with the [agency]. [The former official] was involved in some of the discussions relating to [the specific product]; the primary person with responsibility over the [Program] reported to [the former official] through [an employee], who directly reported to [the former official]; and he received periodic briefings on [Program] matters.

[The former agency head] was present during a number of Board meetings beginning in 1995 at which [Program] presentations were made. In 1996, [the former agency head] personally directed [agency] staff to develop a specific time line for getting [specific] product proposals submitted, reviewed and approved. In 1998, [the former agency head] participated in a [public] ceremony to announce approval of the first [product] for market testing. He accepted the first [sample of the product] from the founder of [Company B], whose product was the first to receive preliminary approval.

PARTICULAR MATTER INVOLVING SPECIFIC PARTIES

You have inquired as to whether the [Program] was a particular matter involving parties during the time [the former agency head] and [the former official] were involved in [Program] activities. A "particular matter involving specific parties" is described in 5 C.F.R. § 2637.201(c).¹ Section 201(c)(1) states that such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions

¹ The regulatory guidance now published at 5 C.F.R. part 2637 relates to 18 U.S.C. § 207 as it was in effect prior to January 1, 1991, and continues to apply to individuals terminating Government service before that date. Until OGE completes the new regulation at 5 C.F.R. part 2641 that will eventually reflect all amendments to section 207 enacted by the Ethics Reform Act of 1989 and thereafter, we have advised that "[e]xcept where the underlying statutory provision has changed, part 2637 remains persuasive concerning the interpretation of the newer version of 18 U.S.C. § 207." Office of Government Ethics Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (Nov. 5, 1992).

between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. Involvement in stages of the formulation of a proposed contract where significant requirements were discussed with persons identified as potentially fulfilling services under the contract could be a particular matter involving specific parties. See 5 C.F.R. § 2637.201(c). Ordinarily, a contract would not become a particular matter involving specific parties until contractors' indications of interest or proposals were received. See 5 C.F.R. § 2637.201(c)(2), Example 2.

If private sector entities comment on regulatory or policy development, that does not, in the normal case, make the regulatory

or policy development a particular matter involving specific parties. Based on the facts described in your submission, we believe that the overall [Program] activity was not a particular matter involving specific parties; the [Program] appears to be a major program of the [agency] designed to implement broad objectives. The fact that private parties have been involved in the process of the development of the broad objectives of development of a regulatory framework for the submission of applications by companies for approval does not make the overall program a particular matter involving specific parties.

However, the facts you have presented seem slightly different because it appears that companies have been simultaneously making generic comments and discussing specific products with an eye toward approval. While work on the overall matter should not be considered to be a particular matter involving specific parties, the submission of a particular product for approval by the [agency] for the issuance of [the product] would be a particular matter involving specific parties. Each of the applications for approval of products by each of the potential service providers would, like a license application, be a particular matter involving specific parties. Under the circumstances you described, it appears that the collective applications would not be all the same particular matter.

When a particular matter involving specific parties begins, depends on the facts. Dealings with a particular company prior to its submission of an application may be part of a particular matter involving specific parties. Where a company engaged in

extensive discussions with the [agency] about the development of a product to be submitted for approval, it would be perfunctory and rather mechanical to say that the matter began with the submission of an application or the product for approval and not at some earlier time.

Your submission describes contact and active discussion between some of the potential product providers and the [agency] for years about creating [information-based] products. Where a company was involved in discussing the development of its technology and a specific product with a view towards submitting a product for approval, those discussions would be part of a particular matter involving specific parties. If a result of those discussions was the submission of a product for approval, the process of review and approval of the product would be part of the same particular matter involving specific parties as the earlier discussions pertaining to such a product.

Depending on their content, different discussions between private entities and the [agency] in connection with the [Program] could have different ramifications for purposes of the particular matter involving specific party determination. Some of the comments and discussions were held with companies apart from the companies' development of products for approval. Other discussions would have been made in the context of a company's development of a product or technology for which approval would be sought.

Accordingly, while the overall [Program] was not a particular matter involving specific parties, several particular matters involving specific parties resulted from [the Program]. From your submission, it appears that four such matters may have developed: those involving [Company B, Company A, Company D, and Company C]. There may well be other particular matters involving specific parties not identified in your submission. These matters may have developed at the time a product was submitted or a design for a product was submitted, or earlier, such as when the companies were engaged in discussions with the [agency] with a mind toward submitting a product for approval. Any [agency] employee who participated personally and substantially in those matters would be subject to the 18 U.S.C. § 207(a)(1) permanent bar for the pendency of the matter.

If the two former employees worked personally and

substantially on the [Company A] approval matter, they would be permanently barred from making representations on behalf of [Company A] with respect to that matter.

PERSONAL AND SUBSTANTIAL PARTICIPATION

If the [Program] is not itself a particular matter involving specific parties, the inquiry turns to whether [the former official] and [the former agency head] participated personally and substantially in any of the separate particular matters involving specific parties concerning the application process under the [Program].

For the prohibition of 18 U.S.C. § 207(a)(1) to apply, the former employee must have participated personally and substantially in a covered matter. To participate personally means to participate directly; to participate substantially means that the employee's involvement is of significance to the matter. See 5 C.F.R. § 2637.201(d).

Generally speaking, an employee who was concerned only with the [agency's] role as a regulator of the [Program] and who had no involvement in matters pertaining to particular companies would not

be subject to the bar of section 207(a)(1). On the other hand, a former employee who participated in a matter involving the development of a particular company's technology or product, where it is clear that the company had a view toward the submission of a product for approval, would be subject to the restrictions in section 207(a)(1) with respect to that same matter.

Based on these generalities, it may be that higher level officials, such as [the former official] and [the former agency head], who were primarily concerned with the overall approach to the [Program], were not involved with the specific party matters involving particular companies and their products. Before reaching this conclusion, however, you should consider whether [the former official] and [the former agency head] were involved in any particular matters involving specific parties as described above. If, for example, an employee was responsible for [Program] matters and was briefed on the status of an application of a specific party, that briefing would be a strong indication of personal and substantial participation by that employee. As supervising officials, [the former official] and

[the former agency head] would have been in a position to direct action as they saw fit with respect to specific party matters brought to their attention.

Your submission indicates that [the former agency head] was present during a number of Board meetings at which informational [Program] presentations were made. In 1996, [the former agency head] personally directed staff to develop a time line for getting [specific] product proposals submitted, reviewed, and approved. [The former agency head's] directive on the time line may have been delivered without his having been briefed on particular potential service providers' readiness in terms of product development and submitting an application for approval. On the other hand, given the facts you have presented, it seems more likely that his directive would have been delivered in response to his having been briefed on the exact status of at least one specific party's product development, since [Company B] had already submitted a product in 1995 for review.²

If [the former official] or [the former agency head] had been briefed on the status of the [Company A] product development or readiness to submit an application for approval, they may well have participated personally and substantially in the particular matter involving [Company A] as a specific party. You will need to further examine the facts to make the determination as to whether [the former official] and [the former agency head] participated personally and substantially in that matter.

OFFICIAL RESPONSIBILITY

You have also asked whether [Program] matters were pending under [the former agency head's] official responsibility during the last year of his Government service. "Official responsibility" is defined at 18 U.S.C. § 202, and restated at 5 C.F.R. § 2637.202(b)(1), as:

² [The former agency head's] participation in the ceremony where [Company B] presented to him the first [sample of the product] may alone have been sufficient to establish his personal and substantial participation in the particular matter involving [Company B's] application for approval. However, it would be necessary to answer this question only if [the former agency head] wanted to participate in the [Company B] matter as a former employee and if there were no additional facts linking [the former agency head] to the [Company B] matter when he was an employee.

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.

The post-employment regulation states at section 2637.202(b)(2) that official responsibility is determined by those areas assigned by statute, regulation, Executive order, job description or delegation of authority. All particular matters involving specific parties at an agency are under the "'official responsibility' of the agency head, and each is under that of any intermediate superior having responsibility for an employee who actually participates in the matter within the scope of his or her duties."

The [agency head] is the [senior executive officer] of the [agency]. The [agency head] is appointed by the Board who are in turn appointed by the President. The [agency head] sits on the Board. As the senior executive officer of the agency, any particular matter involving specific parties pending at the [agency] would be a matter under the [agency head's] official responsibility. All the [Program] matters that were pending during [the former agency head's] last year of Government service were matters under his "official responsibility."

Should you have further questions regarding this matter, please contact [my Office].

Sincerely,

Stephen D. Potts
Director