

WATCH YOUR STEP: A CONTRACTOR’S GUIDE TO REVOLVING-DOOR RESTRICTIONS

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ABSTRACT

This article helps contractors to understand and formulate strategies to comply with the statutes and regulations that govern the recruiting, hiring, and employment of current and former executive branch employees. The author begins by analyzing the revolving-door prohibitions most directly pertinent to government contractors, including the Ethics Reform Act of 1989, the Procurement Integrity Act, and each of their implementing regulations. The author then explores strategies for complying with these restrictions, drawing upon the elements of an “effective compliance and ethics program” set forth in the Federal Sentencing Guidelines, the lessons learned from the Darleen Druyun scandal, and the author’s experience counseling clients regarding revolving-door issues. The article concludes by suggesting several means by which the Government should assist contractors to achieve compliance with revolving-door restrictions.

I. INTRODUCTION

It has been more than two years since Darleen Druyun, former Principal Deputy Assistant Secretary of the Air Force for Acquisition and Management, pleaded guilty to a criminal conflict of interest violation arising from unlawful employment discussions with Boeing.¹ Among other things, Ms. Druyun admitted to discussing employment with Boeing while simultaneously negotiating a proposed \$20 billion tanker aircraft lease deal with Boeing on behalf of the Air Force.²

In the wake of Ms. Druyun’s plea agreement, proposals for tightening revolving-door restrictions have come and gone,³ but the relevant statutes and regulations have not changed. Now that cries for sweeping reform have passed, or at least grown less shrill, it is time for contractors to focus on understanding the existing framework of revolving-door prohibitions and how best to achieve compliance with them.

The fallout from the Darleen Druyun scandal illustrates the importance of this endeavor. Michael Sears, the Boeing chief financial officer with whom Ms. Druyun negotiated employment, was sentenced to four months in prison and fined \$250,000.⁴ Boeing lost two significant contracts as a result of bid

1. Supplemental Statement of Facts at 1, *United States v. Druyun* (E.D. Va. 2004) (No. 04-150-A); see also Jeffrey Branstetter, *Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement*, 34 *PUB. CONT. L.J.* 443 (2005) (analyzing the facts surrounding the Darleen Druyun scandal).

2. Supplemental Statement of Facts, *supra* note 1, at 2-3.

3. See, e.g., *REVOLVING-DOOR WORKING GROUP, A MATTER OF TRUST: HOW THE REVOLVING DOOR UNDERMINES PUBLIC CONFIDENCE IN GOVERNMENT—AND WHAT TO DO ABOUT IT* 52-53, 56-57 (2005), http://www.revolvingdoor.info/docs/matter-of-trust_final-full.pdf.

4. Press Release, U.S. Att’y for the Eastern Dist. of Va., *Michael M. Sears Sentenced* (Feb. 18, 2005), <http://www.usdoj.gov/usao/vae/Pressreleases/02-FebruaryPDFArchive/05/21804SearsSent.pdf> [hereinafter *Sears News Release*].

protests,⁵ paid a record \$615 million global settlement,⁶ and found itself immersed in a public relations nightmare.

The purpose of this article is to help other contractors avoid the unfortunate consequences that befell Boeing. Specifically, the article focuses on understanding and formulating strategies to comply with the statutes and regulations that govern the recruiting, hiring, and employment of current and former executive branch employees.⁷

The article begins, in Parts II and III, by analyzing the revolving-door prohibitions most directly pertinent to government contractors. Part II addresses the relevant provisions of the Ethics Reform Act of 1989,⁸ which applies to government employees generally, while Part III discusses the Procurement Integrity Act,⁹ which imposes additional restrictions on government procurement officials. As discussed below, these restrictions pervade every aspect of the hiring process, including when employment discussions may occur, who may be hired, and what tasks they may perform following government service.

Part IV, which constitutes the principal focus of the article, explores strategies for complying with the revolving-door prohibitions discussed in Parts II and III. This analysis draws upon the elements of an “effective compliance and ethics program” set forth in the Federal Sentencing Guidelines,¹⁰ the lessons learned from the Darleen Druyun scandal,¹¹ and the author’s experience counseling clients regarding revolving-door issues.

Finally, Part V concludes by suggesting that the Government, too, must do its part to foster compliance. Several strategies that the Government could implement within the existing statutory framework are discussed and evaluated.

5. See Lockheed Martin Aeronautics Co., Comp. Gen. B-295401, B-295401.2, B-295401.3, B-295401.4, B-295401.5, B-295401.6, B-295401.7, Feb. 24, 2005, 2005 CPD ¶ 41 (sustaining protest of contract for avionics modernization upgrade for C-130 aircraft); Lockheed Martin Corp., Comp. Gen. B-295402, Feb. 18, 2005, 2005 CPD ¶ 24 (sustaining protest of contract for small-diameter bomb program).

6. Press Release, U.S. Att’y for the Central Dist. of Cal., Boeing to Pay United States Record \$615 Million to Resolve Fraud Allegations (July 30, 2006), <http://www.usdoj.gov/usao/cac/pr2006/092a.html> [hereinafter Settlement Press Release]. The settlement included violations related to Boeing’s handling of competitors’ information in connection with the Evolved Expendable Launch Vehicle Program and certain National Aeronautics and Space Administration launch services contracts. *Id.*

7. For an earlier work reviewing compliance with revolving-door restrictions, see Frederic M. Levy et al., *A Contractor’s Guide to Hiring Government Employees*, 96-08 BRIEFING PAPERS 1 (July 1996).

8. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716.

9. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4304(a), 110 Stat. 186, 659.

10. U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 8B2.1 (2006) [hereinafter USSG].

11. See WARREN B. RUDMAN ET AL., A REPORT TO THE CHAIRMAN AND BOARD OF DIRECTORS OF THE BOEING COMPANY CONCERNING THE COMPANY’S POLICIES AND PRACTICES FOR THE HIRING OF GOVERNMENT AND FORMER GOVERNMENT EMPLOYEES (Feb. 26, 2004), http://www.boeing.com/news/releases/2004/q1/rudman_030904.pdf (analyzing Boeing’s revolving-door compliance program following the Darleen Druyun scandal).

II. THE ETHICS REFORM ACT

The Ethics Reform Act of 1989 imposes criminal liability on government employees who engage in prohibited conflicts of interest. Among other things, the Act restricts the ability of former government employees to represent contractors before the Government¹² and the ability of current government employees to negotiate employment with contractors.¹³ These prohibitions are codified at 18 U.S.C. sections 207 and 208, respectively.

Although sections 207 and 208 do not apply to contractors directly, criminal liability for contractors and their employees may result from aiding and abetting violations by government officials.¹⁴ If convicted, a corporation faces a criminal fine of up to \$500,000¹⁵ or two times the gain to the corporation or the loss to the Government, whichever is greater,¹⁶ plus a civil fine of up to \$50,000.¹⁷ Individual officers and employees also may face criminal liability, as evidenced by the recent plea agreement of Michael Sears.¹⁸ In addition, conduct that violates section 208 may result in a successful bid protest and the corresponding loss of significant contracts.¹⁹ In certain cases, such a violation may even render the underlying contract unenforceable, thereby preventing the contractor from collecting payment for work performed.²⁰ Suspension and debarment proceedings also are possible.

Sections 207 and 208 are implemented by regulations promulgated by the Office of Government Ethics (OGE).²¹ Although these regulations apply to government employees, rather than contractors, they nevertheless provide a

12. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 101, 103 Stat. 1716-24 (codified at 18 U.S.C. § 207).

13. *Id.* § 405, 103 Stat. 1751-53 (codified at 18 U.S.C. § 208).

14. 18 U.S.C. § 2 (2000); *see also* United States v. Byers, No. 90-5305, 1991 WL 127609 (4th Cir. July 16, 1991) (affirming conviction for aiding and abetting a violation of section 208).

15. 18 U.S.C. § 3571(c)(3) (2000).

16. *Id.* § 3571(d).

17. *Id.* § 216(b).

18. Sears News Release, *supra* note 4; *see also* OFFICE OF GOV'T ETHICS, 1998 CONFLICT OF INTEREST PROSECUTION SURVEY ¶ 2 (1999), http://www.usoge.gov/pages/daeograms/dgr_files/1999/do99032.txt (describing law firm's guilty plea for aiding and abetting a violation of section 207).

19. *See, e.g.*, Lockheed Martin Aeronautics Co., Comp. Gen. B-295401, B-295401.2, B-295401.3, B-295401.4, B-295401.5, B-295401.6, B-295401.7, Feb. 24, 2005, 2005 CPD ¶ 41 (sustaining protest alleging conduct related to violation of section 208); Lockheed Martin Corp., Comp. Gen. B-295402, Feb. 18, 2005, 2005 CPD ¶ 24.

20. *See, e.g.*, United States v. Miss. Valley Generating Co., 364 U.S. 530, 548 (1961) (holding that a contract made in violation of the predecessor to section 208 was unenforceable); K & R Eng'g Co., Inc. v. United States, 616 F.2d 469, 472 (Ct. Cl. 1980) (holding that the Government was entitled to recover payments made to a contractor under a contract arising from a violation of section 208).

21. 5 C.F.R. pts. 2635, 2637, 2641. Although 5 C.F.R. pt. 2637 predates the Ethics Reform Act of 1989, the OGE has noted that "part 2637 still provides useful guidance concerning those elements of section 207 that remain essentially unchanged from the prior version of the statute." U.S. Office of Gov't Ethics, Informal Advisory Letter, 05 x 6, 5 n.4 (Sept. 19, 2005), http://www.usoge.gov/pages/advisory_opinions/advop_files/2005/05x6.pdf [hereinafter OGE Advisory Letter, Sept. 19, 2005].

useful tool for understanding the corresponding statutory requirements and are frequently relied upon by courts for that purpose.²² Courts interpreting sections 207 and 208 also frequently look to informal advisory opinions issued by the OGE.²³ Although not binding on the courts, these opinions provide valuable guidance for interpreting a contractor's statutory obligations, as well as the types of conduct that will be deemed to create the appearance of impropriety.

A. *Employment Discussions with Current Government Employees*

Section 208 requires a government employee to disqualify himself from engaging in official activities that may affect the financial interests of a prospective private employer. Specifically, section 208 prohibits a government employee from participating "personally and substantially" in a "particular matter" in which an entity with which he is "negotiating or has an arrangement concerning prospective employment" has a "financial interest."²⁴

1. Covered Government Employees

Section 208 applies to officers and employees of the executive branch or any independent agency of the United States, including special government employees.²⁵ A special government employee is an officer or employee of the executive or legislative branch who has been retained, designated, appointed, or employed, with or without compensation, to perform temporary duties on a full-time or intermittent basis for a period not to exceed 130 days during any consecutive period of 365 days.²⁶

Special rules apply to members of the Armed Forces. Enlisted members of the Armed Forces are excluded from the coverage of sections 207 and 208.²⁷ Reserve and National Guard officers are considered special government employees while on active duty solely for training and while serving involuntarily.²⁸

22. See, e.g., *Robert E. Derecktor of R.I., Inc. v. United States*, 762 F. Supp. 1019, 1027–28 (D.R.I. 1991); *Antarctic Support Assocs. v. United States*, 46 Fed. Cl. 145, 156–57 (Fed. Cl. 2000).

23. See, e.g., *Airline Pilots Ass'n, Int'l v. United States Dep't of Transp.*, 899 F.2d 1230, 1232 (D.C. Cir. 1990).

24. 18 U.S.C. § 208(a) (2000).

25. *Id.* For a detailed summary of the ethical requirements applicable to special government employees, see U.S. Office of Gov't Ethics, Memorandum dated February 15, 2000, from Stephen D. Potts, Director, to Designated Agency Ethics Officials, General Counsels and Inspectors General Regarding Summary of Ethical Requirements Applicable to Special Government Employees, 00 x 1 (Feb. 15, 2000), http://www.usoge.gov/pages/advisory_opinions/advop_files/2000/00x1.pdf [hereinafter OGE Memorandum].

26. 18 U.S.C. § 202(a) (2000); see also OGE Memorandum, *supra* note 25.

27. 18 U.S.C. § 202(a). The Joint Ethics Regulation nevertheless requires members of the Armed Services to comply with the OGE regulations implementing sections 207 and 208. U.S. Dep't of Defense, Reg. 5500.7-R, Joint Ethics Regulation ¶ 1-300(b) (Dec. 12, 1997) [hereinafter DoD Reg.]. The Joint Ethics Regulation incorporates 5 C.F.R. §§ 2634, 2635, 2638, 2639, 2640, and 2641 "to the same extent that these regulations apply to officers of the Uniformed Services." *Id.*

28. 18 U.S.C. § 202(a).

On the other hand, they are deemed to be regular government employees while serving voluntarily for a period of extended active duty in excess of 130 days.²⁹

2. Particular Matter

For section 208 to apply, a government employee must be participating “in a judicial or other proceeding, application, request for ruling or determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter” in which the prospective employer has a financial interest.³⁰ In many cases, the application of this requirement is straightforward. For example, both the statutory language and the OGE regulations expressly state that section 208 applies to contractual activities such as the award of a contract.³¹ On the other hand, neither the statutory language nor the reported case law provides any meaningful guidance regarding what constitutes an “other particular matter” within the meaning of section 208.

The OGE regulations are more helpful. They define the term “particular matter” to include “only matters that involve deliberation, decision, or action that is focused upon the interest of specific persons, or a discrete and identifiable class of persons.”³² Under this definition, a “particular matter” need not involve formal parties and “may extend to legislation or policy making that is narrowly focused on the interest of a discrete and identifiable class of persons.”³³ For example, the OGE regulations indicate that regulations applicable to a specific industry would constitute a particular matter within the meaning of section 208.³⁴

On the other hand, the term “particular matter” does not cover “consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons.”³⁵ For example, a legislative proposal for broad health care reform,³⁶ health and safety regulations applicable to all employers,³⁷ and broad policy recommendations regarding economic growth³⁸ would not be particular matters. A particular matter may emerge, however, from specific implementations of general policies.³⁹ For example, the implementation of broad health care legislation through regulations limiting the amount that can be charged for prescription drugs would be sufficiently focused on

29. *Id.*

30. 18 U.S.C. § 208(a).

31. *Id.*; 5 C.F.R. § 2640.103(a)(1) (example 1) (2007).

32. 5 C.F.R. § 2640.103(a)(1).

33. *Id.*

34. *Id.* (example 3); 5 C.F.R. § 2635.402(b)(3) (example 2); *see also* U.S. Office of Gov't Ethics, Letter to an Agency Ethics Advisor dated April 11, 2000, 00 x 4 (April 11, 2000), http://www.usoge.gov/pages/advisory_opinions/advop_files/2000/00x4.pdf (recommendations concerning specific limits on commercial use of a particular facility).

35. 5 C.F.R. § 2640.103(a)(1).

36. *Id.* (example 4).

37. *Id.* (example 5).

38. *Id.* (example 6).

39. *Id.* (example 7).

the interests of pharmaceutical companies to qualify as a particular matter under section 208.⁴⁰

3. Personal and Substantial Participation

By its terms, section 208 does not require a government employee to refrain from any conduct that could affect a particular matter involving a prospective employer. Rather, the statute only prohibits a government employee from participating “personally and substantially” in that matter through “decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise.”⁴¹

Courts interpreting this language have concluded that “personal and substantial” participation requires the exercise of judgment and discretion and “excludes employees performing purely ministerial or procedural duties.”⁴² In *Ponnapula*, for example, the court held that an attorney hired by the Small Business Administration was not a “substantial” participant in a foreclosure sale, where his only duty was to review the memorandum of sale with the purchaser, because the attorney “had no input regarding the terms of the sale.”⁴³ The court reasoned that section 208 was “aimed at preserving the integrity of the decisionmaking process” and, thus, “does not need to extend to employees who have no discretion to affect that process.”⁴⁴

The OGE regulations provide additional guidance by defining “personally” and “substantially” separately. “To participate personally means to participate directly” and “includes the direct and active supervision of the participation of a subordinate.”⁴⁵ “To participate substantially means that the employee’s involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter,” but it “requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.”⁴⁶

In determining whether a government employee’s involvement is “substantial,” one must consider both “the effort devoted to a matter” and “the importance of the effort.”⁴⁷ “While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.”⁴⁸

Where a government employee “participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in

40. *Id.* (example 8).

41. 18 U.S.C. § 208(a) (2000).

42. *See* *United States v. Ponnapula*, 246 F.3d 576, 582–83 (6th Cir. 2001) (citing Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1128 (1963)).

43. *Id.* at 583.

44. *Id.*

45. 5 C.F.R. § 2635.402(b)(4) (2007).

46. *Id.*

47. *Id.*

48. *Id.*

relation to the matter as a whole.”⁴⁹ For example, the OGE recently opined that it would be inappropriate to conclude that a government employee did not participate substantially in a contract based solely on the fact that his duties involved tasks with a budget figure of only 2.1 percent of the project budget, without considering the significance of those duties.⁵⁰

4. Financial Interest

Section 208 does not require a government employee to disqualify himself from every matter that conceivably could have some effect, however remote, on the financial interest of a prospective employer. Rather, both the OGE and courts have interpreted section 208 to require disqualification only where there is a direct causal link between a particular matter and the relevant financial interest.

In the frequently cited *Gorman* case, the court articulated the test for analyzing the existence of a financial interest as follows:

A financial interest exists on the part of a party to a Section 208 action where there is a *real possibility* of gain or loss as a result of developments in or resolution of a matter. Gain or loss need not be probable for the prohibition against official action to apply. All that is required is that there be a *real, as opposed to a speculative, possibility of benefit or detriment*.⁵¹

Applying this test, the court held that a prospective employer, a creditor’s representative that had a 10 percent contingent fee arrangement with a criminal bankrupt’s creditors, possessed a financial interest in the criminal investigation of banks with which the criminal bankrupt allegedly had conspired.⁵² The court relied upon expert testimony indicating that such investigations frequently prompt favorable settlements for creditors and reasoned that the prospective employer would be entitled to 10 percent of any such settlement by virtue of its contingent fee arrangement.⁵³

In another case, *Air Line Pilots Association v. United States Department of Transportation (ALPA)*,⁵⁴ application of the same test articulated in *Gorman* led the court to conclude that the prospective employer lacked a financial interest in the matter at issue. In *ALPA*, the outgoing Secretary of Transportation was negotiating employment with a law firm at the same time one of the firm’s clients had a matter pending before the Secretary; however, the firm was not representing the client in that matter.⁵⁵ The court held that the financial interest of the firm’s client did not disqualify the Secretary under section 208

49. U.S. Office of Gov’t Ethics, Advisory Letter, 99 x 11 (Apr. 29, 1999), http://www.usoge.gov/pages/advisory_opinions/advop_files/1999/99x11.pdf [hereinafter OGE Advisory Letter, Apr. 29, 1999].

50. *Id.*

51. *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1986) (citing U.S. Office of Gov’t Ethics, Advisory Opinion, 83 x 1 (Jan. 7, 1983)) (emphasis added).

52. *Id.* at 1304.

53. *Id.*

54. 899 F.2d 1230 (D.C. Cir. 1990).

55. *Id.* at 1231.

because the law firm was not involved.⁵⁶ In doing so, the court endorsed “a bright-line rule: no participation by [the Secretary] when a law firm that might employ him served as counsel in the case; but no bar to his participation when the firm did not so serve, though the matter involved a client represented in other matters by the firm.”⁵⁷ The court added that the contrary rule—disqualification from any matter affecting a client of a prospective employer—effectively would have prevented the Secretary from negotiating employment with most, if not all, firms.⁵⁸

Read together, *Gorman* and *ALPA* teach that the extent to which a financial interest will be deemed to be “real,” or merely “speculative,” depends upon whether there is a direct causal link between the outcome of a particular matter and the corresponding financial gain or loss to the prospective employer. The court’s reasoning in *Gorman* suggests that the financial interest at issue was “real” because the prospective employer necessarily would have received 10 percent of any settlement prompted by the criminal investigation, without the need for any intervening event or cause.⁵⁹ The prospective employer in *ALPA*, however, would have gained no direct benefit from the Secretary’s decision to grant its client’s application.⁶⁰ Rather, such a benefit would have been indirect at best, such as the successful application of the client resulting in additional business that in turn resulted in additional legal work in the law firm’s area of expertise.

The necessity for a direct causal relationship is also embodied in the OGE regulations, which interpret section 208 to require disqualification only where the particular matter will have a “direct and predictable effect” on the prospective employer’s financial interest.⁶¹ Under the OGE regulations, a “direct” effect requires a “close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest.”⁶² Although a “direct” effect need not be immediate, an effect is not “direct” where “the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter.”⁶³ The regulations further require that the effect be “predictable,” which means that there must be “a real, as opposed to a speculative, possibility that the matter will affect the financial interest,” although the magnitude of the gain or loss need not be known.⁶⁴

The OGE regulations also indicate that the “dollar amount of the gain or loss is immaterial” to determining whether disqualification is required pur-

56. *Id.* at 1232–33.

57. *Id.* at 1232.

58. *Id.*

59. *United States v. Gorman*, 807 F.2d 1299, 1303–04 (6th Cir. 1986).

60. *Airline Pilots Ass’n, Int’l v. United States Dep’t of Transp.*, 899 F.2d 1230, 1231–32 (D.C. Cir. 1990).

61. 5 C.F.R. § 2640.103(a) (2007).

62. *Id.* § 2640.103(a)(3)(i).

63. *Id.*

64. *Id.* § 2640.103(a)(3)(ii).

suant to section 208.⁶⁵ This stands in contrast to several older cases holding that section 208 reaches only financial interests that are “substantial.”⁶⁶ In those cases, the courts reasoned as follows:

Although Section 208(a) prohibits a government employee from participating substantially in a matter in which he has any “financial interest,” Section 208(b) makes clear that insubstantial interests are to be exempted...⁶⁷

By its terms, however, section 208(b) applies only where there has been an advance waiver or regulatory exception to the prohibition set forth in section 208(a).⁶⁸ Thus, it is not clear whether courts will continue to apply the de minimis exception articulated in these cases where an advance waiver or regulatory exception does not exist.

5. Negotiating versus Seeking Employment

Where the predicate conditions above are met, section 208 prohibits a government employee from “negotiating” employment with a private contractor.⁶⁹ The OGE regulations, however, proscribe a broader range of conduct referred to as “seeking employment.”⁷⁰ The meaning of both terms is discussed below.

a. *Negotiating Employment*

Section 208 does not define what constitutes “negotiating” employment. Nor have the courts adopted any meaningful definition of the term. Instead, most cases simply repeat the mantra that “[t]he term is to be construed broadly,”⁷¹ in accordance with its common everyday meaning.⁷²

Although courts certainly have construed the concept of “negotiating” employment broadly, they have extended the term well beyond its “common everyday meaning.” In *Schaltenbrand*, for example, the court expressly rejected the understanding that negotiating employment requires a formal offer or even back-and-forth discussions regarding the terms and conditions of employment.⁷³ There, an Air Force reserve officer had approached a contractor regarding the possibility of employment, completed an employment

65. *Id.*

66. *TRW Envtl. Safety Sys., Inc. v. United States*, 18 Cl. Ct. 33, 71 (Cl. Ct. 1989) (holding that protestor failed to demonstrate that a government employee’s vested pension in an offeror’s subcontractor “amounts to a substantial financial interest, as contemplated by § 208”).

67. *Id.* (quoting *United States v. Conlon*, 481 F. Supp. 654, 667 (D.C. Cir. 1979)).

68. 18 U.S.C. § 208(b) (2000).

69. *Id.* § 208(a).

70. 5 C.F.R. § 2635.604(a) (2007).

71. *United States v. Schaltenbrand*, 930 F.2d 1554, 1559 (11th Cir. 1991) (quoting *United States v. Hedges*, 912 F.2d 1397, 1403 (11th Cir. 1990)).

72. *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1986); see also *United States v. Conlon*, 628 F.2d 150, 155 (D.C. Cir. 1980) (stating that the terms “negotiating” and “arrangement” are “common words of ordinary usage” and concluding that Congress intended them to be “given a broad meaning”).

73. See *Schaltenbrand*, 930 F.2d at 1559.

application, and attended an interview during which the parties discussed the qualifications for a particular position.⁷⁴ The contractor had not made a formal employment offer and no salary discussions had taken place.⁷⁵ Nevertheless, the court affirmed the officer's conviction for violating section 208.⁷⁶ The court reasoned that "[t]he two parties were not engaged in mere general discussions, but had a specific position in mind and discussed the qualifications of the position in detail."⁷⁷ The court added that "[t]o require that the statute does not apply until the moment when a formal offer is made is to read the statute too narrowly."⁷⁸

A similar result occurred in *Gorman*. There, the court held that employment negotiations began when an assistant U.S. attorney stated he was interested in obtaining a position with a creditor's representative and that, as a condition of employment, he would require \$300,000 to be placed in an escrow account to guarantee two years of salary.⁷⁹ There is no indication in the opinion that an offer had been made, that the parties had discussed his job responsibilities, or that there was any back-and-forth discussion regarding other terms and conditions of employment at that time.⁸⁰

The lesson to be learned from *Schaltenbrand* and *Gorman* is that any substantive discussions with a government employee regarding the possibility of future employment may be enough to trigger a violation of section 208.

b. Seeking Employment

The OGE regulations establish a more rigorous standard for government employees. Specifically, they require disqualification when a government employee begins "seeking employment,"⁸¹ a term that is defined more broadly than "negotiating employment" under section 208. A government employee begins "seeking employment" under the OGE regulations if he has "directly or indirectly" (1) "[e]ngaged in negotiations for employment with any person"; (2) "[m]ade an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person"; or (3) "[m]ade a response other than a rejection to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person."⁸² The OGE regulations provide further guidance and examples regarding each of these triggers.

The first trigger, "negotiations for employment," is intended to be co-extensive with the statutory coverage of section 208.⁸³ Specifically, the term

74. *Id.* at 1556–57.

75. *Id.* at 1559.

76. *Id.*

77. *Id.*

78. *Id.*

79. *United States v. Gorman*, 807 F.2d 1299, 1301–02 (6th Cir. 1986).

80. *Id.* at 1303.

81. 5 C.F.R. § 2635.604(a) (2007).

82. *Id.* § 2635.603(b)(1) (2007).

83. *Id.* § 2635.603(b)(1)(i).

is defined to include discussions “mutually conducted with a view toward reaching an agreement regarding possible employment.”⁸⁴ Like cases interpreting section 208, the OGE regulations indicate that the term “negotiating” employment is “not limited to discussions of specific terms and conditions of employment in a specific position.”⁸⁵ By way of example, the regulations indicate that employment negotiations may occur without discussion of salary and even before the contractor has decided to fill a position.⁸⁶

Under the second trigger, “unsolicited communications regarding future employment,” a government employee will not be deemed to be “seeking employment” based upon communications “[f]or the sole purpose of requesting a job application” or “[f]or the sole purpose of submitting a résumé or other employment proposal.”⁸⁷ The latter exception, however, does not apply where a government employee’s duties will affect a specific prospective employer, rather than generally affect “part of an industry or other class.”⁸⁸ For example, an employee charged with drafting regulations applicable to a particular industry would not be “seeking employment” as the result of mailing résumés to members of that industry.⁸⁹ On the other hand, a government employee assisting with litigation against particular companies would be “seeking employment” if he submitted a résumé to any of the companies involved in the litigation since his participation in the litigation affects that company individually, rather than as a member of the industry.⁹⁰ Further, a government employee who has submitted a résumé to a prospective employer will be deemed to be seeking employment upon receipt of any response by the employer indicating an interest in possible employment.⁹¹

With regard to the third trigger, “making a response other than a rejection to an unsolicited employment communication,” the regulations indicate that a response that defers employment discussions is not a rejection.⁹² For example, an employee would be “seeking employment” if, in response to an unsolicited communication, he stated that he cannot discuss future employment while working on a project affecting the prospective employer but would like to discuss employment when that project is complete.⁹³

A government employee’s disqualification obligations cease when he stops “seeking employment.” Under the OGE regulations, a government employee is no longer “seeking employment” when “[t]he employee or prospective employer rejects the possibility of employment and all discussions of possible employment have terminated” or “two months have transpired after the

84. *Id.*

85. *Id.*

86. *Id.* § 2635.603(b) (example 3).

87. *Id.* § 2635.603(b)(1)(ii).

88. *Id.* § 2635.603(b)(1)(ii)(B).

89. *Id.* § 2635.603(b) (example 4).

90. *Id.* (example 6).

91. *Id.* § 2635.603(b)(1)(ii)(B).

92. *Id.* § 2635.603(b)(1)(iii)(B).

93. *Id.* § 2635.603(b) (example 2).

employee's dispatch of an unsolicited résumé [and] the employee has received no indication of interest in employment discussions from the prospective employer."⁹⁴

6. Arrangements Concerning Prospective Employment

Section 208 also prohibits a government employee from participating in matters that will affect an organization with which he has an "arrangement concerning prospective employment."⁹⁵ Neither the statute nor the OGE regulations define the term "arrangement." However, the OGE regulations do provide guidance in the form of two examples. The first example demonstrates that an arrangement concerning prospective employment exists during the period between a government employee's acceptance of a job with a private contractor and the termination of his government employment.⁹⁶ The second makes the point that such an arrangement exists where an individual leaves the private sector for a government position but retains reemployment rights with his former private employer.⁹⁷

7. Exceptions

Section 208 includes several provisions that permit waiver of the statutory disqualification requirement. The government official responsible for an employee's appointment may grant a waiver if, after "full disclosure" by the employee, the appointing official determines that the employee's financial interest is "not so substantial as to be deemed likely to affect the integrity of the [employee's] services."⁹⁸ In the case of a special government employee serving on an advisory committee under the Federal Advisory Committee Act,⁹⁹ such a waiver is permitted if the appointing official determines that "the need for the individual's services outweighs the potential for a conflict of interest."¹⁰⁰ Finally, section 208 authorizes the OGE to issue regulations exempting financial interests that are determined to be "too remote or too inconsequential" to affect the integrity of the services provided by the government employee.¹⁰¹

94. *Id.* § 2635.603(b)(2).

95. 18 U.S.C. § 208(a) (2000).

96. 5 C.F.R. § 2635.606(a) (example 1).

97. *Id.* (example 2); *see also* U.S. Office of Gov't Ethics, Advisory Letter, 93 x 20 (August 27, 1993), http://www.usoge.gov/pages/advisory_opinions/advop_files/1993/93x20.pdf ("Under the statute, the effect of retaining a right of reemployment is that the Federal employee is disqualified from acting in an official capacity on any particular matter that would affect the former private employer.")

98. 18 U.S.C. § 208(b)(1); *see also* 5 C.F.R. § 2640.301 (setting forth standards with which waivers issued under 18 U.S.C. § 208(b)(1) "should comply" and factors that the responsible official "may consider").

99. Federal Advisory Committee Act of 1972, Pub. L. No. 92-463, 86 Stat. 770 (codified as amended at 5 U.S.C. App. 2 §§ 1-16 (2000)).

100. 18 U.S.C. § 208(b)(3); *see also* 5 C.F.R. § 2640.302 (setting forth standards with which waivers issued under 18 U.S.C. § 208(b)(3) "should comply" and factors that the responsible official "may consider").

101. 18 U.S.C. § 208(b)(2); *see also* 5 C.F.R. § 2640.201 (setting forth the regulatory exemptions to section 208).

8. Disqualification

Under the OGE regulations, a government employee satisfies the obligation to disqualify himself from a matter affecting the interest of a prospective employer simply by “not participating in the particular matter.”¹⁰² Although the regulations provide that the employee “should notify the person responsible for his assignment”¹⁰³ of the need for recusal, the OGE has explained that this provision “fall[s] short of a mandatory notification duty.”¹⁰⁴ The OGE regulations further state that the employee “need not file a written disqualification statement” but “may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.”¹⁰⁵ It should be noted, however, that the Joint Ethics Regulation expressly requires a Department of Defense employee subject to disqualification to provide written notice to his supervisor.¹⁰⁶

B. Post-Government Employment Restrictions

While section 208 restricts employment discussions with current government employees, section 207 limits the activities a former government employee may perform on behalf of his new private employer. Specifically, the statute prohibits a former government employee from representing a private party in matters in which the Government has an interest for a one-year, two-year, or lifetime period, depending upon the former government employee’s seniority and level of involvement in the matter during government service.¹⁰⁷

Overall, section 207 sets forth seven post-government employment restrictions. This subpart addresses the four prohibitions that are most relevant to contractors that hire former executive branch employees.¹⁰⁸

1. General Principles

The post-government employment restrictions applicable to a particular former government employee depend upon a number of factors, including seniority and job responsibilities during government service.¹⁰⁹ Each pro-

102. 5 C.F.R. § 2635.604(a).

103. *Id.* § 2635.604(b).

104. U.S. Office of Gov’t Ethics, Advisory Memorandum, 4 x 13 (Sept. 20, 2004), http://www.usoge.gov/pages/advisory_opinions/advop_files/2004/04x13.pdf.

105. 5 C.F.R. § 2635.604(c).

106. DoD Reg., *supra* note 27.

107. 18 U.S.C. § 207 (2000); *see also* U.S. OFFICE OF GOV’T ETHICS, SUMMARY OF POST-EMPLOYMENT RESTRICTIONS OF 18 U.S.C. § 207, DO-04-023A (July 29, 2004), http://www.usoge.gov/pages/dacograms/dgr_files/2004/do04023a.pdf [hereinafter Summary of Post-Employment Restrictions]; Claude P. Goddard Jr., *Business Ethics in Government Contracting—Part I*, BRIEFING PAPERS 8–11 (May 2003) (summarizing prohibitions set forth in section 207).

108. For an overview of the other restrictions, *see* Summary of Post-Employment Restrictions, *supra* note 107, at 6–8, 10–12; Goddard, *supra* note 107, at 8–11.

109. *Compare* 18 U.S.C. § 207(a)(1) (2000) (lifetime ban on representation applicable to matters in which a former government employee participated “personally and substantially”) *with* 18 U.S.C. § 207(a)(2) (two-year ban on representation applicable to matters that were under a former government employee’s “official responsibility” in his last year of government service).

hibition discussed in this part, however, regulates the same general type of conduct—the representation of private parties before the Government. In the statutory parlance of section 207, these prohibitions limit the ability of a former government employee to make, with the “intent to influence,” a “communication to or appearance before” the Government “on behalf of any other party (except the United States . . .).”¹¹⁰

a. Communication or Appearance

The prohibitions discussed in this part apply to “communications” to and “appearances” before the Government. An “appearance” occurs when a former government employee (1) is “physically present” before the Government in either a “formal or informal” setting or (2) conveys material to the Government in connection with a “formal proceeding or application.”¹¹¹ The first type of appearance is illustrated by a former government employee meeting with an agency employee personally to discuss a matter.¹¹² The latter type is exemplified by the submission of a brief in a judicial or administrative proceeding in a former government employee’s own name.¹¹³

A “communication” is “broader than an appearance.”¹¹⁴ It may include oral, written, or electronic transmissions.¹¹⁵ For example, a communication would occur if a former government employee made a telephone call to an agency official to discuss a matter, even if that matter were not the subject of a formal proceeding.¹¹⁶

Although broad, the terms “appearance” and “communication” are not all-encompassing. In this regard, the OGE regulations describe two relevant circumstances that do not constitute an “appearance” or “communication” within the meaning of section 207.

First, an appearance or communication does not occur when a former government employee communicates with an agency official visiting or assigned to a contractor site used for contract performance.¹¹⁷ For this exception to apply, however, the communication must concern work performed or to be performed under the contract and must occur in the ordinary course of the evaluation, administration, or performance of a contract.¹¹⁸

Second, the terms “appearance” and “communication” do not encompass “behind the scenes” assistance in connection with the representation of other

110. 18 U.S.C. § 207(a)(1), (a)(2), (c)(1), (d)(1).

111. 5 C.F.R. § 2637.201(b)(3) (2007).

112. *Id.* (example 1).

113. *Id.*

114. *Id.* § 2637.201(b)(3).

115. U.S. Office of Gov’t Ethics, Advisory Letter, 97 x 11 (June 26, 1997), http://www.usoge.gov/pages/advisory_opinions/advop_files/1997/97x11.pdf (“Prohibited communications could include oral, written, and electronic transmissions made with the intent to influence.”).

116. 5 C.F.R. § 2637.201(b)(3) (example 2).

117. *Id.* § 2637.201(b)(4).

118. *Id.*

parties.¹¹⁹ For example, a former government employee who administered a particular contract during government service would be permitted to assist a private contractor with a matter involving that contract, provided he did not have direct contact with the Government.¹²⁰ Such assistance could even include the preparation of an analysis describing the persons at his former agency who would be contacted and what should be said to them in order to achieve the desired objective.¹²¹

In some cases, the line between permissible “behind the scenes” assistance and a prohibited “communication” may depend upon a former government employee’s intent. Recently, the U.S. Department of Justice, Office of Legal Counsel (OLC) opined that a “communication” may occur indirectly if a former government employee intends information or views being conveyed to the Government to be attributed to him.¹²² The opinion resulted from an OGE inquiry asking whether a former high-ranking official could submit an unsigned report to his client, in the name of a small consulting firm, knowing that the client would submit the report to the Government and that he would be recognized as the author.¹²³ In concluding that such conduct could violate section 207, the OLC defined a “communication” as “the act of imparting or transmitting information with the intent that the information be attributed to the former official.”¹²⁴ The OLC reasoned that “[a] high-ranking official who aggressively publicizes the fact that he is leaving an agency to start a one-man consulting firm, then submits a report to the agency shortly thereafter under the name of that firm, almost certainly intends that the report will be attributed to him.”¹²⁵

b. Intent to Influence

The prohibitions discussed in this part do not restrict all communications and appearances, but only those made with an “intent to influence.”¹²⁶

119. See, e.g., *id.* § 2637.201(b)(6) (“A former employee is not prohibited from providing in-house assistance in connection with the representation of another person.”); U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum Opinion for the Director Office of Government Ethics, 2001 WL 34054424 (Jan. 19, 2001) [hereinafter Memorandum Opinion] (slip copy) (“§ 207(c)’s prohibition on ‘communication’ alone does not reach behind-the-scenes work on matters that are before a former official’s department or agency.”); U.S. Office of Gov’t Ethics, Advisory Letter, 03 x 10 (Dec. 9, 2003), http://www.usoge.gov/pages/advisory_opinions/advop_files/2003/03x10.pdf [hereinafter OGE Advisory Letter, Dec. 9, 2003] (“[Section 207(a)(1)] does not prohibit you from providing behind-the-scenes assistance to someone else in connection with any particular matter, provided you make no communications to, or appearances before, a government employee with the intent to influence that employee.”); U.S. Office of Gov’t Ethics, Advisory Letter, 99 x 12 (Apr. 29, 1999), http://www.usoge.gov/pages/advisory_opinions/advop_files/1999/99x12.pdf (opining that assistance as a “behind the scenes” consultant would not violate section 207(a)(1) or section 207(a)(2)).

120. 5 C.F.R. § 2637.201(b)(6) (example 1).

121. *Id.*

122. Memorandum Opinion, *supra* note 119.

123. *Id.*

124. *Id.*

125. *Id.*

126. 5 C.F.R. § 2637.201(b)(5).

According to OGE guidance, such an intent may be found if the communication or appearance is made for the purpose of “seeking a discretionary Government ruling, benefit, approval, or other action.”¹²⁷ An “intent to influence” also may be found if the purpose of the communication or appearance is to influence government action with regard to a matter that the former government employee “knows involves an appreciable element of dispute concerning the particular Government action to be taken.”¹²⁸

The OGE regulations provide that an “intent to influence” does not arise from purely social engagements, a request for publicly available documents, or a request for purely factual information.¹²⁹ Nor does an “intent to influence” exist when a former government employee communicates “purely factual information” to the Government.¹³⁰ On the other hand, interactions that begin for the purpose of exchanging purely factual information may lead to discussions in which a former government employee cannot participate. For example, a former government employee who participated in writing the specification for a contract, and is later hired by the awardee, would be permitted to attend a meeting with his former agency to exchange information learned in the course of performance.¹³¹ If a dispute arose at the meeting regarding the terms of the contract, however, the former government employee would not be permitted to support his company’s position.¹³²

The OGE regulations further provide that a finding of “intent to influence” should not be based upon “whatever influential effect inheres in an attempt to formulate a meritorious proposal or program.”¹³³ For example, a former government employee working for a private contractor on a contract for which he prepared the specifications would be permitted to transmit the results of that contract to the Government, despite the fact that the results “may be inherently influential on the question of additional funding.”¹³⁴

Several opinions have noted that “routine or ministerial communications made during contract performance” often lack the requisite intent to influence.¹³⁵ In a frequently cited opinion, the OLC suggested that an appearance for the purpose of delivering supplies under a contract would fall into this category.¹³⁶ Similarly, in *Robert E. Direktor of Rhode Island, Inc. v. United States*,¹³⁷

127. Summary of Post Employment Restrictions, *supra* note 107, at 3.

128. *Id.* at 4.

129. *Id.*; see also 5 C.F.R. § 2637.201(b)(5).

130. 5 C.F.R. § 2637.201(b)(5).

131. *Id.* (example 1).

132. *Id.*

133. *Id.* § 2637.201(b)(5).

134. *Id.* (example 1).

135. U.S. Office of Gov’t Ethics, Advisory Letter, 05 x 3 (June 8, 2005), http://www.usoge.gov/pages/advisory_opinions/advop_files/2005/05x3.pdf [hereinafter OGE Advisory Letter, June 8, 2005].

136. 2 Op. Off. Legal Counsel 313, 317 (1978).

137. *Robert E. Direktor of R.I., Inc. v. United States*, 762 F. Supp. 1019, 1024–28 (D.R.I. 1991).

the court held that an appearance for the purpose of hand-delivering a proposal did not meet the statutory “intent to influence” requirement.

Beyond these relatively straightforward examples, most substantive communications by former government employees create at least some risk that an “intent to influence” will be found.¹³⁸ In this regard, the OGE has opined that an “intent to influence” does not require the existence of a major dispute or controversy, but instead may arise in connection with seemingly routine communications that involve “potentially differing views or interests with respect to the matter being discussed.”¹³⁹

In a recent advisory opinion, the OGE provided the following guidance regarding the types of communications that may result in a violation of section 207 in the context of administering a government contract:

In evaluating . . . proposed communications, it is useful to keep in mind the following excerpt from a seminal opinion of the Office of Legal Counsel, Department of Justice concerning the application of Section 207: “Moreover, the prohibition . . . should not be confined to major disputes, renegotiation, or the like. Requests for extensions of interim deadlines or work orders, nonroutine requests for instructions or information from the agency, suggestions about new directions on even relatively minor portions of the contract, and explanation or justification of the manner in which the contractor has proceeded or intends to proceed would all be barred; they involve at least potentially divergent views of the Government and the contractor on subsidiary issues or an implicit representation by the agent that the contractor is in compliance with contract requirements.”¹⁴⁰

These examples suggest that virtually any substantive request or suggestion regarding the administration or performance of a government contract runs the risk of being deemed to have been made with an “intent to influence” within the meaning of section 207.

Other OGE advisory opinions suggest that an “intent to influence” also exists where a former government employee communicates with the Government for the purpose of providing advisory or consulting services. For example, the OGE has indicated that an “intent to influence” may exist where a former government employee communicates with the Government for the purpose of providing litigation consulting services under a government contract.¹⁴¹ In another recent advisory opinion, the OGE suggested that communications

138. U.S. Office of Gov’t Ethics, Advisory Letter, 03 x 06 (Aug. 28, 2003), http://www.usoge.gov/pages/advisory_opinions/advop_files/2003/03x6.pdf [hereinafter OGE Advisory Letter, Aug. 28, 2003] (“[I]t is not always easy to draw a clear line, especially in advance, between routine or ministerial communications and those that involve at least a subtle form of influence.”).

139. OGE Advisory Letter, June 8, 2005, *supra* note 135 (“It would be very difficult to say that [a former government employee] could have complete freedom to engage in questions and other communications about such issues as [the Corporation’s] scope of work and its coordination of on-site activity.”).

140. *Id.* (quoting 2 Op. Off. Legal Counsel 313, 317 (1978)).

141. U.S. Office of Gov’t Ethics, Advisory Letter, 99 x 19 (Oct 29, 1999), http://www.usoge.gov/pages/advisory_opinions/advop_files/1999/99x19.pdf [hereinafter OGE Advisory Letter, Oct. 29, 1999].

for the purpose of providing contract administration advice under a support contract also could run afoul of section 207.¹⁴²

c. On Behalf of Any Other Person (Except the United States)

Section 207 restricts a former government employee's ability to engage in communications or appearances "on behalf of any other person (except the United States)."¹⁴³ As such, the statute does not prohibit self-representation or communications or appearances made on behalf of the Government.¹⁴⁴

The OGE has explained that a former government employee makes a communication on behalf of another person, rather than himself, if "judging by all the circumstances," he is "engaging in the activity as a formal or informal representative or advocate for the other person."¹⁴⁵ This determination requires consideration of "[a]ll relevant factors," including the relationship between the communication or appearance and "any related interests of the former employee's new employer or other organization with which he is affiliated."¹⁴⁶ According to the OGE, a former government employee can act on behalf of another person even if he does not possess a formal employment relationship or "other arrangement concerning compensation."¹⁴⁷

Several OGE opinions have addressed the exception for communications or appearances on behalf of the Government. In the government contracts context, the OGE has concluded that a contractor employee providing consulting services to the Government acts on behalf of his current employer, not on behalf of the United States.¹⁴⁸ The OGE reasoned that contractor employees do not share an "identity of interest" with the Government because their communications and appearances are made not only in the interest of the Government, but also to further the "employer's business interests arising from its consulting contract with the agency."¹⁴⁹ The OGE further noted that the mere fact that the Government will benefit from the former government

142. OGE Advisory Letter, Aug. 28, 2003, *supra* note 138.

143. 18 U.S.C. § 207(a)(1), (a)(2), (c)(1), (c)(2) (2000).

144. *See, e.g.*, U.S. Office of Gov't Ethics, Advisory Letter, 97 x 9 (May 21, 1997), http://www.usoge.gov/pages/advisory_opinions/advop_files/1997/97x9.pdf [hereinafter OGE Advisory Letter, May 21, 1997] ("[S]ection 207 prohibits individuals from engaging in certain activities on behalf of persons or entities other than the United States...but does not bar 'self-representation.'"); U.S. Office of Gov't Ethics, Advisory Letter, 91 x 33 (Aug. 29, 1991), http://www.usoge.gov/pages/advisory_opinions/advop_files/1991/91x33.pdf [hereinafter OGE Advisory Letter, Aug. 29, 1991] ("The restriction does not bar self representation, but only communications and appearances made on behalf of another person.").

145. OGE Advisory Letter, Oct. 29, 1999, *supra* note 141; OGE Advisory Letter, May 21, 1997, *supra* note 144.

146. OGE Advisory Letter, May 21, 1997, *supra* note 144.

147. *Id.*

148. OGE Advisory Letter, Oct. 29, 1999, *supra* note 141.

149. *Id.*

employee's involvement does not mean that his communications will be on behalf of the United States.¹⁵⁰

2. Specific Prohibitions

The post-government employment restrictions applicable to a particular employee depend on his level of seniority during government service. Specifically, different restrictions apply depending on whether an employee is simply a "government employee," a "senior government employee," or a "very senior government employee."

a. Lifetime Ban on Switching Sides

Section 207(a)(1) prohibits a former government employee from engaging in representational activities in connection with a "particular matter . . . which involved a specific party or parties" and in which he participated "personally and substantially" as a government employee.¹⁵¹ This prohibition applies generally to most former government employees.

(i) Particular Matter Involving Specific Parties

The lifetime representation ban set forth in section 207(a)(1) prohibits a former government employee from engaging in representational activities only with respect to a "particular matter" in which he participated during government service.¹⁵² Moreover, for section 207(a) to apply, the former government employee must have participated in the "particular matter" at a time when it involved a "specific party or specific parties."¹⁵³ Section 207(a)(1) also requires that the matter involve some specific party or parties at the time of the former government employee's communication or appearance, although these can be different parties than those involved with the matter at the time of the former government employee's official participation.¹⁵⁴

A particular matter involving specific parties is a "specific proceeding affecting the legal rights of the parties" or an "isolatable transaction or related set of transactions between identifiable parties."¹⁵⁵ Examples of such matters include contracts, grants, licenses, applications, investigations, and

150. *Id.* ("However, the mere fact that the Government would benefit from a former employee's communications or appearances or because a person may share the same objectives as the Government in a particular matter does not make that person's communications on behalf of the United States."); see also U.S. Office of Gov't Ethics, Advisory Letter, 91 x 29 (Aug. 12, 1991), http://www.usoge.gov/pages/advisory_opinions/advop_files/1991/91x29.pdf ("[a] former employee does not act on behalf of the United States . . . merely because the United States may share the same objective as the person whom the former employer is representing").

151. 18 U.S.C. § 207(a)(1) (1998).

152. *Id.*

153. *Id.* § 207(a)(1)(C).

154. 5 C.F.R. § 2637.201(c)(4) ("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.").

155. *Id.* § 2637.201(e)(1).

litigation.¹⁵⁶ Rulemaking, legislation, and policy making generally are not particular matters involving specific parties.¹⁵⁷ Accordingly, a government employee's participation in the formulation of policies, procedures, and regulations regarding procurement and acquisition functions, for example, would not restrict his future involvement in particular cases involving the application of those policies, procedures, or regulations.¹⁵⁸

In rare cases, legislation or rulemaking focusing narrowly on identified parties could trigger the prohibition set forth in section 207(a)(1). In one such case, the OGE opined that rulemaking concerning health and safety standards applicable to a single hazardous waste disposal site was a "rare" example of rulemaking that involved specific parties.¹⁵⁹ Similarly, the OGE has suggested that legislation "akin to a private relief bill" would constitute a particular matter involving specific parties within the meaning of section 207.¹⁶⁰

On several occasions, the OGE has opined that a particular matter involving specific parties may arise even at a preliminary or informal stage in the development of that matter. For example, the OGE recently concluded that such a matter existed where an agency attorney had conducted a preliminary analysis of a merger announced in the media, but of which his agency had not received official notice.¹⁶¹ Although the attorney did not know the details of the merger, the OGE opined that a particular matter involving specific parties came into being because the agency had elected to consider the "legal rights of the parties to an isolatable transaction or related set of transactions between identifiable parties."¹⁶² In another opinion, the OGE concluded that a particular matter involving specific parties existed where a company was involved in discussing the development of its technology and a specific product

156. *Id.*

157. *Id.*; see also U.S. Office of Gov't Ethics, Advisory Letter, 02 x 10 (Oct. 16, 2002), http://www.usoge.gov/pages/advisory_opinions/advop_files/2002/02x10.pdf [hereinafter OGE Advisory Letter, Oct. 16, 2002] (noting that an agency's "policy with regard to costs incurred under a noncompetitively awarded contract" was not a particular matter involving specific parties); U.S. Office of Gov't Ethics, Advisory Letter, 99 x 21 (Nov. 12, 1999), http://www.usoge.gov/pages/advisory_opinions/advop_files/1999/99x21.pdf [hereinafter OGE Advisory Letter, Nov. 12, 1999] ("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"); U.S. Office of Gov't Ethics, Advisory Letter, 86 x 18 (Dec. 9, 1986), http://www.usoge.gov/pages/advisory_opinions/advop_files/1986/86x18.pdf ("Although special legislation affecting a selected class rather than the public generally might amount to a particular matter involving specific parties, most legislation would not so qualify.").

158. 5 C.F.R. § 2637.201(c)(1) (example 3).

159. U.S. Office of Gov't Ethics, Advisory Letter, 96 x 7 (March 27, 1996), http://www.usoge.gov/pages/advisory_opinions/advop_files/1996/96x7.pdf.

160. U.S. Office of Gov't Ethics, Advisory Letter, 83 x 7 (April 25, 1983), http://www.usoge.gov/pages/advisory_opinions/advop_files/1983/83x7.pdf.

161. U.S. Office of Gov't Ethics, Advisory Letter, 99 x 23 (Dec. 6, 1999), http://www.usoge.gov/pages/advisory_opinions/advop_files/1999/99x23.pdf [hereinafter OGE Advisory Letter, Dec. 6, 1999].

162. *Id.*

with a view toward submitting a product for regulatory approval, even though a formal application had not been submitted.¹⁶³

In the government contracts context, the general rule is that a particular matter involving specific parties arises when the Government first receives initial proposals or indications of interest.¹⁶⁴ In the case of technical work, for example, the OGE regulations provide that participation in projects “generally” involving scientific or engineering concepts, feasibility studies, or proposed programs prior to the formation of a contract will not restrict a former government employee with respect to a contract or specific program entered into at a later date.¹⁶⁵ For example, a government employee that has worked on the design of a new satellite communication system in his official capacity, but leaves the Government prior to the issuance of a solicitation, would not be prohibited from representing an offeror in the resulting procurement because the contract “ordinarily” would not become a particular matter involving specific parties “until initial proposals or indications of interest therein by contractors were first received.”¹⁶⁶

It bears emphasis that a particular matter involving specific parties may exist even before initial proposals have been submitted. In one case, the OGE opined that such a matter came into being by virtue of the agency’s receipt of letters of interest from offerors, the development of an acquisition plan, and the scheduling of a market survey.¹⁶⁷ In another case, the OGE found that an acquisition became a particular matter involving specific parties by virtue of the submission of a preaward protest and intervention by another offeror.¹⁶⁸

A particular matter involving specific parties may arise even before a solicitation has been issued.¹⁶⁹ In one such case, the OGE opined that an agency ethics official erroneously failed to consider whether “expressions of interest even prior to the RFP may have been sufficient to identify parties to the procurement.”¹⁷⁰ The “expressions of interest” at issue there involved communications with potential offerors at an industry day and meetings to discuss requirements.¹⁷¹

163. OGE Advisory Letter, Nov. 12, 1999, *supra* note 157.

164. OGE Advisory Letter, Sept. 19, 2005, *supra* note 21 (“With matters such as contracts, ordinarily specific parties are first identified when initial proposals or indications of interest are received by the Government.”).

165. 5 C.F.R. § 2637.201(c)(2).

166. *Id.* (example 2).

167. U.S. Office of Gov’t Ethics, Advisory Letter, 90 x 12 (June 25, 1990), http://www.usoge.gov/pages/advisory_opinions/advop_files/1990/90x12.pdf.

168. OGE Advisory Letter, Aug. 29, 1991, *supra* note 144.

169. OGE Advisory Letter, Sept. 19, 2005, *supra* note 21 (“OGE opinions also support the view that ‘a contract does not have to have been entered into, or even the request for proposals formulated, for a particular matter involving specific parties to exist.’”) (quoting OGE Advisory Letter, Dec. 6, 1999, *supra* note 161).

170. OGE Advisory Letter, Sept. 19, 2005, *supra* note 21.

171. *Id.*

Under “unusual circumstances,” an acquisition could involve specific parties even “prior to the receipt of . . . a proposal or indication of interest.”¹⁷² For example, the OGE has suggested that a sole source procurement may involve specific parties as soon as the Government has internally identified the prospective sole source.¹⁷³

(ii) Personal and Substantial Participation

Under section 207(a)(1), a former government employee is not disqualified from representing another party in connection with a matter unless he participated both “personally” and “substantially” in that matter during government service.¹⁷⁴ Participating “personally” and “substantially” has essentially the same meaning under section 207(a)(1) as under section 208.¹⁷⁵ The primary difference is that, under section 207(a)(1), such participation must relate to a “particular matter involving a specific party.”¹⁷⁶

Nevertheless, the OGE regulations interpreting section 207(a)(1) provide some additional guidance regarding the meaning of personal and substantial participation. The regulations clarify that a government employee who participates on ancillary matters, such as reviewing a matter solely for compliance with administrative control or budgetary considerations, has not participated personally and substantially in that matter, but only in its administrative and budgetary aspects.¹⁷⁷ The regulations also suggest that forbearance generally does not constitute personal and substantial participation, except when a government employee is charged with responsibility for reviewing a particular matter and action cannot be taken over his objection.¹⁷⁸

(iii) Same Particular Matter

A former government employee is not prohibited from making a communication or appearance with respect to a particular matter unless it is the same matter in which he participated as a government employee.¹⁷⁹ However, the

172. U.S. Office of Gov't Ethics, Advisory Letter, 96 x 21 (Nov. 5, 1996), http://www.usoge.gov/pages/advisory_opinions/advop_files/1996/96x21.pdf [hereinafter OGE Advisory Letter, Nov. 5, 1996].

173. OGE Advisory Letter, Sept. 19, 2005, *supra* note 21.

174. 18 U.S.C. § 207(a)(1)(B) (2000); *see also* United States v. Medico Indus., Inc., 784 F.2d 840, 844 (7th Cir. 1986) (“[T]he officer is disqualified only if he participated ‘personally and substantially’ in the contract or other matter; if the matter was just within his job description, but he did not work on it himself, the officer would be free to represent a private party after leaving the government.”).

175. *Compare* 5 C.F.R. § 2635.402(b)(4) *with id.* § 2637.201(d).

176. *Id.* § 2637.201(d)(1).

177. *Id.* § 2637.201(d)(2).

178. *Id.* § 2637.201(d)(3).

179. CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1575–76 (Fed. Cir. 1983) (concluding that no violation of section 207 occurred because the contract in which the former government employee participated during government service and the proposal effort in which he later represented a private contractor were not the “same particular matter”); 5 C.F.R. § 2637.201(c)(4) (“The same particular matter must be involved.”).

same particular matter may continue in a different form.¹⁸⁰ For example, an agency's attempt to address an issue informally may constitute the same particular matter as a formal investigation or proceeding involving that issue.¹⁸¹ Similarly, different stages of an application or proceeding typically will be considered part of the same particular matter.¹⁸²

The OGE regulations articulate a number of factors that are relevant to determining whether two particular matters are the same.¹⁸³ These include the extent to which the matters involve the same facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of a government interest.¹⁸⁴

In the government contracts context, the general rule is that a procurement, the resulting contract, and any modifications to that contract are the same particular matter.¹⁸⁵ This point is illustrated by an OGE opinion involving a former government purchasing agent who had executed a contract with a contractor during government service and later obtained private employment with a different company to which that contract had been assigned.¹⁸⁶ Although the contract had been amended with respect to price, quantity, and delivery terms, the OGE opined that the former government employee was prohibited from representing his new employer in matters involving that contract.¹⁸⁷ Similarly, in *United States v. Medico Industries*,¹⁸⁸ the court concluded that a former government employee who had negotiated a contract was prohibited from representing the contractor in connection with

180. See, e.g., 5 C.F.R. § 2637.201(c)(4); OGE Advisory Letter, Sept. 19, 2005, *supra* note 21 (noting that “the same particular matter may continue in another form or in part.”).

181. U.S. Office of Gov't Ethics, Advisory Letter, 93 x 32 (Nov. 9, 1993), http://www.usoge.gov/pages/advisory_opinions/advop_files/1993/93x32.pdf (opining that an agency's informal attempt to stop a controlling shareholder from taking part in a corporation's affairs due to certain improprieties was the same particular matter as a later formal investigation and threatened administrative and judicial action related to those same improprieties).

182. See U.S. Office of Gov't Ethics, Advisory Letter, 94 x 13 (June 27, 1994), http://www.usoge.gov/pages/advisory_opinions/advop_files/1994/94x13.pdf [hereinafter OGE Advisory Letter, June 27, 1994] (opining that the stages of a two-tier registration and application process were the same particular matter although they required consideration of different issues); see also U.S. Office of Gov't Ethics, Advisory Letter, 02 x 5 (July 31, 2002), http://www.usoge.gov/pages/advisory_opinions/advop_files/2002/02x5.pdf (“OGE long has held that each stage in an administrative adjudication ‘involves the same particular matter,’ and ‘we do not foresee that any such adjudication would be divisible into separate particular matters for purposes of section 207(a).’”) (quoting U.S. Office of Gov't Ethics, Advisory Letter, 81 x 23 (July 22, 1981)).

183. 5 C.F.R. § 2637.201(c)(4).

184. *Id.*

185. See, e.g., *United States v. Medico Indus., Inc.*, 784 F.2d 840, 844 (7th Cir. 1986) (holding that a contract and its subsequent modification were the same particular matter despite changes in terms governing price, quantity, and delivery date). *But see* OGE Advisory Letter, Dec. 9, 2003, *supra* note 119 (suggesting that a contract may not continue to be the same particular matter where “there are different [contract] terms and different confidential information involved and there has been a significant period of time since the [contract] was entered.”).

186. U.S. Office of Gov't Ethics, Advisory Letter, 91 x 24 (July 17, 1991), http://www.usoge.gov/pages/advisory_opinions/advop_files/1991/91x24.pdf.

187. *Id.*

188. *Medico Indus., Inc.*, 784 F.2d at 844.

a modification to that contract. In reaching this conclusion, the court suggested that two matters are the same when they involve the same “nucleus of operative facts.”¹⁸⁹

On the other hand, separate contracts ordinarily are considered to be separate particular matters.¹⁹⁰ Thus, a “follow on” contract involving changed technology and personnel would not be the same particular matter as the original contract.¹⁹¹ Similarly, a government employee who participated in a feasibility study or contract will often be able to make representations to the Government with respect to another contract to implement the project.¹⁹²

In some cases, however, two contracts may be so integrally related that they form part of the same particular matter.¹⁹³ The OGE addressed such a case in a recent opinion that required it to determine whether an analysis contract, a development contract, and a demonstration contract for the same program were parts of the same particular matter.¹⁹⁴ It concluded that the analysis contract was separate from the development and demonstration contracts because their objectives were “fundamentally different.”¹⁹⁵ Whereas the objective of the analysis contract was to propose numerous alternatives, the objective of the development and demonstration contracts was to design, test, evaluate, and implement the remainder of the program.¹⁹⁶ On the other hand, the OGE concluded that the design and development contracts could be part of the same particular matter, depending upon the facts.¹⁹⁷ The “primary objective” of the development contracts was to determine which of the two contractors should be awarded the follow-on sole source system contract.¹⁹⁸ According to the OGE, this suggested that the downselect process was “meant not only to develop the technology, but also to be an integral part of the competition to select which of the two contractors would essentially win the sole source contract.”¹⁹⁹

189. *Id.* at 843–44.

190. OGE Advisory Letter, Sept. 19, 2005, *supra* note 21 (referring to the “usual presumption that successive contracts are separate matters”).

191. 5 C.F.R. § 2637.201(c)(3) (example 1) (suggesting that a “follow on” competitively sourced contract advancing the same objective as the original contract would be a new matter where, six years after an employee terminated government employment, the technology and personnel had changed such that the new contract would be significantly different); *see also* CACI, Inc.-Federal v. United States, 719 F.2d 1567, 1576 (Fed. Cir. 1983) (concluding that two contracts were different particular matters where the latter contract was “broader in scope, different in concept, and incorporate[d] different features than the prior contracts”).

192. *See* 5 C.F.R. § 2637.201(e)(2) (example 1) (suggesting that a former government employee who participated in the award of a contract to Z Company for the purpose of proposing alternative technical approaches could represent Q Company in connection with a contract to manufacture one of the systems suggested by Z Company).

193. OGE Advisory Letter, Sept. 19, 2005, *supra* note 21.

194. *See id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

b. Two-Year “Official Responsibility” Provision

Section 207(a)(2) prohibits a former government employee, for a period of two years after the termination of his government service, from engaging in representational activities in connection with a particular matter that was “actually pending” under his “official responsibility” within the last year of his government service, and that involved a “specific party or specific parties at the time it was so pending.”²⁰⁰ This prohibition is identical to the lifetime restriction discussed above, except that it is of shorter duration and requires only that an individual have had “official responsibility” for a matter while employed by the Government, not that he have participated “personally and substantially” in that matter.²⁰¹

(i) Official Responsibility

For purposes of section 207(a)(2), “official responsibility” is defined broadly to include virtually any matter over which a government employee has authority. Specifically, the term includes “direct administration 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.”²⁰²

Under the OGE regulations, the scope of an employee’s “official responsibility” includes “those areas assigned by statute, regulation, Executive Order, job description or delegation authority.”²⁰³ An agency head has “official responsibility” for all matters pending within his agency.²⁰⁴ Likewise, each intermediate supervisor has “official responsibility” for all matters pending within the department or other element of the agency for which he is responsible.²⁰⁵

The OGE regulations further explain that “official responsibility” requires authority for planning, organizing, and controlling a matter, rather than authority to review or make decisions on ancillary aspects of a matter such as the regularity of budget procedures, public or community relations aspects, or equal opportunity considerations.²⁰⁶ The “official responsibility” of a government employee involved in such ancillary aspects of a matter is limited to those aspects of the matter with which he is charged.²⁰⁷ For example, an agency’s comptroller would not have official responsibility for all programs within the agency, even though all such programs are contained in the agency’s

200. 18 U.S.C. § 207(a)(2)(C) (2000).

201. Summary of Post-Employment Restrictions, *supra* note 107, at 5–6.

202. 18 U.S.C. § 202(b) (2000).

203. 5 C.F.R. § 2637.202(b)(2).

204. *Id.*; see also OGE Advisory Letter, Nov. 12, 1999, *supra* note 157.

205. 5 C.F.R. § 2637.202(b)(2).

206. *Id.* § 2637.202(b)(3).

207. *Id.*

budget.²⁰⁸ On the other hand, the comptroller would be prohibited from representing a private party with respect to a contract dispute concerning an accounting formula if, during his tenure, that dispute had been referred to any of his subordinate offices.²⁰⁹

A government employee's "official responsibility" for a matter terminates when the matter no longer is "actually pending" or there is a formal modification of his responsibilities such as a change in his job description.²¹⁰ In the absence of such a formal modification, a government employee continues to have "official responsibility" for a matter even during terminal leave.²¹¹

(ii) Actually Pending

A matter is "actually pending" under an employee's official responsibility when, in fact, it has been referred to or is under consideration by persons within the employee's area of responsibility, not merely when it could have been so referred.²¹² For example, if a staff member in a department's Office of General Counsel was consulted by a contracting officer regarding the correct resolution of a contractual matter involving a particular company, that matter would be "actually pending" under the General Counsel's official responsibility.²¹³ On the other hand, if the same legal question later arose in a contract with another company, but the dispute with that company was not referred to the Office of the General Counsel, that dispute would not be "actually pending" under the General Counsel's official responsibility.²¹⁴

A matter is "actually pending" under a government employee's official responsibility the moment it is referred to any subordinate for which he is responsible. It is not necessary that the subordinate participate "personally" or "substantially" in the matter.²¹⁵

Once a matter is "actually pending" under an employee's official responsibility, it remains pending "until a specific action or event terminates this

208. *Id.* (example 1).

209. *Id.* (example 2).

210. OGE Advisory Letter, Sept. 19, 2005, *supra* note 21.

211. *Id.* ("[A]n employee's mere terminal leave does not affect his official responsibility."); *see also* U.S. Office of Gov't Ethics, Advisory Letter, 98 x 20 (Dec. 8, 1998), http://www.usoge.gov/pages/advisory_opinions/advop_files/1998/98x20.pdf (opining that section 207(a)(2) barred a former government employee's proposed representation of a client in connection with a matter that was not pending in his agency until after he had taken terminal leave but prior to his leaving government employment).

212. 5 C.F.R. § 2637.202(c).

213. *Id.* (example 1); *see also* OGE Advisory Letter, Oct. 16, 2002, *supra* note 157 (opining that a contract dispute was "actually pending" under the official responsibility of an agency's General Counsel when, ten days prior to his resignation, an agency employee provided a copy of the contract to a field attorney and requested an opinion regarding the dispute).

214. *Id.*

215. OGE Advisory Letter, Apr. 29, 1999, *supra* note 49 (opining that it was improper for an agency ethics official to conclude that a particular matter was not "actually pending" under a former government employee's official responsibility simply because none of the employees under his supervision had "substantial" duties with regard to that matter).

status.”²¹⁶ If no such action or event occurs, a particular matter remains pending under a supervisor’s official responsibilities “[e]ven if no action at all is taken by a former government employee’s subordinate during the final year of service.”²¹⁷

c. One-Year Cooling-Off Period

Section 207(c) prohibits a former senior government employee, for one year after termination of senior government service, from engaging in representational activities, in connection with “any matter,” before any officer or employee of any department or agency in which he served during the year prior to his termination of senior service.²¹⁸ This prohibition is in addition to, and not in lieu of, the prohibitions of section 207(a)(1) and (2).²¹⁹

(i) Basic Prohibition

Like section 207(a), discussed above, section 207(c) limits the ability of a former government employee to make, with the “intent to influence,” a “communication to or appearance before” the Government “on behalf of any other party (except the United States).”²²⁰ Section 207(c) differs from section 207(a), however, in four important respects.

First, section 207(c) is limited to former government employees who served in certain senior positions. Specifically, section 207(c) applies to a former government employee who was paid at a rate specified or fixed according to the Executive Schedule, who received a rate of basic pay greater than or equal to 86.5 percent of the basic rate of pay for Level II of the Executive Schedule,²²¹ who served as an active duty commissioned officer in a position with a pay grade of O-7 or above, or who was appointed by the president or vice president to a position under 3 U.S.C. § 105(a)(2)(B) or 3 U.S.C. § 106(a)(1)(B).²²²

216. *Id.*; see also OGE Advisory Letter, June 27, 1994, *supra* note 182 (opining that an application would remain pending until “either one or several actions on the part of the agency or by the [applicant] or other events occur with respect to the particular registered project which terminates its status”); U.S. Office of Gov’t Ethics, Advisory Letter, 85 x 6 (May 16, 1985), http://www.usoge.gov/pages/advisory_opinions/advop_files/1985/85x6.pdf [hereinafter OGE Advisory Letter, May 16, 1985] (opining that a contract claim would remain pending “until a final judgment is rendered or until the statute of limitations has run”).

217. OGE Advisory Letter, Apr. 29, 1999, *supra* note 49; see also OGE Advisory Letter, May 16, 1985, *supra* note 216 (opining that a contract claim remained pending under the official responsibility of a regional solicitor even though the solicitor’s office had closed the file based upon the contractor’s failure to take action on the claim).

218. 18 U.S.C. § 207(c) (2000).

219. *Id.* § 207(c)(1).

220. *Id.*

221. An employee’s “rate of basic pay” refers to the base amount of actual pay for each individual employee, not the minimum rate of pay for a position’s authorized pay range. OGE Informal Advisory Letter, 98 x 2 (Feb. 11, 1998), http://www.usoge.gov/pages/advisory_opinions/advop_files/1998/98x2.pdf. The “rate of basic pay” excludes locality adjustments and additional pay such as bonuses, awards, and allowances but includes annual or periodic pay adjustments such as cost-of-living raises and step or equivalent increases. *Id.*

222. 18 U.S.C. § 207(c)(2)(A)(iii), (iv).

Second, section 207(c) only prohibits a former government employee from making communications to or appearances before employees of a department or agency in which he served within the last year before leaving senior service.²²³ It should be noted, however, that this prohibition extends to communications to or appearances before employees of any agency in which the former government employee served “in any capacity” during that time period.²²⁴ For example, a former government employee who left a nonsenior position in one agency, moved to a senior position in another agency, and then retired six months later would be prohibited from making communications to or appearances before both agencies for the one-year period following termination of his senior service.

Third, section 207(c) applies to communications or appearances regarding “any matter” on which a former senior government employee seeks official action.²²⁵ The term “matter” is broader than “particular matter” and, according to the OGE, is “virtually all-encompassing with respect to the work of the Government.”²²⁶ Unlike “particular matter,” the term “any matter” covers even the consideration of “broad policy options that are directed to the interests of a large and diverse group of persons.”²²⁷

Finally, section 207(c) applies regardless of whether the former senior government employee has “ever been in any way involved” in the matter that is the subject of the communication or appearance.²²⁸ It does not require that the former senior government employee have participated personally and substantially in, or had official responsibility for, the relevant matter.²²⁹

(ii) Waiver

At the request of an agency, the director of OGE may waive the restrictions of section 207(c) with respect to a position or category of positions that otherwise would be covered.²³⁰ The director of OGE may grant such a waiver only if he determines that the application of section 207(c) would create an “undue hardship” in obtaining qualified personnel and that granting the waiver would not give rise to the potential for “use of undue influence or unfair advantage.”²³¹ A waiver may not be granted with respect to positions for which the rate of pay is fixed by the Executive schedule, to which an employee

223. *Id.* § 207(c)(1).

224. Summary of Post-Employment Restrictions, *supra* note 107, at 8.

225. 18 U.S.C. § 207(c)(1).

226. Memorandum DO-06-029 from Robert I. Cusick, Director, Office of Gov't Ethics, to Designated Agency Ethics Officials (Oct. 4, 2006), http://www.usoge.gov/pages/daecograms/dgr_files/2006/do06029.html.

227. *Id.*

228. Summary of Post-Employment Restrictions, *supra* note 107, at 8.

229. U.S. Office of Gov't Ethics, Advisory Letter, 02 x 8 (Oct. 16, 2002), http://www.usoge.gov/pages/advisory_opinions/advop_files/2002/02x8.pdf (rejecting the argument that section 207(c) did not apply to a matter in which the former senior government employee was not “actively involved”).

230. 18 U.S.C. § 207(c)(2)(C) (1998); 5 C.F.R. § 2641.201(d).

231. 18 U.S.C. § 207(c)(2)(C)(i), (ii); 5 C.F.R. § 2641.201(d)(5).

is appointed under 3 U.S.C. § 105(a)(2)(b) or 3 U.S.C. § 106(a)(1)(B), or to which an employee is assigned from a private sector organization to an agency under the Information Technology Exchange Program.²³²

Waivers of section 207(c) are granted infrequently. A current list of the positions for which section 207(c) has been waived is set forth in Appendix A to 5 C.F.R. § 2641. Currently, the list includes only three positions.²³³

(iii) Designation of Separate Agency Components

By its terms, section 207(c) extends to any “department or agency” in which an individual served during the year before he left senior government service.²³⁴ However, for certain senior government employees—those not paid according to the Executive Schedule or appointed to a position under 3 U.S.C. § 105(a)(2)(b) or 3 U.S.C. § 106(a)(1)(B)—the director of OGE is authorized to narrow this restriction by designating separate agency components that, in effect, are treated as separate agencies under section 207(c).²³⁵ Such designations are permitted under section 207(h) if the director of OGE determines that a component exercises functions that are “distinct and separate” from the rest of the agency and that there is no potential for “use of undue influence or unfair advantage” based on former senior government service.²³⁶ A list of these designations, to which separate components are added periodically, is set forth in Appendix B to 5 C.F.R. § 2641.

Where a separate agency component has been designated, a former eligible senior employee of that component is prohibited by section 207(c) from making communications to or appearances before employees of that component, but not employees of the parent agency or any of its other designated components.²³⁷ Likewise, a former eligible senior employee of the parent agency is barred from making communications to or appearances before employees of the parent, but not employees of any of its designated components.²³⁸

d. Former Very Senior Government Employees

Section 207(d) prohibits a former very senior government employee, for one year after termination of very senior government service, from engaging in representational activities, in connection with “any matter,” before any Executive Schedule employee or any employee of a department or agency in which he served as a very senior government employee during the one-year period prior to his termination of very senior government service.²³⁹ In

232. 18 U.S.C. § 207(d)(1)(C); 5 C.F.R. § 2641.01(d)(2).

233. 5 C.F.R. § 2641, App. A.

234. 18 U.S.C. § 207(c)(1).

235. *Id.* § 207(h)(1); 5 C.F.R. § 2641.201(e).

236. 18 U.S.C. § 207(h)(1).

237. 5 C.F.R. § 2641.201(e)(1).

238. *Id.*

239. 18 U.S.C. § 207(d).

addition, a former very senior government employee is subject to the restrictions set forth in section 207(a) but not those applicable to former senior government employees under section 207(c).²⁴⁰

(i) Basic Prohibition

Like the one-year restriction of section 207(c), discussed above, section 207(d) applies to “communications to or appearances before” certain government employees, made with the “intent to influence,” “on behalf of any other person (except the United States).”²⁴¹ Also like section 207(c), it applies to “any matter” on which a former government employee seeks official action, regardless of his prior involvement or responsibility.²⁴² Section 207(d) differs, however, in both the class of government employees to which it applies²⁴³ and the class of current government employees that may not be contacted.²⁴⁴

First, section 207(d) is limited to a narrow class of very senior former government employees. Specifically, it applies to a former government employee who was employed in a position at a rate of pay payable for Level I of the Executive Schedule or in a position in the Executive Office of the President at a rate of pay payable for Level II of the Executive Schedule.²⁴⁵ It also applies to a former vice president and any former government employee appointed by the president or vice president to a position under 3 U.S.C. § 105(a)(2)(A) or 3 U.S.C. § 106(a)(1)(a).²⁴⁶

Second, section 207(d) defines a different class of government employees that may not be contacted. As explained in the previous section, former senior government employees are barred by section 207(c) from engaging in representational activities before employees of any agency in which they served in any capacity during the year before termination of their senior government service.²⁴⁷ A former very senior government employee, in contrast, is restricted from engaging in representational activities with respect to employees of the agency in which he served as a very senior employee during the relevant period.²⁴⁸ In addition, a former very senior government employee cannot represent another person before any government employee currently appointed to an Executive Schedule position listed in 5 U.S.C. §§ 5312–5316, whether or not that individual is serving in the very senior government employee’s former agency.²⁴⁹

240. *Id.* § 207(d)(1).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* § 207(d)(2).

245. *Id.* § 207(d)(1)(B).

246. *Id.* § 207(d)(1)(A)–(C).

247. *Id.* § 207(c).

248. *Id.* § 207(d)(2)(A).

249. *Id.* § 207(d)(2)(B).

(ii) Waiver

The director of OGE is not authorized to designate separate and distinct components for former very senior government employees. Nor does section 207(d) permit the OGE to exempt positions or categories of positions from the restrictions applicable to such employees.

3. Exemptions

Section 207 sets forth a number of circumstances under which the substantive prohibitions of the statute do not apply. The exemptions that are particularly relevant to government contractors are discussed below.

a. Special Knowledge

Section 207(c) and (d) does not prohibit a former senior or very senior government employee from making a statement based upon his “special knowledge” in the “particular area that is the subject of the statement,” provided that “no compensation is thereby received.”²⁵⁰ The OGE has interpreted the requirement for “special knowledge” to mean that this exemption should be limited to assistance that “relate[s] to matters more specific than broad policy issues.”²⁵¹ In addition, the OGE recently clarified that the exemption does not apply to a statement that is made as part of an individual’s duties for a private employer.²⁵² With regard to the latter point, the OGE reasoned that “compensation is thereby received” for such a statement in the form of an employee’s salary for doing his job generally, even if he is not paid “specifically for the particular statement.”²⁵³

b. Scientific or Technological Information

If certain procedures are followed, the restrictions contained in section 207(a), (c), and (d) do not apply to communications made “solely for the purpose of furnishing scientific or technological information.”²⁵⁴ The procedural requirements for invoking this exception, as well as the types of information that may be conveyed, are discussed below.

(i) Procedures

Section 207 establishes two mechanisms for using the exception for “scientific and technological information.”²⁵⁵ Under the first, otherwise prohibited

250. *Id.* § 207(j)(4).

251. U.S. Office of Gov’t Ethics, Advisory Letter, 89 x 14 (Sept. 12, 1989), http://www.usoge.gov/pages/advisory_opinions/advop_files/1989/89x14.pdf; *see also* U.S. Office of Gov’t Ethics, Advisory Letter, 81 x 9 (Feb. 25, 1981), http://www.usoge.gov/pages/advisory_opinions/advop_files/1981/81x9.pdf (fact that report would “deal only with broad policy issues” would “tend to undercut” use of the special knowledge exemption).

252. OGE Advisory Letter, June 8, 2005, *supra* note 135.

253. *Id.*

254. 18 U.S.C. § 207(j)(5).

255. OGE Advisory Letter, Nov. 5, 1996, *supra* note 172 (summarizing procedures for invoking section 207(j)(5)).

communications are permissible if made “under procedures acceptable to the department or agency concerned.”²⁵⁶ Several agencies, including the National Aeronautics and Space Administration²⁵⁷ and the Department of Defense,²⁵⁸ have published procedures under this exception.

The second mechanism requires the agency head concerned with the matter, in consultation with the director of OGE, to issue a certification published in the Code of Federal Regulations.²⁵⁹ The certification must state that the former government employee has “outstanding qualifications” in a particular discipline, that he is acting with respect to a particular matter that requires such qualifications, and that the national interest would be served by his participation in that particular matter.²⁶⁰

(ii) Scope

A communication is made “for the purpose of furnishing scientific or technological information” if the communication “primarily conveys information of a scientific or technological character.”²⁶¹ If this condition is met, the entirety of the communication will be permissible, notwithstanding incidental references to feasibility, risk, cost, speed of implementation, or other considerations, when necessary to appreciate the significance of the information provided.²⁶² The exception also includes communications intended to facilitate the furnishing of scientific or technological information such as contacts to determine the type and form of information required or the adequacy of information already provided.²⁶³

A recent OGE advisory opinion illustrates the manner in which the exception for “scientific or technological information” applies in the government contracts context.²⁶⁴ The opinion resulted from an inquiry regarding the types of tasks a former senior government employee could perform if assigned as the program manager under a safety contract with his former agency.²⁶⁵ The OGE explained that the former government employee would be permitted to address “any scientific or technological issue covered under the safety contract” and to make the types of ancillary communications discussed in the preceding paragraph, regardless of the fact that his advice would have financial implications for his current employer and former agency.²⁶⁶ On the other

256. 18 U.S.C. § 207(j)(5); *see also* 5 C.F.R. § 2637.206(e).

257. *See* 14 C.F.R. § 1207.202 (2004).

258. *See* DoD Reg., *supra* note 27.

259. 18 U.S.C. § 207(j)(5); *see also* 5 C.F.R. § 2637.207(a).

260. 18 U.S.C. § 207(j)(5); *see also* 5 C.F.R. § 2637.207(a).

261. U.S. Office of Gov’t Ethics, Advisory Letter, 02 x 6 (Sept. 6, 2002), http://www.usoge.gov/pages/advisory_opinions/advop_files/2002/02x6.pdf [hereinafter OGE Advisory Letter, Sept. 6, 2002]; *see also* 5 C.F.R. § 2637.206(a).

262. 5 C.F.R. § 2637.206(b); *see also* OGE Advisory Letter, Sept. 6, 2002, *supra* note 261.

263. 5 C.F.R. § 2637.206(a).

264. *See generally* OGE Advisory Letter, Sept. 6, 2002, *supra* note 261.

265. *Id.*

266. *Id.*

hand, the OGE opined that the former senior government employee would be required to “avoid discussions primarily of a ‘business’ nature.”²⁶⁷ For example, he would not be permitted to “argue for acceptance of a proposal with respect to any prospective contract or any new funding, modification, or dispute under the existing contract.”²⁶⁸ Nor would he be permitted to participate “in discussions about contract modifications, performance disputes, equitable adjustments, negotiation for new or follow-on contracts, or similar contract issues,” except where his contribution of scientific or technological information is the “focus of his communication.”²⁶⁹

(iii) Testimony

Section 207 does not prohibit any former government employee from “giving testimony under oath” or “making statements required to be made under penalty of perjury.”²⁷⁰ This exception is subject to a special rule for expert testimony. Specifically, unless compelled by a court order, a former government employee may not provide expert testimony regarding any particular matter with respect to which he is subject to the lifetime ban set forth in section 207(a)(1).²⁷¹

C. *Ethics Advice*

The OGE regulations encourage a government employee who has questions concerning the application of section 208 to seek advice from an agency ethics official.²⁷² Similarly, agencies have established procedures for current and former government employees to obtain counseling and written advice concerning post-government employment restrictions.²⁷³

Pursuant to the OGE regulations, “disciplinary action” will not be taken against an employee who has “engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee . . . has made full disclosure of all relevant circumstances.”²⁷⁴ Although this provision does not create a safe harbor with respect to criminal liability, the OGE regulations indicate that the Department of Justice “may” take into account good faith reliance on the advice of an agency ethics official in determining whether to prosecute a government employee under section 208.²⁷⁵

For current and former government employees, the primary disadvantage of requesting ethics counseling is that any information provided to the agency in the course of obtaining advice is not protected by the attorney-client

267. *Id.*

268. *Id.*

269. *Id.*

270. 18 U.S.C. § 207(j)(6).

271. *Id.*

272. 5 C.F.R. § 2635.107(b).

273. *See, e.g.*, DoD Reg., *supra* note 27, ¶ 9-500.

274. 5 C.F.R. § 2635.107(b).

275. *Id.*

privilege.²⁷⁶ In fact, the OGE regulations warn government employees that an agency ethics official is required by statute to report information relating to a criminal violation.²⁷⁷

III. PROCUREMENT INTEGRITY ACT

The Procurement Integrity Act, implemented by section 3.104 of the Federal Acquisition Regulation (FAR), imposes additional limitations on a government procurement official's ability to seek employment with a private contractor. First, the Act sets forth reporting and disqualification requirements that apply when a government employee participating in a procurement above the simplified acquisition threshold contacts or is contacted by an offeror concerning the possibility of employment.²⁷⁸ Second, the Act prohibits government employees involved in certain procurement-related functions from accepting compensation from affected contractors for a period of one year after their last involvement in those functions.²⁷⁹

A contractor who engages in employment discussions with an agency official, knowing that the official has not complied with the foregoing reporting and disqualification requirements, or who knowingly hires a former procurement official in violation of the one-year compensation ban, is subject to a civil penalty of up to \$500,000, plus twice the amount received or offered for the prohibited conduct.²⁸⁰ In addition, the agency may initiate suspension or debarment proceedings against the contractor,²⁸¹ cancel the procurement if a contract has not been awarded, disqualify the offeror, or "[t]ake any other appropriate action in the interests of the Government."²⁸² If a contract has been awarded, the Government may exercise contractual remedies under FAR 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity, which permits the Government to reduce the price of the contract to exclude fees or profits or to terminate the contract for default.²⁸³

A. *Employment Discussions*

The Procurement Integrity Act requires an "agency official" who is "participating personally and substantially in a Federal agency procurement" in excess of the simplified acquisition threshold, and who "contacts or is contacted" by a "bidder or offeror" in that procurement regarding possible nonfederal employment, to promptly report the contact in writing to his supervisor and designated agency ethics official.²⁸⁴ In addition, the agency official must either

276. *Id.*; see also DoD Reg., *supra* note 27, ¶ 9-500.

277. 5 C.F.R. § 2635.107(b).

278. 41 U.S.C. § 423(c) (2000); FAR 3.104-3(c).

279. 41 U.S.C. § 423(d); FAR 3.104-3(d).

280. 41 U.S.C. § 423(e)(2).

281. *Id.* § 423(e)(3)(A)(iii); see also FAR 3.104-7(d)(3).

282. FAR 3.104-7(d)(1); see also 41 U.S.C. § 423(e)(3)(A)(i).

283. FAR 3.104-7(d)(2)(i), 52.203-10.

284. 41 U.S.C. § 423(c)(1); see also FAR 3.104-3(e)(1)(i).

reject the possibility of employment or disqualify himself from further personal and substantial participation in the procurement until such time as the agency has authorized the official to resume participation.²⁸⁵

1. Covered Government Employees

The Procurement Integrity Act applies to a class of government employees that is in one sense broader, and in another sense narrower, than the reach of section 208. On the one hand, the Act extends to employees of all three branches of the Government, including enlisted military personnel, and creates no exceptions for special government employees.²⁸⁶ On the other hand, the Act applies only to government employees who are “participating personally and substantially” in a “federal agency procurement,” as those terms are explained below.²⁸⁷

2. Federal Agency Procurement

The Procurement Integrity Act applies to government employees participating in a “federal agency procurement,” a term the Act defines as follows: “the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from nonfederal sources by a federal agency using appropriated funds.”²⁸⁸ This definition narrows the Act’s coverage in two ways. First, the requirement for the use of “competitive procedures” to award a “contract” excludes contract modifications and noncompetitive acquisitions from the scope of the Act.²⁸⁹ Second, the definition renders the Act inapplicable to procurements conducted exclusively with nonappropriated funds.

On the other hand, the term “federal agency” expands the Procurement Integrity Act to cover procurements conducted by all three branches of the Government. Specifically, the Act defines a “federal agency” to include both executive agencies and “establishment[s] in the legislative or judicial branch of the Government,” excluding the Senate, the House of Representatives, and the Architect of the Capitol.²⁹⁰

3. Personal and Substantial Participation

The Procurement Integrity Act does not explain what it means to “participate personally and substantially” in a procurement. The FAR, however, defines “participating personally and substantially in a federal agency pro-

285. 41 U.S.C. § 423(c)(1)(B)(ii); *see also* FAR 3.104-3(c)(1)(ii).

286. 41 U.S.C. § 423(f)(7).

287. *Id.* § 423(c)(1); *see also* FAR 3.104-3(c)(1).

288. 41 U.S.C. § 423(f)(4); *see also* FAR 3.104-1.

289. Sections 207 and 208 nevertheless apply.

290. 41 U.S.C. § 423(f)(3) (incorporating definition of “Federal agency” set forth in 40 U.S.C. § 102).

curement” to mean “active and significant involvement” in any of the following activities “directly related” to that procurement:

- (i) Drafting, reviewing, or approving the specification or statement of work for the procurement.
- (ii) Preparing or developing the solicitation.
- (iii) Evaluating bids or proposals, or selecting a source.
- (iv) Negotiating price or terms and conditions of the contract.
- (v) Reviewing and approving the award of the contract.²⁹¹

In addition, the government employee’s participation must be both personal and substantial.²⁹² The FAR defines “participating personally” and “participating substantially” in essentially the same manner as the OGE regulations interpreting section 208, discussed above.²⁹³

The FAR also identifies actions that, in themselves, “[g]enerally” will not be deemed to constitute personal and substantial participation in a procurement.²⁹⁴ These safe harbors include participating in the following activities:

- (i) Agency-level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency-level missions or objectives.
- (ii) The performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement.
- (iii) Clerical functions supporting the conduct of a particular procurement.
- (iv) For procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of “most efficient organization” analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.²⁹⁵

4. Employment Contact

The FAR defines an employment “contact” to include any actions that constitute “seeking employment” under the OGE regulations interpreting section 208.²⁹⁶ In addition, unsolicited communications from offerors regarding possible employment are considered employment “contacts,” even if immediately rejected by the government employee.²⁹⁷

291. FAR 3.104-1.

292. *Id.*

293. *Id.*; *see also* 5 C.F.R. § 2635.402(b)(4).

294. FAR 3.104-1.

295. *Id.*

296. FAR 3.104-3(c)(2); *see also* 5 C.F.R. § 2635.603(b).

297. FAR 3.104-3(c)(2).

5. Reporting and Disqualification

If all of the conditions set forth above are met, an agency official who contacts or is contacted by a bidder or offeror regarding possible employment must (1) promptly report the contact in writing to his supervisor and agency ethics official and (2) either reject the possibility of employment or disqualify himself from further participation in the procurement.²⁹⁸ If the agency official chooses disqualification, he must submit a written disqualification notice to the contracting officer, the source selection authority, and his immediate supervisor.²⁹⁹ The notice must identify the procurement, describe the nature and approximate dates of his participation, and identify the offeror and its interest in the procurement.³⁰⁰

Once disqualified from a procurement, an agency official must remain disqualified until such time as the agency, in its “sole and exclusive discretion,” authorizes him to resume participation.³⁰¹ Specifically, the head of the contracting activity (HCA), after consultation with the agency ethics official, may authorize reinstatement only if the contractor with which the agency official had employment contacts no longer is an offeror in the procurement or if all discussions regarding possible employment have terminated without an agreement or arrangement for employment.³⁰² Although the FAR states that the HCA’s reinstatement decision should be in writing, this is not a mandatory requirement.³⁰³

B. Hiring Restrictions

The Procurement Integrity Act imposes special restrictions on the hiring of former procurement officials. Specifically, the Act prohibits a former government employee from accepting compensation from a contractor for a period of one year after the former government employee

(A) served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000;

(B) served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to that contractor; or

(C) personally made for the federal agency—

(i) a decision to award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10,000,000 to that contractor;

298. 41 U.S.C. § 423(c)(1); *see also* FAR 3.104-3(c)(1)(i), (ii).

299. FAR 3.104-5(b).

300. *Id.*

301. FAR 3.104-5(c)(1); *see also* 41 U.S.C. § 423(c)(1)(B)(ii).

302. FAR 3.104-5(c)(2); *see also* 41 U.S.C. § 423(c)(1)(B)(ii).

303. FAR 3.104-5(c)(2).

(ii) a decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;

(iii) a decision to approve issuance of a contract payment or payments in excess of \$10,000,000 to that contractor; or

(iv) a decision to pay or settle a claim in excess of \$10,000,000 with that contractor.³⁰⁴

Factors relevant to the application of these prohibitions are discussed below.

1. One-Year Prohibition

The date on which the one-year hiring ban commences depends upon the statutory basis for its application. For a procuring contracting officer, source selection authority, member of the source selection evaluation board, or chief of an evaluation team, the ban begins on the date of contract award.³⁰⁵ If the official no longer was serving in one of these positions at the time of award, the date of contractor selection is used instead.³⁰⁶ In the case of a program manager, deputy program manager, or administrative contracting officer, the ban begins on the former government employee's last date of service in the relevant position.³⁰⁷ For a former government employee who personally made one of the enumerated decisions, the hiring ban begins on the date of that decision.³⁰⁸

2. \$10 Million Threshold

The determination of whether a contract award exceeds the \$10 million threshold is based upon the estimated value of the contract, including all options, at the time of award.³⁰⁹ For indefinite-delivery, indefinite-quantity and requirements contracts, this includes the estimated value of all orders.³¹⁰ Multiple-award contracts are deemed to constitute an award in excess of \$10 million unless the contracting officer documents a lower estimate.³¹¹

In the case of a decision to establish overhead or other rates, the \$10 million threshold is based upon the amount of money that will be allocated to government cost objectives based upon those rates.³¹² This includes the aggregate impact of those rates across all affected contracts.³¹³ Similarly, the

304. 41 U.S.C. § 423(d)(1); FAR 3.104-3(d).

305. FAR 3.104-3(d)(2)(i).

306. *Id.*

307. FAR 3.104-3(d)(2)(ii).

308. *Id.*

309. FAR 3.104-1.

310. *Id.*

311. *Id.*

312. *Id.*

313. *See* 41 U.S.C. § 423(d)(2)(C)(ii).

threshold for a decision to approve contract payments is based upon the aggregate value of all payment to the contractor approved by the former government employee.³¹⁴

For a government employee who personally makes a decision to settle a claim, the threshold is based upon the amount paid or to be paid in settlement of that claim.³¹⁵ There is no provision for aggregating the value of multiple settlement decisions made by the same government employee.

3. Acceptance of Compensation

The one-year hiring ban applies to the payment of “compensation” to a former procurement official as an employee, officer, director, or consultant.³¹⁶ The FAR defines the term “compensation” to include wages, salaries, honoraria, commissions, professional fees, and any other form of compensation provided “directly or indirectly” for services rendered.³¹⁷ Compensation is paid indirectly to a former procurement official if it is provided to a third party “specifically in exchange for services provided by that individual.”³¹⁸

The Procurement Integrity Act guidance issued by the Department of Defense (DoD) Standards of Conduct Office suggests that the Act generally does not apply to compensation paid by a prime contractor to a subcontractor that employs a former procurement official.³¹⁹ On the other hand, the guidance states that compensation may be deemed to have been provided “indirectly” to a former procurement official if “a subcontract is a sham or a vehicle established to provide services by individuals.”³²⁰

4. Exception for Divisions and Affiliates

The Procurement Integrity Act permits the payment of compensation to a former procurement official by a contractor “division or affiliate” that does not produce the “same or similar products or services” as the contractor entity responsible for the contract that gives rise to the compensation ban.³²¹

Under the FAR, two “associated business concerns” are “affiliates” if one has the power to control the other or a third party has the power to control both.³²² However, neither the Procurement Integrity Act nor the FAR defines the term “division.” The DoD guidance is equally unhelpful in that it merely characterizes the question of what constitutes a “division” as “highly

314. *See id.* § 423(d)(2)(C)(iii).

315. FAR 3.104-1.

316. 41 U.S.C. § 423(d)(1); FAR 3.104-3(d)(1).

317. FAR 3.104-1.

318. *Id.*

319. *See* U.S. Dep’t of Defense Standards of Conduct Office, Memorandum for Members of the DoD Ethics Community: Guidance on Application of the Procurement Integrity Law and Regulation at ¶ 2 (Aug. 28, 1998), http://www.dod.mil/dodge/defense_ethics/dod_oge/guidanceprocure.htm [hereinafter DoD Guidance].

320. *Id.*

321. 41 U.S.C. § 423(d)(2).

322. FAR 2.101.

fact-dependent” and notes that the label attached by the contractor is not dispositive.³²³

With regard to the question of what constitutes the “same or similar products or services,” the Procurement Integrity Act and the FAR again are silent, and the DoD guidance is only marginally more helpful. Although that guidance does not provide a list of criteria for determining when products or services are the “same or similar,” it does provide the following example, which suggests a narrow reading of the phrase: “[A]dvertising a particular product is the service, not advertising in general. Therefore, advertising for recruitment could be considered ‘dissimilar enough’ from advertising the sale of used cars, so that former employees could accept compensation.”³²⁴ The DoD guidance goes on to explain that the requisite degree of dissimilarity will not be found merely because a division or affiliate produces a product for commercial, rather than government, customers.³²⁵

Two additional aspects of the exception for divisions and affiliates are noteworthy. First, the exception, by its terms, appears to be limited to divisions or affiliates that do not produce *any* of the “same or similar products or services” as the contractor entity responsible for the contract that gives rise to the ban.³²⁶ Thus, a division or affiliate that does not produce the “same or similar products or services” as those being acquired under the relevant contract, but does produce other similar products or services, could be ineligible for the exception.

Second, there is no express exception for a de minimis quantity of the “same or similar products or services” that may be produced by a division or affiliate without being subject to the compensation ban. The DoD Standards of Conduct Office has interpreted this to mean that a division or affiliate that produces *any* amount of the “same or similar product or service”—even if that product or service comprises less than 1 percent of its workload—would be subject to the compensation ban.³²⁷

C. Ethics Advice

The FAR establishes procedures that allow a current or former procurement official to request an advisory opinion from the appropriate agency ethics official regarding the permissibility of accepting compensation from a particular contractor.³²⁸ The request must be in writing, signed, and dated and must include detailed information regarding the relevant procurement or decision, the individual’s participation, and the contractor, including a description

323. DoD Guidance, *supra* note 319, at ¶ 3.A.

324. *Id.*

325. *Id.*

326. 41 U.S.C. § 423(d)(2); FAR 3.104-3(d)(3).

327. DoD Guidance, *supra* note 319, at ¶ 3.B.

328. FAR 3.104-6(a).

of the products or services produced by the division or affiliate from which compensation would be accepted.³²⁹

The FAR further provides that the appropriate agency ethics official “should” issue an advisory opinion within thirty days after receipt of a complete request “or as soon thereafter as practicable.”³³⁰ If the agency ethics official issues a written opinion that the requestor may accept compensation from a particular contractor, and the requestor relies on that opinion in good faith, then neither the individual nor the contractor will be found to have knowingly violated section 423(d).³³¹ As a result, neither will be liable for penalties or administrative sanctions under the Act.³³² This safe harbor does not apply, however, if the requestor or the contractor has “actual knowledge or reason to believe that the opinion is based upon fraudulent, misleading, or otherwise incorrect information.”³³³

IV. COMPLIANCE

Contractors have at least two powerful incentives to implement programs to foster compliance with revolving-door restrictions. First, an effective compliance program reduces the likelihood that employees will violate those restrictions, thereby minimizing the contractor’s exposure to fines and penalties. Second, under the Federal Sentencing Guidelines, the existence of an “effective compliance and ethics program” may reduce substantially the fines and penalties that will be imposed in the event a violation occurs.³³⁴

In order to have an “effective compliance and ethics program” under the Federal Sentencing Guidelines, a contractor must incorporate at least the following elements into its operational structure:

- Standards and procedures to prevent and detect criminal conduct;
- Clearly defined responsibilities at all levels of the contractor’s organization;
- Screening of personnel who have engaged in illegal or unethical activities;
- Periodic training and dissemination of information appropriate to each individual’s roles and responsibilities;
- Auditing, monitoring, and nonretaliatory internal reporting systems;
- Consistent enforcement through appropriate incentives and disciplinary measures; and

329. FAR 3.104-6(b).

330. FAR 3.104-6(c).

331. FAR 3.104-6(d)(3).

332. 41 U.S.C. § 423(d)(3), (4).

333. FAR 3.104-6(d)(3).

334. USSG, *supra* note 10, § 8C2.5(f). Specifically, the existence of an effective ethics and compliance program will lower the contractor’s culpability score (used for calculating the defendant’s sentence) by three points. *Id.* This translates into a 50 to 67 percent reduction in the applicable fine, depending upon the nature of the offense. *See id.* § 8C2.4.

- Implementation of reasonable preventative steps upon detection of criminal conduct.³³⁵

Drawing upon these elements, as well as the lessons learned from the Darleen Druyun scandal, this part explores strategies for complying with the revolving-door restrictions discussed in the preceding parts of this article.³³⁶ This analysis is not intended to be exhaustive, or to suggest a single approach for all contractors, but instead merely to address the factors a contractor should consider when incorporating a revolving-door component into its overall ethics and compliance program.

A. *Written Policies and Procedures*

A contractor's written policies and procedures, together with its code of conduct, are the cornerstone of any compliance program. They not only define the essential features of the program, but also establish the fundamental obligations and standards with which all contractor personnel must comply. Accordingly, it is crucial for a contractor to ensure that it has written policies and procedures in place, that they are sufficiently clear and comprehensive to provide meaningful guidance, and that they are distributed periodically to all contractor personnel.³³⁷

In the case of revolving-door restrictions, the most appropriate form and content for a contractor's policies and procedures depends upon numerous factors, including the contractor's organizational structure, its sophistication and resources, and its compliance history.³³⁸ Nevertheless, there are certain elements that all contractors should consider including in their revolving-door policies and procedures. These include the following:

- An expression of the contractor's commitment to comply with applicable revolving-door statutes and regulations and to avoid even the appearance of impropriety in the recruiting, hiring, and employment of current and former government employees;
- A member of senior management charged with oversight responsibility for the contractor's revolving-door policies and procedures and the compliance of contractor personnel therewith;³³⁹
- A high-level explanation of the relevant provisions of section 207, section 208, and the Procurement Integrity Act, with an emphasis on conveying the general principles underlying these statutes;
- A step-by-step description of the contractor's procedures for screening applicants, including obtaining required documents and certifications,

335. *Id.* § 8B2.1(b).

336. Although this part focuses on the compliance of contractor employees, many of the strategies discussed herein may be adapted for use with consultants as well.

337. *See* USSG, *supra* note 10, § 8B2.1(b)(1), (b)(4)(A).

338. *See generally id.* § 8B2.1(b)(2).

339. *See id.* § 8B2.1(b)(2)(B).

analyzing applicable revolving-door restrictions, and communicating with the applicant;

- A step-by-step description of the contractor's procedures for monitoring the assignments of former government employees, including the mechanism used for such monitoring, the steps that must occur before a former government employee may be reassigned, and the procedure for informing supervisors of the post-government employment restrictions applicable to their personnel;
- A description of the documents required to be obtained and generated in connection with the contractor's revolving-door policy, including the point at which each document must be acquired or prepared, the required contents of each document, and where and for how long each document must be maintained;
- An explanation of the potential consequences of noncompliance with revolving-door restrictions for both the contractor and the responsible personnel;
- A procedure for reporting violations of the contractor's revolving-door policies and procedures and a statement that the reporting of known or suspected violations is mandatory;³⁴⁰
- A statement that periodic audits will be conducted and that personnel found to be in noncompliance with the contractor's revolving-door policies and procedures will be disciplined appropriately;³⁴¹ and
- A procedure for requesting additional information or guidance regarding applicable revolving-door restrictions.

In addition, the contractor's revolving-door policy should identify the individual or organization with primary responsibility for each of the foregoing issues.³⁴²

The contractor should ensure that its revolving-door policies and procedures are distributed to all contractor personnel. In addition, the contractor may wish to require its personnel to certify that they have received the document, understand the contractor's policies and procedures, and will comply strictly with them. Periodic redistribution of the policy and recertification by contractor personnel may enhance compliance further by increasing employees' awareness of their obligations.

B. *Procedures for Minimizing Risk*

1. Initial Screening

Before entering into employment discussions with a current or former government employee, a contractor should conduct an initial conflict of interest screening. The immediate and most important purpose of such a screening is

340. See *id.* § 8B2.1(b)(5)(C).

341. See *id.* § 8B2.1(b)(6).

342. See *id.* § 8B2.1(b)(2)(C).

to determine whether the contractor may engage in employment contacts or negotiations with the applicant. However, the initial screening also provides a useful opportunity to determine whether the applicant is subject to a hiring ban under the Procurement Integrity Act or representational restrictions under section 207. Because the facts necessary to make these determinations are integrally related, it may be more efficient to obtain all required information at once. Moreover, the existence of a hiring ban or representational restrictions may have significant implications for determining whether employment discussions with the applicant are warranted.³⁴³ Indeed, there may be no point in entering into employment discussions with an applicant who cannot be hired or that would be prohibited, pursuant to section 207, from performing tasks critical to the position for which he would be hired.

In most cases, the initial conflict of interest screening should include at least three steps. Specifically, the contractor should require the applicant to complete a written conflict of interest questionnaire and certification, obtain a copy of the applicant's disqualification statement and any related documents, and analyze this information to determine whether employment discussions with the applicant should proceed.

a. Conflict of Interest Questionnaire

The purpose of a conflict of interest questionnaire is to obtain the information necessary to determine whether employment discussions may occur, whether the applicant may be employed, and what restrictions will apply to the applicant if he is hired.³⁴⁴

(i) Timing

A contractor can minimize risk by ensuring that the questionnaire is completed and analyzed before any contacts regarding possible employment occur. Until the contractor has conducted such an analysis, even exploratory discussions regarding the possibility of future employment create a significant compliance risk. The risk is particularly acute with respect to potential violations of the Procurement Integrity Act, since the notice and recusal requirements applicable to procurement officials are triggered by the first employment contact. Although the restrictions that apply to other government employees under section 208 are limited to negotiating employment, which generally occurs somewhat later in the recruiting process, a contractor will

343. Stuart B. Nibley, *Jamming the Revolving-Door; Making It More Efficient, or Simply Making It Spin Faster: How Is the Federal Acquisition Community Reacting to the Darleen Druyun and Other Recent Ethics Scandals?* 41:4 *PROCUREMENT LAW*, 4, 22 (2006) (emphasizing the significance of analyzing post-government employment restrictions before hiring a current or former government employee).

344. For a recent example of a preemployment conflict of interest questionnaire, see Boeing Government Conflict of Interest Questionnaire (May 28, 2004), http://www.inconen.com/docs/Boe_COI_Full.doc.

not be able to determine which set of restrictions applies to a particular government employee until the questionnaire has been analyzed.

Particularly in the case of senior government employees, there may be an understandable reluctance to require the completion of a lengthy questionnaire as a prerequisite to exploring the possibility of employment. However, these are precisely the government employees for whom the completion of a conflict of interest questionnaire is most crucial. Senior government employees typically are involved in a larger number of matters than their junior counterparts, thereby increasing the probability that they are participating personally and substantially in a matter that involves the contractor. Moreover, the cost of noncompliance in the case of senior government employees is often higher, since violations involving such employees typically receive more attention and, thus, create more political pressure for serious consequences. If necessary, a contractor can mitigate this risk, while decreasing the amount of paperwork required to be completed by senior government employees, by limiting the scope of the initial screening questionnaire to information related to the permissibility of employment discussions and obtaining information regarding post-government employment restrictions after the employment discussions have progressed.

(ii) Questions

The optimal composition and format of a conflict of interest questionnaire depends upon the unique circumstances of each contractor. In most cases, the questionnaire should be designed to elicit the information described below.

- *Is the applicant a current or former government employee?*

The first and most basic question that must be asked is whether the applicant is a current or former government employee. If the applicant is not a current or former government employee, there is no need for him to complete the remainder of the questionnaire or for the contractor to conduct any type of revolving-door analysis.

Most applicants will be able to report accurately whether they qualify as a current or former government employee. Typically, a government employee receives an appointment into the civil service and regular paychecks from the Government. The case may be different, however, for special government employees. Such individuals often serve without compensation. Moreover, it has been held that an appointment or other formal employment paperwork, "while perhaps the norm, is not a condition of special government employment as statutorily defined."³⁴⁵ It is possible, therefore, that an applicant will not be aware that he qualifies as a current or former government employee for purposes of analyzing revolving-door restrictions.

To address this concern, the conflict of interest questionnaire should request the applicant to state whether he has served as a special government

345. *Ass'n of Am. Physicians and Surgeons v. Clinton*, 187 F.3d 655, 652 (D.C. Cir. 1999).

employee. In addition, the contractor may wish to ensure that the questionnaire explains what is meant by the term “special government employee” and provides illustrative examples.

- *Is the applicant currently participating in a procurement in which the contractor is a bidder or offeror?*

This question is intended to determine whether the applicant currently is performing any duties that would trigger the notice and disqualification requirements of the Procurement Integrity Act. To clarify the question, the contractor may wish to list the relevant duties, which are set forth in plain language in FAR 3.104-1. In addition, the contractor should consider omitting references to defined terms such as participating “personally and substantially” and “federal agency procurement” and instead require the applicant to list all procurement-related responsibilities he has possessed with regard to the contractor. This reduces the risk that the applicant will misinterpret legal phrases or concepts incorporated into the question and, thus, omit critical information.

If the applicant indicates that he is involved in procurement in which the contractor is a bidder or offeror, the questionnaire should seek information regarding the identity of the agency, the applicant’s role in the procurement, the dollar value of the procurement, and whether the procurement is being conducted on a competitive or sole source basis. To the extent this information indicates that the applicant is participating personally and substantially in a federal agency procurement in excess of the simplified acquisition threshold, and in which the contractor is a bidder or offeror, further employment contacts may not occur until the procurement is over, the contractor no longer is involved in the procurement, or the applicant has submitted written disqualification statements to the contracting officer, the source selection authority, and his immediate supervisor.³⁴⁶

- *Is the applicant currently participating in any other matter that could affect the contractor’s financial interests?*

This question is intended to elicit the information necessary to determine whether negotiating employment with the applicant would risk violating section 208. The question should omit qualifying legal terms such as participating “personally and substantially” and “particular matter.” Instead, the question should request the applicant, in plain terms, to list any current or anticipated job responsibilities that could affect the contractor.

If the applicant indicates that he is involved in any matter that could impact the contractor’s financial interests, the questionnaire should seek information regarding the nature of the matter, the applicant’s responsibilities, and how the matter might affect the contractor. If the applicant’s response indicates

346. See FAR 3.104-5(c)(2); 41 U.S.C. § 423(c)(1)(B)(ii).

that he is participating personally and substantially in a particular matter in which the contractor has a financial interest, employment negotiations may not occur until the applicant disqualifies himself from further participation in that matter. For certain agencies, such as the Department of Defense, the applicant also must submit a written disqualification statement to his supervisor.

- *Within the past year, has the applicant performed any of the duties enumerated in FAR 3.104-3(d)?*

This question is intended to determine whether the applicant is subject to a one-year compensation ban under the Procurement Integrity Act. The contractor should consider listing the activities that trigger the ban, which are set forth in FAR 3.104-3(d), but omitting reference to the \$10 million threshold. The applicant may not have the information or knowledge necessary to calculate the relevant dollar values in accordance with the applicable requirements. For example, the applicant may not remember the estimated value of a modification awarded to the contractor or be in a position to calculate the “estimated monetary value of negotiated overhead or other rates when applied to the Government portions of the applicable allocation base.”³⁴⁷

If the applicant indicates that he has been involved in any of the activities enumerated in FAR 3.104-3(d), the questionnaire should require the applicant to identify the relevant contracts and describe the nature and dates of his involvement. Once the applicant has disclosed this information, the contractor can validate the corresponding dollar values from its internal records and ensure that they are calculated correctly.

In cases where the applicant is determined to be subject to the one-year compensation ban, the contractor may not hire the applicant until the ban has expired.³⁴⁸ However, the contractor is free to continue negotiating employment with the applicant and to hire the applicant immediately upon expiration of the ban.

- *Has the applicant ever participated, either directly or through the supervision of a subordinate, in a matter that involved the contractor?*

This question is intended to determine whether the applicant’s job responsibilities will be constrained by the lifetime representation ban set forth in section 207(a)(1). Although the ban is permanent, some contractors place a temporal limitation on this question as a concession to practicality. The risk associated with this strategy obviously depends upon the time period selected by the contractor. As a general rule, it would be unwise to confine the question to a period of less than five years.

If the applicant indicates that he has participated in a matter involving the contractor, the questionnaire should request information regarding the

347. FAR 3.104-1.

348. FAR 3.104-3(d)(1); *see also* 41 U.S.C. § 423(d)(4).

nature of the matter, the applicant's involvement, the parties, and the dates of the applicant's participation. The contractor then can use this information to determine whether a "particular matter" involving "specific parties" existed at the time of the applicant's involvement, whether the applicant participated "personally and substantially" in that matter, and whether the matter is ongoing or continues to exist in a different form.

- *Within the past year, were any matters involving the contractor pending under the applicant's official responsibility?*

This question is intended to determine the extent to which the applicant will be subject to the two-year representation ban set forth in section 207(a)(2). To avoid any misunderstanding, the contractor may wish to explain in the questionnaire that a matter is pending under the applicant's "official responsibility" if it has been referred to anyone for which he has supervisory responsibility, whether directly or through one or more subordinates.³⁴⁹

If the applicant indicates that he possessed official responsibility for any matter involving the contractor during the relevant timeframe, the questionnaire should require the applicant to provide information regarding the nature of the matter, the parties involved, and the time period during which it was pending. The contractor then can use this information to determine whether a "particular matter" involving "specific parties" was pending under the applicant's responsibility, whether the matter still was pending at any point during the last year of the applicant's government service, and whether the matter continues to exist in any form. In addition, the contractor may wish to request the names of the government employees most directly involved in the matter so that they can be contacted, with the applicant's permission, if the need to do so later arises.

- *What is the applicant's recent government employment history?*

The applicant should be required to provide basic information regarding his recent government employment history, including the names of his agency or agencies, the dates of service, his rank or grade, his job title, a description of his duties, and his salary.³⁵⁰ This information serves three purposes.

First, it allows the contractor to determine whether the applicant is subject to the one-year representational bans set forth in section 207(c) and (d). Information regarding the applicant's rank or grade, job title, and salary will allow the contractor to determine whether the applicant qualifies as a senior or very senior former government employee. If the applicant is a former senior or very senior government employee, the contractor can look to the agency in which he served and his dates of employment in the relevant positions to determine the individuals before whom he may not engage in representational activities and when that restriction will expire.

349. See 5 C.F.R. § 2637.202(b)(2).

350. See generally Levy et al., *supra* note 7.

Second, the applicant's response will allow the contractor to analyze the likelihood that the applicant is subject to additional, undisclosed restrictions under section 207(a)(2). In many cases, a government employee may not be aware of every matter pending under his official responsibility. If the contractor knows the positions in which the applicant has served and the relevant dates of service, it can use that information to determine whether any matter in which it was involved was pending within the applicant's organization during the relevant time period.

Third, the applicant's response will serve as a check on the information provided elsewhere in the questionnaire. For example, if the applicant has indicated that he is not participating, or has not participated, in any matter involving the contractor, but lists a position that likely requires, or would have required, such participation, the contractor may be alerted to the need to ask additional follow-up questions.

- *Has the applicant submitted a written disqualification statement?*

The questionnaire should ask whether the applicant has submitted a written disqualification statement to his supervisor or any other party. If a written disqualification statement is required, whether by law or contractor policy, the questionnaire should require the applicant to provide a copy to the contractor.

Although the OGE regulations generally do not require a government employee to submit a written disqualification statement,³⁵¹ one is required by the Department of Defense³⁵² and may be required by other agencies. Even where a written disqualification statement is not mandatory, it may be prudent for the contractor to require the applicant to provide one to his supervisor, with a copy to the contractor, before the parties begin negotiating employment.³⁵³ Such a requirement creates a written record of the contractor's good faith efforts to comply with its statutory obligations. By ensuring that the applicant's supervisor has received notice that the applicant is seeking employment with the contractor, it also reduces the risk that the applicant subsequently will receive and perform an assignment that would violate section 208.

As explained above, the official responsible for appointing a government employee may waive the requirements of section 208 if he finds that the integrity of the employee's services are unlikely to be affected.³⁵⁴ If this exception applies, the contractor should consider requesting a copy of the waiver in lieu of a disqualification statement.³⁵⁵

351. 5 C.F.R. § 2635.604(c).

352. DoD Reg., *supra* note 27, ¶ 2-204(c).

353. Levy et al., *supra* note 7, at 9-10.

354. 18 U.S.C. § 208(b)(1) (2000).

355. Levy et al., *supra* note 7, at 10.

- *Has the applicant received a written ethics opinion from his current or former agency?*

The questionnaire should ask whether the applicant has received an ethics opinion from the appropriate agency ethics official. If the applicant has received such an opinion, the contractor may wish to require the applicant to provide a copy of that opinion.³⁵⁶

Depending upon the purpose for which it was prepared, an ethics opinion may assist the contractor in evaluating the propriety of employment discussions, analyzing applicable post-government employment restrictions, or both. If the opinion suggests that employment contacts would be improper, the contractor should not discuss employment with the applicant until the applicant has received a subsequent opinion stating that such discussions would be permissible or the contractor has made a determination that such a subsequent opinion is unnecessary. Likewise, if the applicant is hired, the contractor should ensure that he does not receive assignments that would conflict with his ethics opinion.

On the other hand, the contractor should not assume that an ethics opinion includes an exhaustive description of all restrictions that apply to the applicant. Agency ethics advisors typically must rely primarily, if not exclusively, on information disclosed by the requestor. The contractor, therefore, may have more information than the ethics advisor regarding an applicant's participation in matters involving the contractor. If the contractor is aware of information that was not disclosed to the agency ethics advisor, the ethics opinion may provide little, if any, protection with regard to any conflicts related to that information.³⁵⁷

The contractor can address this concern by requiring the applicant to provide a copy of the request letter on which the agency ethics advisor relied in preparing his opinion.³⁵⁸ The contractor then will be in a position to determine whether the ethics opinion is based upon all information known to the contractor. If the contractor determines that the letter contains inaccuracies or material omissions, the contractor may wish to require the applicant to submit a new request letter that includes all relevant information.

(iii) Certification

The contractor can minimize risk by requiring the applicant to certify that his responses to the questionnaire are current, accurate, and complete to the best of his knowledge and belief. In addition, the certification should require the applicant to update the contractor immediately of any changes that would

356. Nibley, *supra* note 343, at 21 (noting that most contractors now request government employees to provide a copy of any ethics opinion received from the appropriate agency ethics official).

357. See, e.g., FAR 3.104-6(d)(3) ("If the requestor or the contractor has actual knowledge or reason to believe that the opinion is based upon fraudulent, misleading, or otherwise incorrect information, their reliance upon the opinion will not be deemed to be in good faith.").

358. Nibley, *supra* note 343, at 21.

affect his answers to the questionnaire. The latter certification will help to ensure that the contractor's conflict of interest analysis is based upon the most current information regarding the applicant's responsibilities.

The contractor also should consider requiring the applicant to certify that he has complied, and will continue to comply, with all laws and regulations that apply to him by virtue of the fact that he is seeking employment with the contractor. In addition, the contractor may wish to include with the questionnaire a copy of OGE's most recent pamphlet for government employees seeking employment with private entities and require the applicant to certify that he has read that pamphlet.³⁵⁹

b. Analysis and Written Determination

Once the conflict of interest questionnaire has been completed, it must be reviewed and analyzed. The contractor should establish and consistently follow a written procedure for accomplishing this task. Risk will be minimized if contractor personnel are not permitted to engage in any employment contacts with an applicant until they receive notice, preferably in writing, that the process has been completed and employment discussions are permissible.

The contractor's procedures should define clearly which element or elements of its organization are responsible for reviewing the completed conflict of interest questionnaire.³⁶⁰ Some contractors require law department review for all current and former government employees, while others use different elements of their organization, such as human resources, to perform preliminary screening. If the contractor uses a multitiered system, its procedures should specify the criteria that trigger the requirement for law department review. For example, a contractor may decide that law department review is required for all current government employees and all applicants for relatively senior positions. Whatever criteria the contractor decides to use should be documented and applied consistently.

The party performing the conflict of interest review should have access to the applicant's résumé and conflict of interest questionnaire, his disqualification statement, and any other materials submitted by the applicant.³⁶¹ The contractor will be charged with knowledge of all facts disclosed in these documents, as well as any other information conveyed by the applicant. Accordingly, it is important to review and consider all documents and information provided, rather than relying exclusively on the conflict of interest questionnaire.

In addition, the contractor should consider providing the party responsible for the conflict of interest review with a detailed description of the position for which the applicant has applied.³⁶² To the extent possible, the description

359. Recent OGE publications are available at http://www.usoge.gov/pages/forms_pubs_otherdocs/forms_pubs_other_pg2.html.

360. See USSG, *supra* note 10, § 8B2.1(b)(2)(C).

361. RUDMAN ET AL., *supra* note 11, at 37.

362. *Id.*

should be tailored to the particular tasks the applicant would perform, the program with which he would be involved, and the Government customers with whom he would interact. The reviewer then can use this information, in conjunction with that provided by the applicant, to determine whether the applicant will be placed in an environment where high-risk representational activities are likely. Where the risk of such activities is high, the contractor may determine that a more thorough or higher-level review is required.

Access to a detailed job description also allows the reviewer to analyze the extent to which any applicable representational bans would prevent the applicant from performing the duties required by the relevant position. The reviewer then will be in a position to communicate more effectively with the hiring authority regarding the practical significance of any restrictions on the applicant's representational activities.

If the party charged with conducting the conflict of interest review determines that additional information is required, employment contacts should not be authorized until that information has been obtained and analyzed. The contractor should consider requiring the reviewer to obtain this information from the applicant directly, rather than through other contractor personnel. Direct contact allows the reviewer to ensure that the applicant understands the precise nature of the additional information required and to obtain any necessary clarifications regarding the applicant's response. It also ensures that the information will not be filtered through contractor personnel that may have a vested interest in hiring the applicant.

Requiring additional information to be obtained from the applicant by an individual with expertise in the rules applicable to hiring government employees also reduces the risk that improper employment negotiations will occur in the course of obtaining that information. For the same reason, and to prevent even the appearance of impropriety, contractor personnel with recruiting or hiring responsibilities should refrain from engaging in any contacts with the applicant while the conflict of interest review is pending.

After the reviewer has obtained and analyzed all necessary information, his findings may be documented in a written conflict of interest memorandum. At a minimum, the memorandum should state whether employment discussions with the applicant are permitted and whether the applicant is subject to the one-year hiring ban under the Procurement Integrity Act. In addition, it generally will be in the contractor's interest to require the memorandum to include an analysis of any representational bans that will apply if the applicant is hired. The latter analysis will assist the party responsible for hiring decisions to determine whether the applicant will be able to perform the essential responsibilities of the position sought.

The contractor's written procedures should clarify that no employment contacts may occur until the conflict of interest review has been completed and a written determination that such contacts are permissible has been issued by the law department or other responsible element of the contractor's organization. In addition, those procedures should specify when, if ever, an

exception to this requirement will be recognized. For example, the contractor may determine that there are circumstances under which a preliminary conflict of interest review, limited to the immediate concern of determining the permissibility of employment discussions, is warranted. This might be the case where, for example, the contemplated employment discussions are merely exploratory or an expedited decision regarding the propriety of an interview is required. In each case, the basis for exercising any exception to the requirement for a full review should be documented and a complete conflict of interest analysis should be conducted before an offer is extended to the applicant.

c. Centralized Control

In many cases, the risk of noncompliance can be reduced further by centralizing the procedures relevant to the recruiting and hiring functions. There are several advantages to such an approach.

Typically, centralization increases the objectivity of the review process. Individual groups or business units may have too much of a vested interest in hiring a particular applicant to objectively evaluate the resulting risk. Similarly, a reviewer who reports to those who are most affected by a decision to hire the applicant may feel increased pressure to issue a favorable conflict of interest determination. That is not to say that individual groups or business units should be excluded from the review process. To the contrary, their input regarding the applicant's prospective job responsibilities is essential to evaluating the risk associated with any representational bans that will apply to the applicant.

Centralization also facilitates control over the contractor's communications with the applicant. For example, if interviews are scheduled centrally, there will be a single entity responsible for ensuring that they do not occur until contractor personnel have reviewed the applicant's file to ensure that it contains all documents required by the contractor's written procedures, including a favorable conflict of interest determination.³⁶³ Similarly, the use of a centralized process for the issuance of offer letters may reduce the risk that an applicant will be hired before all necessary reviews have been conducted and all necessary documents obtained.³⁶⁴

2. Prehire Certification

Much can change in the interval between an applicant's submission of a conflict of interest questionnaire and the contractor's hiring decision. An applicant who has not been contacted by the contractor as quickly as anticipated may withdraw his disqualification statement and begin working on matters involving the contractor. Depending upon the nature of such matters and the applicant's involvement, a new ban on employment discussions or compen-

363. *Id.* at 36.

364. *Id.* at 37–38.

sation may result. Alternatively, an applicant may be promoted to a senior position or one that entails official responsibility for matters involving the contractor, thereby triggering additional restrictions on the applicant's representational activities should he be hired. These and many other types of changes may alter significantly the contractor's conflict of interest analysis.

Ideally, the applicant would have informed the contractor of such changes in accordance with a certification included in the contractor's employment application or conflict of interest questionnaire. It is risky, however, to assume that an applicant will remember to comply with this obligation without prompting from the contractor. Accordingly, if a decision is made to employ the applicant, the contractor would be well advised to require additional assurances from the applicant immediately before he is hired. For example, the contractor may wish to provide the applicant with a copy of his previously completed conflict of interest questionnaire and require the applicant to certify that the information provided remains current, accurate, and complete. If the applicant is unable to make this certification, or otherwise indicates that his job responsibilities have changed, further employment contacts should be avoided and the applicant should not be hired until a supplemental review has been completed in accordance with the contractor's standard procedures.

Several additional representations can be included in the contractor's pre-hire certification to further minimize risk. For example, the contractor may wish to require the new applicant to certify that:

- He has complied, and will continue to comply, with all conflict of interest laws, rules, and regulations applicable to current and former government employees.³⁶⁵
- He has provided the contractor with copies of any ethics opinions, received from his agency or the OGE, regarding any restrictions that will be imposed upon his activities following termination of government service.
- He did not engage in any employment contacts with the contractor prior to submitting a written disqualification statement.³⁶⁶
- He will notify his supervisor immediately if he believes that his performance of an assignment would violate any restrictions imposed by law, the contractor's conflict of interest policy, or the written conflict of interest determination prepared by the contractor.

Depending upon the circumstances, additional or different certifications may be warranted.

3. Initial Meeting Regarding Representational Activities

The law regarding post-government employment restrictions is complex and the manner in which it applies to each former government employee is

365. Levy et al., *supra* note 7, at 13.

366. RUDMAN ET AL., *supra* note 11, at 36.

highly sensitive to the particular assignments he performed during government service. Likewise, the risks to which each former government employee must be sensitive depend significantly upon the duties he will perform for the contractor. Accordingly, in addition to mandatory compliance training, discussed below, the contractor may wish to require an initial meeting between each former government employee and a representative of the law department for the purpose of ensuring that the new employee understands the unique restrictions and risks he will face in his new position.³⁶⁷

In addition to explaining the limitations set forth in the employee's written conflict of interest determination, the law department can apprise the employee of the particular risks he is likely to encounter in his new position and clarify any remaining questions the employee may have. The meeting also provides the contractor with an opportunity to clarify other aspects of its policy such as how the former government employee should address assignments that he perceives to create a high level of risk.

A meeting of the type described above can be an even more effective risk mitigation tool if the contractor personnel responsible for supervising the former government employee are required to attend. The better a supervisor understands the restrictions that apply to his employees, the less likely he will be to assign tasks that risk violations.³⁶⁸ A supervisor who has been educated regarding each employee's limitations also will be in a better position to monitor his employees' activities to ensure that they do not stray into high-risk areas.

The presence of the employee and his supervisor also allows the contractor to send several important messages. The supervisor's attendance signals to the employee that the contractor takes compliance with post-government employment restrictions seriously. It also conveys the message that compliance with post-government employment restrictions is a joint responsibility. The law department can reinforce the latter message by explaining that the employee is responsible for apprising the supervisor immediately when he believes that an assignment would create a significant risk of violating applicable post-government employment restrictions. In this regard, the employee needs to understand that, as the party most familiar with his history of government service, he frequently will be in the best position to identify areas of potential risk.

4. Monitoring of Assignments

When a former government employee changes positions or assignments within a company, he may face new and very different challenges regarding

367. *Id.* at 37. Alternatively, if there are insufficient resources, the contractor may consider limiting this requirement to the new hires that pose the greatest risk such as former senior and very senior government employees, former government employees who will be engaging in representational activities on a regular basis, and former government employees who are subject to the most complex or far-reaching restrictions.

368. Levy et al., *supra* note 7, at 10.

compliance with applicable post-government employment restrictions. Risk may increase significantly if, for example, a project manager is reassigned to a contract with his former agency. To reduce the likelihood that a former government employee will be transferred to a position that imposes an unacceptable level of risk, the contractor can implement a procedure for screening former government employees prior to significant reassignments.³⁶⁹

One way to implement such a procedure is to place an electronic “flag” in the personnel files of former government employees.³⁷⁰ Each time a “flagged” employee is proposed for a new position, the system could notify the law department of the proposed transfer. The law department then would be in a position to review the employee’s file and a description of the new position to assess the level of risk associated with the transfer and to determine whether additional legal analysis is required. In either case, the contractor could ensure that the former government employee is not transferred until the law department has either prepared a supplemental conflict of interest determination or documented its finding that a supplemental determination is not required.³⁷¹

Flagging each former government employee also allows the contractor to ensure that the employee’s new supervisor receives a copy of the employee’s written conflict of interest determination before any reassignment occurs. The new supervisor can then assess whether the employee is subject to any post-government employment restrictions that would prevent the employee from performing the essential responsibilities associated with the new position.

In addition, before or soon after a former government employee is transferred to a new position, the contractor may wish to require a brief meeting between the employee, his new supervisor, and a representative of the law department. The meeting would allow the law department to acquaint the supervisor with the restrictions that apply to the employee and to educate the employee regarding new or additional risks that are likely to arise in connection with his new responsibilities. Any such meetings should be documented. The contractor also may wish to require the former government employee and his new supervisor to execute a written certification stating that they attended the meeting, understand the post-government employment restrictions that apply to the former government employee, and will comply with those restrictions.

C. Training

Contractor personnel are unlikely to comply with rules of which they are not aware or that they do not understand. Mandatory ethics training, there-

369. RUDMAN ET AL., *supra* note 11, at 38; *see also* Levy et al. *supra* note 7, at 12 (suggesting periodic monitoring of the activities of former government employees to ensure compliance with post-government employment restrictions).

370. RUDMAN ET AL., *supra* note 11, at 38.

371. *Id.*

fore, is an essential element of any compliance program.³⁷² In light of recent events, including the Darleen Druyun scandal, it is now more important than ever that such training include basic instruction regarding a contractor's policies and procedures for complying with revolving-door prohibitions.³⁷³

Although no single approach is best suited to all contractors, revolving-door training generally should include the following elements:

- A high-level overview of the relevant statutory prohibitions with a focus on conveying general concepts and analyzing relevant examples;
- An explanation of the contractor's mandatory policies and procedures for ensuring compliance with such prohibitions, including the requirement to obtain a written conflict of interest determination, the use of certifications, and the need for ongoing monitoring of assignments;
- A discussion of the consequences of noncompliance for both the contractor and the responsible employee, including statutory penalties, internal disciplinary action, and performance evaluations;
- A description of the contractor's policy for reporting violations, including an explanation of the contractor's mandatory reporting requirement, nonretaliation policy, and ethics hotline;³⁷⁴
- An overview of the documents required to be generated and maintained; and
- A list of individuals that employees can contact with questions or to report violations of the contractor's policies.

If possible, the contractor may wish to provide the training in person to encourage discussion.

In addition, the contractor may wish to require former government employees and their supervisors to receive more detailed training regarding post-government employment restrictions. Although all contractor personnel should be familiar with such restrictions generally, former government employees and their supervisors require a more detailed understanding because they are responsible for ensuring compliance on a daily basis. Regardless of the level of detail included in the conflict of interest questionnaire, a former government employee will always have more information than the contractor regarding the matters in which he participated during government service. If the former government employee does not have a thorough understanding of post-employment restrictions, he will be unable to apply this knowledge to identify potential risks of which the contractor otherwise may be unaware.

Finally, a contractor should ensure that mandatory revolving-door training is extended to members of senior management.³⁷⁵ Such individuals often participate in efforts to recruit prominent government officials. If they are

372. See USSG, *supra* note 10, § 8B2.1(b)(4).

373. See generally Nibley, *supra* note 343, at 21–22.

374. See USSG, *supra* note 10, § 8B2.1(b)(5)(C).

375. RUDMAN ET AL., *supra* note 11, at 40; see also USSG, *supra* note 10, § 8B2.1b(4).

not aware of the applicable prohibitions, the risk of noncompliance can be significant. Indeed, the legal and public relations consequences of ethics violations can be particularly serious in cases involving senior management and high-profile government employees.

D. *Reporting Violations*

The contractor's written policies and procedures should address the procedure for seeking guidance regarding, or reporting violations of, applicable revolving-door restrictions. As with other types of violations, reporting should be mandatory, retaliation should be prohibited, and all reports should be investigated. In addition, as with other types of violations, the contractor may wish to provide for at least one reporting mechanism that preserves the anonymity and confidentiality of those who report violations.

E. *Incentives and Disciplinary Measures*

An effective compliance program requires a contractor to establish appropriate incentives for all personnel, including supervisory personnel, to act in accordance with its established policies and procedures.³⁷⁶ A contractor can create such incentives by including compliance as a factor in the periodic performance evaluations used to determine the advancement and compensation of its personnel. Adherence to the contractor's revolving-door policy can be simply one element of the compliance factor.

The considerations relevant to evaluating each employee's compliance with the contractor's revolving-door policy depend upon that employee's job responsibilities. For example, former government employees could be credited for spotting high-risk assignments, human resources personnel for identifying the absence of mandatory records, and supervisors for the compliance of their subordinates. Conversely, contractor personnel could be downgraded for failing to attend mandatory training, proceeding with employment discussions in the absence of required documentation, or failing to report known violations.

In addition to performance incentives, an adequate compliance program requires a contractor to implement disciplinary measures for personnel who engage in violations.³⁷⁷ Such penalties generally should vary in proportion to the frequency and severity of an employee's noncompliance. For example, it may be appropriate to issue a written warning to personnel who commit a single technical violation, such as failing to obtain a required certification from an applicant, but to impose more serious disciplinary action such as suspension or termination on personnel who commit the same violation on multiple occasions. On the other hand, one instance of engaging in or covering up a criminal conflict of interest violation generally would be grounds for termination of employment.

376. USSG, *supra* note 10, § 8B2.1(b)(6)(A).

377. *Id.* § 8B2.1(b)(6)(B).

F. Compliance Audits

An effective compliance program requires a contractor to conduct periodic audits to detect criminal conduct and to evaluate the effectiveness of its compliance efforts.³⁷⁸ The extent to which such audits should focus on compliance with revolving-door restrictions depends upon whether the contractor has identified the violation of those restrictions as an area of risk in its most recent periodic compliance assessment.

If the contractor has identified revolving-door restrictions as an area of risk, its periodic compliance audits should include efforts to assess the quality of its revolving-door policies and procedures and the extent to which those procedures are followed by its personnel. The previous sections of this article have addressed strategies for establishing adequate revolving-door policies and procedures. To analyze compliance with those policies and procedures, the contractor should consider incorporating the following procedures within the scope of its audit:

- A review of the prehire personnel files of former government employees. A file should include the former government employee's employment application, completed conflict of interest questionnaire, written conflict of interest determination, disqualification statement, prehire certification, and any other documentation required by the contractor. These documents should be dated before the commencement of employment discussions and should be accurate and complete. For example, the conflict of interest questionnaire should include a thorough response to each question. The written conflict of interest determination should reflect accurately all information disclosed by the applicant and should be as thorough as circumstances warrant.
- A review of the post-hire personnel files of former government employees. The files should include all required certifications and supplemental conflict of interest determinations. These documents should have been completed at the appropriate points in time. The former government employee's certification that he attended a meeting with his supervisor and a representative of the law department to discuss post-government employment restrictions should be dated within the required number of days after his hire date. To the extent required, supplemental determinations should have been completed before the former government employee was transferred to his new position.
- A review of the contractor's training procedures and materials. The training materials should be current and complete. Certificates of attendance should exist for all contractor personnel required to attend revolving-door training.

378. *Id.* § 8B2.1(b)(5). For an analysis of the considerations relevant to conducting compliance audits, see generally Louis D. Victorino & David D. Kadue, *Compliance Programs*, 7 BRIEFING PAPERS 387 (1986).

- Interviews with former government employees. Relevant topics include the types of prehire documents submitted and when they were requested, the nature and timing of any informal employment discussions, the consistency between current assignments and written conflict of interest determinations, and perceived opportunities for improvement in the hiring process.
- An analysis of reported violations. All reports should have been documented and investigated promptly and thoroughly. Investigation findings should be adequately documented. There should be records of any disciplinary or other personnel actions that resulted from the investigation.
- A review of all disciplinary actions and subpar compliance evaluations. Disciplinary measures should have been taken and documented in appropriate cases. The consequences of any violations should have been proportionate to the frequency and severity of the noncompliance and should be sufficient to deter future noncompliance.
- Depending upon the contractor's written policies and procedures, additional, different, or fewer reviews may be required.

To the extent possible, data should be collected and maintained in a manner that facilitates sorting and analysis. For example, the contractor may find it useful to generate reports that analyze compliance issues by individual, group, and division for each data field collected.

After the audit has been completed, the contractor should act on the findings at the individual and organizational level. Each violation discovered should be analyzed and the contractor should determine what disciplinary action, if any, should be taken against the responsible employee. In addition, the contractor should analyze the overall pattern of violations to identify gaps and weaknesses in its compliance program. These gaps and weaknesses should be addressed promptly through appropriate modifications to the contractor's revolving-door policies, procedures, or training, as the case may be.³⁷⁹

V. CONCLUSION

This article has focused on the steps contractors can take to minimize the risk of revolving-door violations. There is no reason, however, for the entire burden to fall on contractors. To the contrary, there are a number of steps that the Government can and should take to facilitate compliance.

First, the Government must improve the consistency and quality of the revolving-door training provided to its employees. Such training often is incomplete, undocumented, or both. For example, a recent GAO report found that the Department of Defense lacked knowledge regarding which personnel had received mandatory ethics training and whether that training addressed

379. See USSG, *supra* note 10, § 8B2.1(b)(7).

all relevant revolving-door prohibitions.³⁸⁰ The report further concluded that such prohibitions were not consistently addressed.³⁸¹ The GAO summarized these findings as follows:

DOD does not know if the population critical to the acquisition process, those employees covered by procurement integrity restrictions, are trained. Further, many ethics counselors could not provide evidence that employees received the annual ethics training. Additionally, DOD does not know whether the training and counseling includes all relevant conflict-of-interest and procurement integrity rules. As shown in Table 1, we found that the ethics counselors we interviewed did not consistently include information on the restrictions provided for in 18 U.S.C. 207, 18 U.S.C. 208, and 41 U.S.C. 423 in their annual ethics briefings for the past 3 years.³⁸²

To address these concerns, the Government should evaluate the revolving-door training currently being provided to government employees. Content should be standardized, all revolving-door prohibitions should be addressed, and employees who fail to attend training should be disciplined. In addition, the Government should implement the same monitoring and continuous improvement programs it expects from contractors. Violations should be analyzed, failure analyses should be conducted, periodic compliance audits should be performed, and procedures and training should be changed to address any weaknesses discovered.

Second, the Government should allow employees to obtain ethics advice without fear of retribution. Under current procedures, ethics officials are required by statute to report criminal violations disclosed to them by government employees.³⁸³ This creates a significant disincentive for government employees to disclose all relevant facts to ethics officials or to request ethics advice in the first instance. In the absence of such advice, government employees are less likely to recognize existing violations and more likely to commit future ones.

This unjustifiable result could be eliminated by creating a parallel procedure whereby government employees can obtain ethics advice confidentially. If such advice cannot be provided under circumstances that give rise to an attorney-client privilege,³⁸⁴ then the Government should explore the possibility of allowing government employees to obtain ethics advice anonymously, perhaps through electronic exchanges with agency ethics officials.

380. See U.S. GOV'T ACCOUNTABILITY OFFICE, DEFENSE ETHICS PROGRAM: OPPORTUNITIES EXIST TO STRENGTHEN SAFEGUARDS FOR PROCUREMENT INTEGRITY, GAO Rep. No. 05-341, at 6, 9-12 (2005).

381. See *id.* at 6-7.

382. *Id.* at 7.

383. 28 U.S.C. § 535(b); see also 5 C.F.R. § 2635.107(b).

384. See *In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998) ("When government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury.").

Finally, contractors, like government employees, should be entitled to request written advisory opinions regarding compliance with revolving-door restrictions. The contractor frequently will be in a better position than a current or former government employee to ensure that all relevant facts are identified and disclosed to the agency ethics official. Enhanced disclosure would increase the reliability of ethics opinions and correspondingly decrease the probability of unintentional violations.

It would be naïve to contend that these simple changes are the panacea for compliance with revolving-door restrictions. Nevertheless, they provide a useful starting point for discussions regarding the frequently overlooked topic of steps the Government should take to help contractors achieve compliance.