

Date: July 21, 2004

In reply refer to: Advisory-0704

Subject: Post-Government Employment

To: All OCFO Employees

The following guidelines are provided to assist you in conducting activities properly as you seek employment after you leave the Government—post-employment. These guidelines do not address every aspect of post employment. Therefore, if you have a specific question, you should seek advice from your supervisor and/or the Agency Ethics Office.

Post-Employment

- 1 **Lifetime Representation Ban** [“**Hands-on Switching Sides**”]. If an employee participates personally and substantially in a particular Government matter, and the participation happened after one or more specific non-Government parties (such as a contractor, grantee, applicant, claimant, opposing party, etc.) became involved in the matter, then he or she may not, at any time after leaving the Government, make an appearance before or communicate with any Federal employee, with the intent to influence that employee, regarding that same particular matter. [18 USC 207(a)(1)] Behind-the-scenes assistance is generally permitted. Also, you may represent yourself as a person (but not as a corporation, etc.). In addition to this ban, other bans may also apply.
- 2 **Two-Year Representation Ban** [“**Supervisory Switching Sides**”]. If an employee has a particular Government matter under his or her official responsibility during his or her last year of Government service, and the matter was under the employee’s official responsibility after the point when one or more specific non-Government parties (such as a contractor, grantee, applicant, claimant, opposing party, etc.) became involved in the matter, then he or she may not, for two years after leaving Government service, make an appearance before or communicate with any Federal employee, with the intent to influence that employee, regarding that same particular matter. [18 USC 207(a)(2)] If the ban applies, behind-the-scenes assistance and self-representation are generally permitted. In addition to this ban, other bans may also apply.
- 3 **Definitions for Purposes of the Lifetime and Two-Year Representation Bans.**
 - **“Particular matter”** includes a broad spectrum of Government actions, programs, efforts, and initiatives, such as interpretive rulings, decisions to undertake particular projects, or determinations to open a project to competitive bidding. It includes rulemaking, legislation, formulation of general policy, standards or objectives, or other actions of general application. The term **“particular matter involving specific parties”** includes only those particular matters that are proceedings that affect the legal rights of the Federal Government and at least one identifiable, non-Federal party—law suits, loan or grant applications, contract bids, investigations of named parties, etc. It does not include rulemaking, legislation, formulation of general policy, standards and objectives, or other actions of general application.
 - **“To ‘participate personally’** means to participate directly. Also, it includes the direct and active supervision of the participation of a subordinate in the matter. To

‘participate substantially’ means that the employee’s involvement is of significance to the matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.” [5 CFR 2635.402(b)(4) & .603(d)] Examples of “personal and substantial” participation include, but are not limited to, serving as a decision maker, an approval authority, an advisor, a reviewer, an evaluator, an inspector, or an investigator.

- “[T]he term ‘official responsibility’ means 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 action.” [18 USC 202(b)]
 - “The scope of an employee’s official responsibility is usually determined by those areas assigned by statute, regulation, executive order, or job description. 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 the activities of a subordinate employee who actually participates in the matter. An employee’s recusal from or other non-participation in a matter does not remove it from his official responsibility.” [Office of Government Ethics Summary of 18 USC 207, 17 Feb 00]
 - “A ‘communication’ can be made orally, in writing, or through electronic submission. An ‘appearance’ extends to a former employee’s mere physical presence at a proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An ‘intent to influence’ the United States may be found if the communication or appearance is made for the purpose of seeking a discretionary Government ruling, benefit, approval, or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular Government action to be taken.” [Office of Government Ethics Summary of 18 USC 207, 17 Feb 00]
- 4 Senior Employee One-Year “Cooling Off” Ban. A “senior employee” may not, for one year after leaving the Government, make any communication to, or appearance before, any employee of his former agency, with the intent to influence that employee, on behalf of any third person, in connection with any matter on which the senior employee seeks official action by his former agency. [18 USC 207(c)] “Senior employee” includes SES and other employees whose rate of basic pay equals or exceeds 86.5 percent of the rate for Level II of the Executive Schedule. For OCFO personnel, “former agency” generally means the Department of Agriculture.
- 5 Senior Employee One-Year Ban On Representing Or Advising Foreign Entities. A “senior employee” may not, for one year after leaving Government service, represent a foreign entity before any United States (US) Government agency with intent to influence a decision by that agency, and may not aid or advise a foreign entity with intent to influence a decision by a US Government agency. “Foreign entity” means a foreign Government or a foreign political party. [18 USC 207(f)] “Senior employee” has the same definition as in the previous paragraph. The

ban on aiding and advising also prohibits behind-the-scenes assistance. [Office of Government Ethics Summary of 18 USC 207, 17 Feb 00].

6 One-Year Compensation Ban. Employees who serve in any of the following seven positions or make any of seven decisions on a contract over \$10 million (M) may not accept compensation from the contractor for one year [41 USC 423(d)]. The positions are procurement contracting officer, source selection authority, source selection evaluation board member, chief of a financial or technical evaluation team, program manager, deputy program manager, or administrative contracting officer. The decisions are:

- Decision to award a contract over \$10M.
- Decision to award a subcontract over \$10M.
- Decision to award a modification over \$10M of a contract, or a modification over \$10M of a subcontract.
- Decision to award a task order or delivery order over \$10M.
- Decision to establish overhead or other rates for a contract or contracts valued over \$10M.
- Decision to approve issuance of a contract payment or payments over \$10M.
- Decision to pay or settle a contract claim over \$10M.

Even if there are no conflicts of interest involved, there is always a sense of uneasiness when Government employees see their former fellow workers back in a contractor capacity. To protect the rights of a former employee and their future employment opportunities, post-employment restrictions and laws are considerably narrow so as to be fair.

Please remember that appearance problems and post-employment issues go hand-in-hand. To the extent that an individual is looking to come back and work with their former employer, they should ensure that there is not the appearance that they are “swinging” business to their new employer.

For more information on post-employment, please visit the Ethics Website at http://www.usda-ethics.net/training/module_08/index.htm and at <http://www.usda-ethics.net/rules/postemployment.htm>

If you have questions or encounter situations not covered by this advisory, please contact your supervisor. Supervisors with inquiries should contact the Agency Ethics Office at 504-426-0308 or 504-426-0307.



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