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1.11:600  Federal Conflict of Interest Statutes and Regulations

Discussed in this section are eleven federal statutory prohibitions and related regulations addressing conflicts of interest on the part of present or former officers or employees of the Federal (and in some instances of the District of Columbia) government. None of the statutory prohibitions is limited in application solely to lawyers, but all apply to lawyers, and that application gets particular attention in this discussion. The conflicts dealt with by the several provisions are, in each instance, conflicts between public responsibilities and private interests. All of the statutory provisions are found in Chapter 11 (Bribery, Graft and Conflicts of Interest) of Title 18 of the United States Code, the Federal Criminal Code.

Seven of the statutory provisions are post-government-employment restrictions, all found in various subsections of 18 USC § 207 and deriving in their present form from Pub. L. No. 87-849, 76 Stat.1119 (1962), as amended by the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, and the Ethics Reform Act of 1989, Pub. L. No.101-194, 103 Stat. 1716 (hereinafter, collectively, the "Act"). (There are a few other federal statutory provisions, not addressed in this discussion, that impose post-employment restrictions with respect to particular agencies: see, e.g., 12 USC § 2242(a), relating to Members of the Board of the Farm Credit Administration; 12 USC § 1812(e), relating to Members of the Board of the Federal Deposit Insurance Corporation; and 28 USC § 594(j)(2), relating to Independent Counsels and their staff.) The other four restrictions, also deriving in their present form from Public Law 87-849 (1962), address various potential conflicts between governmental responsibilities and private interests of government employees arising while they are in office.

The Statutory Post-Employment Restrictions

The seven post-employment restrictions are discussed below in an order slightly different from the order in which they appear in section 207, since the subject matter of one provision, section 207(b), fits it more comfortably at the end rather than in the middle of the series of post-employment provisions. The seven restrictions, in the order in which they are here discussed, are as follows:

[1]  A permanent prohibition (roughly paralleled, as to lawyers, by Rule 1.11) on former executive branch officers or employees making representational communications with or appearances before government agencies in particular matters involving a specific party or parties, in which they participated personally and substantially while in government. (18 USC § 207(a)(1), discussed under 1.11:610, below)

[2]  A two-year prohibition on former executive branch employees making representational communications with or appearances before government agencies in particular matters involving a specific party or parties, that were under their "official responsibility" while in government. (18 USC § 207(a)(2), discussed under 1.11:620, below)
A one-year prohibition on former senior executive branch employees making representational communications with or appearances before their former agencies in any matter. (18 USC § 207(c), discussed under 1.11:630, below).

A one-year prohibition on former very senior executive branch employees making communications with or appearance before either their former agencies or senior employees of other executive branch agencies. (18 USC § 207(d), discussed under 1.11:640, below).

A one-year prohibition on former members of Congress and certain categories of former employees of the legislative branch making representational communications with or appearances before specified categories of persons and entities in the legislative branch. (18 USC § 207(e), discussed under 1.11:650, below).

A one-year prohibition on former members of Congress and former employees of the legislative and executive branches who are subject to the preceding three prohibitions (i.e., those imposed by 18 USC §§ 207(c), (d) and (e)) representing, aiding or advising foreign governments or political parties with the intent to influence any officer or employee of any department or agency of the United States. (18 USC § 207(f), discussed under 1.11:660, below).

A one-year prohibition on former members of Congress and former employees of either the executive or the legislative branch aiding or advising any person (other than the United States) regarding trade negotiations in which the former members or employees had participated while in government. (18 USC § 207(b), discussed under 1.11:670, below).

Three of these seven prohibitions -- nos. [1], [2] and [4] in the listing above -- apply to former employees of the District of Columbia, as well as of the federal government; the other four apply only to former federal employees.

General Exceptions to the Statutory Post-Employment Prohibitions

Section 207(j) sets out seven general exceptions each of which is applicable to either some or all of the seven post-employment prohibitions contained in section 207. They are as follows:

(1) Official Government Duties: "[A]cts done in carrying out official duties on behalf of the United States or the District of Columbia or as an elected official of a State or local government." (Applicable to all seven of the post-employment prohibitions in section 207.)

(2) State and Local Governments and Institutions, Hospitals and Organizations: Acts done in carrying out official duties as an employee and on behalf of an agency or instrumentality of a state or local government or of any accredited degree-giving
institution of higher learning or hospital or medical research organization.  
(Applicable only to subsections (c), (d) and (e) of section 207.)

(3) International Organizations: "[A]n appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States."  (Applicable to all seven of the post-employment prohibitions in section 207.)

(4) Special Knowledge: Making or providing a statement that is based on the individual's own special knowledge in a particular area, provided that no compensation is received therefor.  (Applicable only to subsections (c), (d) and (e) of section 207.)

(5) Scientific or Technological Information: "[M]aking of communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned . . .."  (Applicable only to subsections (a), (c) and (d) of section 207.)

5 CFR § 2637.206 casts some light on this exception, although as a technical matter it implements a predecessor provision,

(6) Testimony: Giving testimony under oath or making statements required to be made under penalty of perjury, subject to certain restrictions on serving as an expert witness.  (Applicable to all seven of the post-employment prohibitions in section 207.) 5 CFR § 2637.208, again implementing a predecessor provision, is also applicable to this exception.

(7) Political Parties and Campaign Committees: Communication or appearance made solely on behalf of a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national federal campaign committee, a state committee or a political party. Certain limitations apply.  (Applicable only to subsections (c), (d) and (e) of section 207.)

The "Clinton Pledge"

Two of the post-employment prohibitions have been effectively expanded by Exec. Order No. 12834, 58 Fed. Reg. 5911 (1993), titled Ethical Commitments by Executive Branch Appointees, and commonly known as the "Clinton Pledge," which was issued on January 20, 1993, at the commencement of the Clinton administration. The Executive Order imposes upon certain categories of Executive Branch employees the requirement of a pledge whose effect is to impose a contractual commitment extending the post-employment period for which restrictions of the kind imposed by the statutory prohibitions (albeit not, like the latter, enforced by criminal penalty) must be observed. These commitments consist of a four-part pledge required of "senior appointees" in every executive agency, and a single pledge required of every "trade negotiator," whether or not also a "senior appointee." The substance
of those pledges is described in the discussion below of the two statutory provisions that they reflect, namely, section 207(c) (discussed under 1.11:630, below), and section 207(f) (discussed under 1.11:660, below). Enforcement of the pledges is by debarment proceedings, barring a former officer who has violate the pledge from lobbying a particular agency for up to five years, or by civil judicial proceeding for declaratory, injunctive or monetary relief (including establishment of a constructive trust).

The Statutory Restrictions on Conflicts of Interest During Government Service

The four statutory provisions regarding conflicts between governmental responsibilities and private interests of government employees, all of which apply to employees of the District of Columbia as well as the federal government, are the following:

[8] A prohibition on both payment to and receipt by present or former government employees of compensation derived from services rendered by such an employee or anyone else in representing someone before the government. (18 USC § 203, discussed under 1.11:680, below).

[9] A prohibition on certain representational activities relating to claims against and other matters affecting the government. (18 USC § 205, discussed under 1.11:690, below.)

[10] A prohibition on certain acts by government employees affecting a personal financial interest -- applying, inter alia, to negotiations for post-government employment. (18 USC § 208, discussed under 1.11:695, below).


Interpretive Authority

Authoritative interpretive guidance with regard to most of these statutory prohibitions is sparse.

Regulations issued by the Office of Government Ethics (OGE) that appear as 5 CFR Part 2637 provide authoritative guidance for application of the post-employment provisions as they stood prior to the 1989 amendments: that guidance is in terms applicable only to employees who left government employment before January 1, 1991, the effective date of those amendments, and as to them only with respect to the lifetime prohibition of section 207(a)(1)(the only provision of section 207 that, because of the time limits on the others, remains effective as to such employees). With respect to the amended provisions, and application of the Act to post-1990 departures, the regulations in Part 2637 have some value, but that value necessarily varies inversely with the degree to which the amendments made substantive changes in the statutory provisions. As of the time this text was prepared (April
1999), OGE had issued, in 5 CFR Part 2641, regulations interpreting and implementing section 207(c), as amended -- discussed under 1.1:630, below -- but had not yet adopted (or, indeed, exposed for comment) regulations interpreting the other provisions of the Act as amended. OGE did promulgate in November 1992 a memorandum titled Summary of Post-Employment Restrictions of 18 USC § 207 (herein the OGE Summary), which carries the disclaimer that it "reflects only a preliminary interpretation" of the 1989 amendments. Id. at 1.

As to the restrictions on conflicts of interest during government service, only section 208 is illuminated by formal regulations, which are found in Subparts D, E and F of 5 CFR 2635 and in 5 CFR Part 2640.

Some authority is also to be found with respect to almost all of the statutory provisions in Informal Advisory Opinions of OGE, a sprinkling of court decisions, and an occasional opinion by the Office of Legal Counsel (OLC) in the Department of Justice.

Penalties and Other Remedies

18 USC § 216 sets out criminal penalties and other remedies for all eleven of the statutory prohibitions. The criminal penalties are imprisonment for up to one or up to five years, depending on whether the offense was committed willfully, and/or a fine (as specified by the general fine statute, 18 USC § 3571) of up to $100,000 for a misdemeanor or $250,000 for a felony up to one or to five years in prison, depending on whether the offense was willfully committed; and fines of double these amounts in the case of organizational defendants. In addition, Section 216 makes provision for the Attorney General to bring actions for a civil penalty of $50,000 or the amount of compensation paid or offered for the prohibited conduct, whichever is larger; and for injunctive relief.

"Special Government Employees"

A category of employee that is specifically mentioned in most (though not all) of the eleven statutory prohibitions is that of "special Government employee," a term defined in 18 USC § 202(a) as an officer or employee of the executive or legislative branch or any agency of the United States government or of the District of Columbia who is employed to perform temporary duties, with or without compensation, for no more than 130 days out of any period of 365 consecutive days, or an independent counsel appointed under Chapter 40 of Title 28, or any person appointed by an independent counsel. The term also includes any person serving as a part-time local representative of a Member of Congress in the Member's home district or state, and reserve officers of the armed forces or officers of the National Guard while on active duty for training. An individual is designated a "special Government employee" only if at the time of his or her appointment it is estimated that he or she will fit the literal definition of the term. See OGE Informal Advisory Opinion 81 x 24 (July 23, 1981).
Section 207(a)(1) imposes a permanent bar against a former employee of the executive branch of the United States, or of the District of Columbia, "knowingly mak[ing], with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court martial of the United States or the District of Columbia" on behalf of another person in connection with a "particular matter" --

(A) in which the pertinent government is a party or has a "direct and substantial interest,"

(B) in which the former government employee while in government "participated personally and substantially," and

(C) which involved "a specific party or parties" at that time.

The bar explicitly applies not only to full-time government officers and employees but also to "special Government employees." And although the text of section 207(a)(1) refers only to employees of the executive branch of the federal government, the prohibition applies as well to employees of independent agencies. (This is made clear by the fact that subsections (b), (c) and (d) of section 207 (discussed, respectively, under 1.11:670, 1.11:630 and 1.11:640, below) all explicitly apply to employees of independent agencies as well as those of the executive branch, and all assume that this is also the case with subsection (a), to which each of them makes explicit reference.)

The bar applies to communications to and appearances before the executive and the judicial branches, but not the legislative branch. However, "[f]ormer employees must exercise care in their communications with the legislative branch since such communications may unavoidably also be directed to employees of a department or agency." OGE Informal Advisory Opinion 93x26 (October 4, 1993).

Although the prohibition applies to former employees of both the United States and the District of Columbia, section 207(a)(3) makes clear that former federal employees are barred from contacts with officers and employees of the specified entities of the U.S. Government, while former DC employees are prohibited from contacts with the specified entities of the DC Government; neither group is barred from contacts with entities of the other government.

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (a)(1) is subject to only four of those exceptions, namely, nos. (1) -- Official government duties; (3) -- International organizations; (5) -- Scientific or
Comparison to Rule 1.11

The statutory bar imposed by section 207(a)(1) is similar to the ethical prohibition imposed by Rule 1.11; it is, indeed, in major respects the model on which the Rule is based. The parallels are that both provisions are permanent, lifetime bars; and that both turn on personal and substantial participation while in government in a particular matter involving a specific party or parties, and on post-government employment in such a particular matter. The key term "matter," moreover, is defined almost identically in the two provisions. There are, however, important differences. The statutory provision is broader in scope in that it applies to all former government employees, whether or not they are lawyers, while the Rule of course applies only to lawyers. But in a very significant way the Rule casts a broader net, for while the statutory provision applies only to representational contacts, with "intent to influence," with any officer or employee of the executive or judicial branches of the government, and so does not prohibit "back office" work, or advice or assistance to another, or representational activities directed to a person or entity other than the government, the Rule prohibits any activity on behalf of a client with respect to a tainted "particular matter." And finally, the statute is concerned only with a post-employment "matter" that is the same as the governmental matter, and in which at the time of the former employee's post-employment contact with the matter the government is a party or has a direct and substantial interest, whereas the DC Rule's post-employment "matter" need not be same as, but may be only substantially related to the governmental "matter," and there is no requirement of a continuing governmental interest in order for the Rule's prohibition to apply.

"Particular Matter Involving a Specific Party or Parties"

This phrase is critical in determining the scope of the prohibition of section 207(a)(1), as well as that of section 207(a)(2) (discussed in 1.11:620, immediately below). The term "particular matter" is defined in section 207(i)(3) to include "any investigation, application, request for a ruling or other determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." The final phrase "involv[ing] a specific party or parties," which limits the defined term "particular matter" as used in the prohibitory provisions of section 207, is not defined in section 207(a)(1). However, 5 CFR § 2637.201(c)(1) sheds some illumination by stating that "[s]uch a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties."

"Rulemaking" was added to the list of examples of "particular matters" by the Ethics Reform Act of 1989; before that, rulemaking was not only not included in the examples of a "particular matter," but was expressly excluded from the definition by the pertinent regulations. Thus, 5 CFR § 2637.201(c)(1), interpreting section 207 as it stood before the 1989 amendments, draws a distinction between "specific matters" and "policy matters," and declares that "[r]ulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application" were not "particular matters" under section
207 as it stood before the 1989 amendment. It followed that a former government employee could "represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding." *Id.* Thus, the addition in 1989 of "rulemaking" to the examples of a "particular matter" broadened somewhat the scope of the Act's prohibition. The change was not, however, a major one, since "particular matter" must still be read together with the requirement that the matter involve "a specific party or parties": thus, a "rulemaking" will be a "particular matter" only as it involves such specific parties. And "[g]eneral rulemakings do not usually involve specific parties." *OGE Summary* at 4. "Consequently, it is quite possible that an employee who participated in a rulemaking while employed by the Government will, after leaving Government service, be able to appear before his former agency concerning the application of that rule to his new private sector employer without violating the . . . restriction." *Id.* There does not appear to be any authoritative guidance as to what sorts of rulemakings would be construed as involving specific parties under the various subsections of section 207 that are governed by the definition in subsection (i), but some guidance may be provided by the regulations addressing waivers and exemptions under section 208, 5 CFR Part 2640, making a distinction between a "particular matter involving specific parties" and a "particular matter of general applicability" – the latter being defined to mean a "particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties." See 1.11:695 at "Waivers and Exemptions," below.

**OGE Informal Advisory Opinion 90 x 7 (April 17, 1990)** rejected an argument that bilateral trade agreements regarding specific products are not matters involving specific parties because they have general application to specific industries, not individual companies, and so are comparable to general rulemakings. The *Opinion* held that the countries that are parties to such trade agreements are "specific parties" within the meaning of section 207(a).

The text of section 207(a)(1)(C) makes clear that the "particular matter" in which the departed employee participated while in government must have involved a "specific party or specific parties at the time of such participation." (Emphasis added.) Although the statutory text does not refer to "specific party or parties" in connection with the post-employment matter, OGE takes the view that the prohibition also requires that the matter involve some specific party or parties at the time of the post-employment communication or appearance, though such parties need not be the same specific parties as were involved at the earlier stage. *OGE Summary* at 4. The *OGE Summary* goes on to say that contracts are always particular matters involving specific parties, and that a Government procurement proposal "has specific parties identified to it when a bid or proposal is received in response to a solicitation, if not before." *Id.*

The prohibition applies only when the "matter" in which the former government employee participated while in government and the matter with respect to which a disqualification may arise after the former government employee leaves the government are the *same* particular matter although, as has been explained, the specific parties involved may be different. "The
same particular matter," however, "may continue in another form or in part." 5 CFR § 2637.201(c)(4). In the determination of whether a "matter" remains the "same," albeit continuing in another form or part, the relevant factors are "the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest." Id. In determining whether two situations are part of the same particular matter, "one should consider all relevant factors, including the time elapsed and the extent to which the matters involve the same basic facts or issues and the same or related parties." OGE Summary at 4.

It is clear that assignment of a contract with the Government from one contractor to another, and modifications to the terms of the contract, do not necessarily make the resulting contract into a separate "matter" from the original one. OGE Informal Advisory Opinion 91 x 24 (July 17, 1991.)

"Personal and Substantial Participation"

Section 207(i)(2) defines the term "participated," but only by non-exclusive example; it says that "participated" means an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action." (Emphasis supplied). No separate definition is provided in the statutory text for the modifying phrase "personally and substantially." Before the 1989 amendments, the Act did not define "participated" separately; rather, the examples now given in section 207(i)(2) followed the phrase "personally and substantially participated by . . ." in the prohibitory text of the provision. Clearly enough, however, the phrase "personally and substantially" continues substantively to modify "participated." And the regulations interpreting "personally and substantially" as used in the Act before the 1989 amendments clearly continue to offer guidance. Thus,

To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. "Substantially" means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.

5 CFR § 2637.201(d)(1). The OGE Summary elaborates that "An employee can participate 'personally' in a matter even though he merely directs a subordinate's participation." Id. at 4.

In Shakeproof Indus. Prods Div. of Ill. Tool Workers, Inc. v. United States, 104 F.3d 1309 (Fed. Cir. 1997), the plaintiff sought to compel the Commerce Department to
disqualify a law firm from representing another party in an antidumping review proceeding involving spring lock washers, on the basis that a member of the firm had been an Assistant Secretary of Commerce for the Import Administration at the time the antidumping investigation began. The critical issue was whether the lawyer in question had participated personally and substantially in the investigation while at the Commerce Department, so as to require his disqualification under either DC Rule 1.11 or section 207(a). Two documents lay at the heart of the dispute. One was the document that had initiated the antidumping investigation, which had been signed by the Assistant Secretary's deputy. The Commerce Department had found that this did not constitute personal and substantial participation by the Assistant Secretary, and the Court agreed. \textit{Id.} at 1313. The second document, which the Court found to present a closer case, was one by which the Assistant Secretary had approved a particular method for treating voluntary respondents in non-market economy antidumping cases. The Department had concluded that this document "reflected a policy matter of general applicability, not a decision specific to the lock washer case," although it did refer to that case "by way of illustrating the operation of [the] general policy." \textit{Id.} at 1313-14. As to this, the Court asserted that, "\textit{w}hile there is ground for debate about the proper characterization of that document, we conclude that the Commerce Department's characterization was not arbitrary or capricious." \textit{Id.} at 1314.

In \textit{Kelly v. Brown, 9 Vet. App. 37 (1996)}, the then Court of Veterans Appeals (since renamed the United States Court of Appeals for Veterans Claims) considered whether a lawyer should be disqualified from representing the appellant in a case, in light of the prohibitions of section 207(a)(1) or Rule 1.11 of the Model Rules, by reason of his having previously had contacts with the case while employed by the Department of Veterans Affairs. The contacts in question had consisted of signing a motion for an extension of time and a filing transmitting to the Court the decision of the Board of Veterans Appeals here appealed from. The Court concluded that these contacts did not amount to substantial participation in the case, for purposes of either the statute or the Rule.

It should be noted that the "personal and substantial participation" must have occurred when the government officer or employee was acting "as such," which is to say, in the course of his or her official duties. The point is illustrated by \textit{OGE Informal Advisory Opinion 95 x 12 (November 15, 1995)}, which addressed (but did not resolve) the question whether a former government employee who, while in government, had represented a fellow employee with respect to two EEO complaints, could, consistently with section 207(a)(1), continue the representation after departure from government service. The \textit{Opinion} noted that although section 205(a) generally prohibits an employee from acting as agent or attorney for anyone else in a matter in which the United States is a party or has a substantial interest, it does make an exception where the representation is "in the proper discharge of [the employee's] duties." [See 1.11:690, below.] Were this the case, then because the representation would have originally been pursuant to the employee's "official duties," continuation of the representation post-government employment would be prohibited by section 207(a)(1). The \textit{Opinion} also noted, however, that subsection (d) of section 205 permits an employee to represent another who is subject to administrative proceedings "if not inconsistent with the faithful performance of his duties." If this had been the ground of the representation in
question, then the post-employment prohibition of section 207(a)(1) would not apply. (The Opinion did not reach a conclusion as to which provision of section 205 applied in the particular circumstances to which it was addressed.)

The regulations interpreting section 207 prior to the 1989 amendments provide additional elaboration that appears to remain valid. First, they suggest that actions do not constitute "personal and substantial participation" in a matter if they are not taken after consideration of the merits of the matter. For example, "[i]f an officer personally approves the departmental budget," he is considered to have participated substantially "only in those cases where [n] individual] budget item is actually put in issue" before him. 5 CFR § 2637.201(d)(1), Example 1 (emphasis added). And even though an officer or employee could or does cause disapproval of a matter for failure to comply with administrative control, budgetary, or other non-substantive standards, he or she "should not be regarded as having participated substantially in the matter, except when such considerations also are the subject of the . . . [subsequent] representation." 5 CFR § 2637.201(d)(2). On the other hand, if an employee has authority to review a matter and to veto it, his or her reviewing it and passing it onto another without other action may constitute "personal and substantial participation." 5 CFR § 2637.201(d)(3).

Second, under the regulations "self-disqualification" by a government employee from a particular matter before his agency thereby avoids personal or substantial participation with respect to that matter. 5 CFR § 2637.202(b)(5). Such screening, however, does not protect against a finding that a former government employee had "official responsibility" for the screened matters, thereby invoking the two-year prohibition of section 207(a)(2), discussed in 1.11:620, immediately below. Id. Indeed, the very fact of screening would suggest that the matter in question was within the bounds of the employee's "official responsibility."
1.11:620 Restrictions Arising from Former Government Service: Two-Year Prohibition with Respect to Particular Matters Under Official Responsibility (18 USC § 207(a)(2))

Section 207(a)(2) of the Act imposes on the same categories of persons that are subject to the lifetime bar of section 207(a)(1) (i.e., former officers and employees of the executive branches of the United States and District of Columbia) a bar on representational contacts with "intent to influence" with regard to particular matters involving a specific party or parties and in which the pertinent government is a party or has a direct and substantial interest, all of these elements being cast in terms identical to those of the lifetime bar. This bar, however, is broader as to subject matter and narrower as to time than the former prohibition. Specifically, rather than imposing a lifetime ban, applying only to matters in which the former government employee participated "personally and substantially," it applies to any particular matter that the former officer or employer "knows or reasonably should know was actually pending under his or her official responsibility . . . within a period of 1 year before termination of his or her service or employment" with the government in question, and the ban applies for just two years after termination of government service.

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (a)(2) is subject to the same four of those exceptions as that of subsection (a)(1), namely, nos. (1) -- Official government duties; (3) -- International organizations; (5) – Scientific or technological information; and (6) Testimony.

The discussion of section 207(a)(1), under 1.11:610 above, with regard to the term "particular matter" and the nature of the prohibited representational contacts, need not be repeated here, for the language of the two provisions on those points is identical. As to "official responsibility," that is defined by section 202(b) as "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government actions." The OGE Summary elaborates that

The scope of an employee's official responsibility is usually determined by those areas assigned by statute, regulation, executive order or job description. All particular matters under consideration in an agency are under the official responsibility of the agency head, and each is under that of any intermediate supervisor having responsibility for the activities of a subordinate employee who actually participates in the matter. An employee's recusal from or other non-participation in a matter does not remove it from his official responsibility.

Id. at 5. The Regulations also specify that an employee does not have "official responsibility" for the substance of a matter by virtue of "authority to review or make decisions on ancillary aspects of [it] such as the regularity of budgeting procedures, public or community relations aspects, or equal employment opportunity considerations."
Since the bar applies only to a matter that the former official "knows or reasonably should know was actually pending . . . within a period of 1 year before the termination of his or her service," it will not apply if the matter was concluded earlier in the former employee's tenure.

The OGE Summary states that "[a] matter was 'actually pending' under a former employee's official responsibility if the matter was in fact referred to or under consideration by persons within the employee's area of responsibility." Id. at 5.

The OGE Summary confirms that whether a former employee "knows or reasonably should know" that the matter had been under the former employee's official responsibility relates to the state of the former employee's knowledge at the time of the proposed post-employment representation, rather than to awareness of the matter while still in office. Id. at 5-6.

"Reasonably should know" appears to suggest some degree of obligation to make appropriate inquiries of the former agency, at least, and perhaps the prospective client as well. As with the lifetime bar of section 207(a)(1), this bar applies only if the United States (or the District of Columbia) is a party to or has a substantial interest in the matter at the time of the post-employment representation. And as with that bar, this one does not prohibit representation through in-office assistance, such as drafting, counseling, and providing strategic advice. Also as with that bar, it restricts former federal employees only from contacts with agencies of the federal government, and former District of Columbia employees only from contacts with that government. Section 207(a)(3).
1.11:630  Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Former Senior Personnel (18 USC § 207(c))

Section 207(c) imposes on certain former "senior personnel" of the executive branch, including any independent agency, of the federal government (but not, in this case, the DC government) a one-year prohibition on representational communications with or appearances before an officer or employee of a department or agency in which he or she served within one year before leaving government, "with the intent to influence" such officer or employee "in connection with any matter on which such person seeks official action by any officer or employee of such department or agency." Unlike the prohibitions of sections 207(a)(1) and (a)(2), discussed immediately above, this prohibition does not depend on the former official having had any previous involvement in the matter that is the subject of the contacts with his or her former agency. The principal purpose of section 207(c) is to address "the problem of unfair or undue influence by former officials over their former colleagues and subordinates." S. Rep. 95-170, at 154 (1977).

"Senior" personnel to whom the prohibition applies are specified by section 207(c)(2) as those who fit in one of the following categories:

1. those employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5 [which refers to the Executive Schedule, comprising the five highest pay grades for non-elected Federal government officials];

2. those paid at a salary equal to or greater than level 5 of the Senior Executive Service [another five-stop scale of pay grades comprising government employees not subject to presidential appointment or Senatorial confirmation];

3. those appointed by the President to a position under section 105(a)(2)(B) of title 3 [certain White House employees];

4. those appointed by the Vice President under section 106(a)(1)(B) of title 3 [certain assistants to the Vice President];

5. active duty commissioned officers paid at pay grade 0-7 [brigadier general] or above; or

6. those detailed to any of the foregoing positions.

5 CFR § 2641.101. Excluded from the prohibition are very senior personnel who are subject to section 207(d) (discussed under 1.11:640, below); and "special Government employees" who served less than 60 days in the one-year period before termination of such service. And the Director of the Office of Government Ethics is authorized to narrow the scope of the prohibition in various ways, as described below.
As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (c) is subject to all seven of those exceptions.

The one-year period in which the prohibition applies runs from the date on which employment as a senior employee ends, not the date of leaving government employment, if the two do not coincide. OGE Summary at 8. The OGE Summary explains that "[t]he purpose of this one-year ‘cooling off’ period is to allow for a period of adjustment to the new roles for the former senior employee and the agency he served, and to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former senior position." Id.

Like the lifetime prohibition and the one-year prohibition in section 207(a), discussed under the two preceding headings, this prohibition applies only to representational communications or appearances with "intent to influence," and not to "behind-the-scenes" assistance. OGE Summary at 8. It applies, however, to any "matter" and, unlike those provisions, not merely to a "particular matter" involving a "specific party or parties"; nor need the "matter" involve a direct and substantial government interest. Additionally, as has been mentioned, there is no requirement that the former senior employee have had any prior involvement with the "matter" that is the subject of the communication or appearance. OGE Summary at 8. And, unlike the prohibitions in section 207(a), this prohibition applies to contacts only with the person's former agency, not the entire executive branch.

The OGE Summary reads the language of the statute literally to prohibit communication with an employee of any agency in which the former employee served in the one year period prior to termination of Senior Employee status, not simply the agency in which the former employee served as Senior Employee. Id. at 8. Thus, for example, if a former employee served in agency A in a non-Senior Employee post from January 1, 1996 to June 1, 1996 and served in agency B in a Senior Employee post from June 1, 1996 to January 1, 1997, she would be barred from communicating with employees of agency A and agency B from January 1, 1997 to January 1, 1998.

Section 207(c)(2)(C), which was added by the 1989 amendments, gives the Director of OGE authority, at the request of a department or agency, to waive the restrictions imposed, with respect to any position or category of positions in the department or agency, upon a determination that (i) the imposition of the restrictions with respect thereto would create an undue hardship in obtaining qualified personnel to fill the position, and (ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.

In addition, section 207(h) authorizes the Director of OGE to designate an agency or bureau within a department or agency as a separate department or agency for purposes of section 207(c) when the Director determines that the agency or bureau performs separate functions that preclude the potential for undue influence over other parts of the parent department or agency. As an exception to this authority, no agency or bureau within the Executive Office of
the President may be designated as separate, and designations of other agencies do not apply to persons who are Senior Employees by virtue of categories (1), (3) or (4) under subsection (c)(2), described in the text above. Section 207(h)(2). Thus, to take an example from the OGE Summary, OGE could designate the Defense Logistics Agency (DLA) as an agency that exercises functions that are separate and distinct from its "parent" department, the Department of Defense (DOD). Id. at 8. An individual formerly serving in the DOD but not the DLA would then be barred by section 207(c) from communicating with an employee of most agencies or bureaus of DOD, but would not be barred as to employees of the DLA. Conversely, an individual formerly serving with the DLA would be barred from communications with DLA employees, but not with employees of other agencies or bureaus of DOD. Prior to the 1989 amendments, the limitation of section 207(c)'s applicability resulting from OGE designations of separate agencies or bureaus did not extend to former officers or employees with official responsibility for supervision of such agencies. See 5 CFR § 2637.205(c)(3) (interpreting what was then section 207(e), now amended and redesignated as section 207(h), and stating that such persons remained subject to the prohibition of section 207(c) on communicating with employees of the designated agency despite such designation). As a result of the 1989 amendments, the reference to officers or employees with supervisory responsibilities was dropped, so that such persons are no longer excluded on this basis from the effect of separate agency designations by OGE. This change in statutory language would, however, be of no practical effect if the officer or employee were a Senior Employee in category (1), (3) or (4) under subsection (c)(2). Moreover, where the communication related to a particular matter involving specific parties, the two year prohibition of section 207(a)(2) (discussed under 1.11:620 above) would apply in any event.

The "Clinton Pledge"

The "Clinton Pledge," required by Executive Order 12834 to be executed by every "senior appointee" in every executive agency appointed on or after January 20, 1993, includes two undertakings whose effect is to extend from one year to five years the post-employment period in which the substance of the restrictions of section 207(c) (albeit without statutory sanctions) apply. The pledges are these:

1. I will not, within five years after the termination of my employment as a senior appointee in any executive agency in which I am appointed to serve, lobby any officer or employee of that agency.

2. In the event that I serve as a senior appointee in the Executive Office of the President ("EOP") . . . I also will not, within five years after I cease to be a senior appointee in the EOP, lobby any officer or employee of any other executive agency with respect to which I had personal and substantial responsibility as a senior appointee in the EOP.

The term "senior appointee" is defined by section 2(a) of the Executive Order as meaning "every full-time, non-career Presidential, Vice-presidential or agency head appointee in an executive agency whose rate of basic pay is not less than the rate or level V of the Executive
Schedule (5 USC §5316)," but excludes members of the senior foreign service and uniformed service commissioned officers. This is a somewhat less inclusive group than the "senior personnel" to which section 207(c) applies, at least as respects the two exclusions. (A memorandum dated January 5, 1996 from White House Counsel to heads of agencies stated that the Executive Order does not apply to non-career Senior Executive Service level 4 appointees and certain others in similar pay systems.) The term "lobby" is defined by section 2(c) of the Executive Order as meaning "to knowingly communicate to or appear before any officer or employee of any executive agency on behalf of another (except the United States) with the intent to influence official action," with a series of exceptions corresponding roughly to those in section 207(j), discussed under 1.11:600, above. The terms "personal and substantial responsibility" and "personal and substantial participation" are defined in subsections 2(g) and (h) of the Executive Order, in terms that incorporate the definitions of "personally" and "substantially" as those terms are defined for purposes of sections 207(a) and (b).

As to enforcement, see the discussion under the subcaption The "Clinton Pledge," in 1.11:600, above.
1.11:640  Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Former Very Senior Personnel (18 USC § 207(d))

Section 207(d), like section 207(c), discussed immediately above, imposes a one-year prohibition on post-employment representational contacts with "intent to influence"; but unlike section 207(c), it applies only to former very senior employees; it prohibits such contacts not only with any such employee's former department or agency but with high-level personnel in any department or agency; and it is subject to no limitation by determinations of the Director of OGE. The "very senior personnel" to whom the prohibition applies are

(1) the Vice President;

(2) persons in executive branch positions, including positions with an independent agency, paid at Level I of the Executive Schedule;

(3) persons in the Executive Office of the President paid at Level II of the Executive Schedule or above;

(4) persons appointed by the President under section 105(a)(2)(A) of title 3 [certain White House employees]; and

(5) persons appointed by the Vice President under section 106(a)(1)(A) of title 3 [certain assistants to the Vice President].

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (d) is subject to all seven of those exceptions.

There are two categories of persons that the former very senior employee may not make representational contacts with during the one-year period. The first is employees of the department or agency in which the very senior employee served as such within the one-year period preceding termination of his or her government employment. Section 207(d)(2)(A). This is substantially equivalent to the restriction imposed by section 207(c) on former senior employees, except that there is no comparable provision for designation of separate agencies or exemption of particular positions by OGE.

In addition, very senior employees are prohibited from contacting "any person appointed to a position in the executive branch which is listed in section 5312, 5313, 5314, 5315, or 5316 of title 5" [listing the grades of the Executive Schedule], regardless of whether these persons serve within the very senior employee's former agency. Section 207(d)(2)(B).

The prohibition applies for one year following the date on which the former employee ceased to be a very senior one, and not from the termination of government service, unless the two
dates are the same. **OGE Summary** at 9. Like the prohibition of section 207(c), this one applies to communications or appearances with respect to all matters, regardless of whether they involve specific parties; but, again, it does not prohibit in-office drafting or counseling.
Section 207(e) of the Act, which was added by the 1989 amendments, applies only to former Members of Congress and to certain former senior officers and employees of the legislative branch. The post-employment restrictions it imposes on persons in the legislative branch are similar to those imposed on executive branch personnel by sections 207(a)(2), 207(b) and 207(c) (addressed in 1.11:620 above, 1.11:670 below and 1.11:630 above, respectively). Its prohibition is on "knowingly mak[ing], with the intent to influence, any communication to or appearance before" specified persons within the legislative branch, "on behalf of any other person (except the United States) in connection with any matter on which [the former Member or employee] seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity." The prohibition lasts for a period of one year from the date on which the former employee left the position giving rise to the prohibition. If the former employee served in more than one position with the legislative branch in the year before leaving government, it is possible that he or she may be prohibited from contacting different groups of legislative employees by virtue of each position. For example, a person serving on a Member's personal staff through June 30, 1998, and then on a committee staff through December 31, 1998, joining a private law firm on January 1, 1999, would be barred from contacting the Member's personal staff until July 1, 1999, and from contacting the committee staff until January 1, 2000.

The categories of legislative personnel who may not be contacted vary depending on the position held by the former Member or government employee. Thus, there are six somewhat intricate levels of prohibited contacts:

[1] Former Members of Congress (who include, in addition to Senators and Representatives, Delegates and Resident Commissioners to the House of Representatives, sections 207(e)(7)(J) and (K)) are barred from contacting "any Member, officer, or employee of either House of Congress, and any employee of any other legislative office of the Congress." Section 207(e)(1)(B).

[2] Former elected officers of either House of Congress (e.g., the sergeant-at-arms of either House) are barred from contacting "any Member, officer, or employee of the House of Congress in which the elected officer served." Section 207(e)(1)(C). As to employees of a joint committee, the former elected officer is barred from contact if the particular employee's pay is disbursed by the Clerk or Secretary of the House of Congress in which that former officer served. Sections 207(e)(7)(C) and (D).

[3] Former employees on a Member's personal staff who, for at least 60 days in the aggregate during the one-year period before such employment was terminated, were paid at a level equal to or above 75 percent of the basic rate of pay of a Member of the House of Congress in which the employee was employed are barred from
contacting the Member on whose staff they served, and any employee (regardless of pay level) of that Member. Sections 207(e)(2) and (6). A person is an employee of a Representative if employed "under the clerk hire allowance," section 207(e)(7)(E), and an employee of a Senator if that person "is an employee in a position in the office of a Senator," section 207(e)(7)(F).

[4] Former employees on the staff of any Committee of Congress (defined to include "standing committees, joint committees and select committees," section 207(e)(7)(A)), who, for at least 60 days in the aggregate during the one-year period before such employment was terminated, were paid at a level equal to or above 75 percent of the basic rate of pay of a Member of the pertinent House of Congress are barred from contacting any Member or employee (regardless of pay level) of their former committee, and any Member (but not employee) who, even if no longer on that committee, was on it during the year prior to the former staff member's termination. Sections 207(e)(3) and (6)(A).

[5] Former employees on the leadership staff of either House of Congress who for at least 60 days in the aggregate during the one-year period before such employment was terminated were paid at a level equal to or above 75 percent of the basic rate of pay of a Member of the pertinent House of Congress are barred from contacting any Member who is a member of the leadership or any employee (regardless of pay level) on the leadership staff of the House of Congress for which the former employee served. Sections 207(e)(4) and (6). The leadership positions in the respective Houses are set forth at 207(e)(7)(L) and (M). An employee on the leadership staff means an employee of the office of a Member serving in a leadership position in either House, and "any elected minority employee of the House of Representatives." Sections 207(e)(7)(H) and (I).

[6] Former employees of any other legislative office of Congress who, for at least 60 days in the aggregate during the one-year period before such employment was terminated, were in a position for which the rate of basic pay is equal to or greater than that of level V of the Executive Schedule, are barred from contacting employees (regardless of pay level) and officers of the legislative office for which the former employee worked. Sections 207(e)(5) and (6)(B). Included in this provision are officers and employees of the Architect of the Capitol, the U.S. Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the Copyright Royalty Tribunal, the U.S. Capitol Police, and any other agency, entity, or office of the legislative branch not covered by the prior categories. Section 207(e)(7)(G).

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (e) is subject to six of those seven exceptions, namely, nos. (1) -- Official government duties; (2) -- State and local governments and institutions;
(3) -- International organizations; (4) -- Special knowledge; (6) -- Testimony; and 
(7) -- Political parties and campaign committees.

It should be noted that the prohibition applies regardless of whether a former employee is seeking official action by the person contacted: the contact is prohibited if the purpose is to influence action by any Member, officer, or employee of either House. Thus, a former member of Senator X's staff cannot contact Senator X in order to seek Senator X's help to persuade Representative Y to take some action in Representative Y's official capacity. On the other hand, the provision does not prohibit the former member of Senator X's staff from approaching Representative Y directly. The only exception to this is in the case of former employees of other legislative offices, who may not contact employees of their former office for the purpose of influencing official action by that person or any other employee of their former office, but who may contact employees of their former office for the purpose of influencing official action by anyone else, including employees of a different legislative office or Members or staffers of either House of Congress. (This follows from the statutory language of section 207(e)(5), governing former employees of legislative offices, which differs from the formulation of sections 207(a)-(d) with regard to whose action is sought.)

The provisions of section 207(e) are not addressed by any reported court decisions, by Regulations, by the OGE Summary or by any OGE opinions. OGE Informal Advisory Opinion 90 x 17 (October 26, 1990), which provides a summary of all the other post-employment restrictions of 18 U.S.C. § 207 as they stood after the 1989 amendments, does not address section 207(e). Thus, little official guidance beyond the language of the statute is currently available.
1.11:660  Restrictions Arising from Former Government Service:
One-Year Prohibition with Respect to Representation of Foreign
Governments and Political Parties (18 USC § 207(f))

Section 207(f) was also added to the Act by the 1989 Amendments. It imposes a one-year
post-employment prohibition with respect to representation of foreign governments and
political parties on all former Members of Congress and former legislative branch employees
who are subject to section 207(e) (discussed immediately above), and on former senior and
very senior employees of the executive branch, as those categories are defined under sections
207(c) and (d) (discussed under 1.11:630 and 11:640, above). The bar in question is a
permanent one for anyone who serves as United States Trade Representative or Deputy
Trade Representative. Section 207(f)(2).

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general
exceptions to some or all of the post-employment prohibitions contained in that section. The
prohibition of subsection (f) is subject to only three of those exceptions, namely, nos. (1) --
Official government duties; (3) -- International organizations; and (6) -- Testimony.

Section 207(f) goes beyond all the post-employment restrictions discussed above in that it
prohibits not only appearances on behalf of a foreign government or political party but in-
office activities such as counseling and drafting as well. Specifically, the provision prohibits
both "represent[ing] a foreign entity before any officer or employee of any department or
agency of the Government of the United States with intent to influence" that person's official
decisions, section 207(f)(1)(A), and "aid[ing] or advis[ing] a foreign entity with the intent to
influence a decision of any [such] officer or employee," section 207(f)(1)(B). The OGE
Summary (interpreting the provision only as it applies to Executive Branch employees)
points out that this includes such "behind the scenes" activities as drafting a proposed
communication to an agency, advising on an appearance before an agency, or consulting on
strategies designed to persuade decision-makers to take certain agency action. Id. at 11.
Such activities are prohibited, however, only if they are intended to help influence "an
official discretionary decision of a current departmental or agency employee." Id.

Section 207(f)(3) defines the term "foreign entity" as meaning the "government of a foreign
country" or a "foreign political party" as those terms are defined in the Foreign Agents
Registration Act of 1938 ("FARA"), 22 U.S.C. § 611 et. seq. The "government of a foreign
country," as defined under FARA, includes any "person or group of persons exercising
sovereign de facto or de jure political jurisdiction over any country" as well as "any faction
or body of insurgents within a country assuming to exercise governmental authority . . .
[whether or not] recognized by the United States." 22 U.S.C. § 612(e). The definition
extends as well to subdivisions and agencies of such governments, however named, to which
sovereign authority or functions have been delegated. Id. "Foreign political party" is defined
very broadly under FARA to include any "organization or other combination of individuals"
whose "aim or purpose," even in part, is to control or influence the government of a foreign
country. 22 USC § 611(f). The OGE Summary provides some limitation, stating that "[a]
foreign commercial corporation will not generally be considered a 'foreign entity' . . . unless it exercises the functions of a sovereign." *Id.* at 11.

The "Clinton Pledge"

The "Clinton Pledge," Executive Order 12834, effectively extends the restrictions of section 207(f) in three respects. The commitments required of every "senior appointee" in every executive agency appointed on or after January 20, 1993, include these two pledges that relate to the restrictions imposed by section 207(f):

3. I will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, if undertaken on January 20, 1993, would require me to register under the Foreign Agents Registration Act of 1938, as amended.

4. I will not, within five years after termination of my personal and substantial participation in a trade negotiation, represent, aid or advise any foreign government, foreign political party or foreign business entity with the intent to influence a decision of any officer or employee of any executive agency, in carrying out his or her official duties.

*Id.*, sec. 1. In addition, the Executive Order requires the same pledge as no. 4, just quoted, from every "trade negotiator" who is not a senior appointee and has been appointed to a position in an executive agency on or after January 20, 1993. *Id.*

The term "senior appointee" is defined; the definition is set out in 1.11:630, above, and need not be repeated here.

The term "trade negotiator" is defined to mean a "full-time, non-career Presidential, Vice-presidential or agency head appointee . . . who personally and substantially participates in a trade negotiation as an employee of an executive agency." *Id.*, sec. 2(b).

The term "trade negotiation" is defined to mean a negotiation that the President determines to undertake to enter into a trade agreement with one or more foreign government, and does not include any action taken before that determination has been made. *Id.*, sec 2(i). (This definition is virtually identical to the definition of the same term under section 207(b) [discussed under 1.11:670, immediately below].)

The phrases "personal and substantial responsibility" and "personal and substantial participation" are defined in terms that incorporate by reference "'personally' and 'substantially' as those terms are defined for purposes of sections 207(a) and (b) of title 18, United States Code." *Id.*, sec. 2(g). For discussion of those terms as there employed, see 1.11:610, above.
As to enforcement of the obligations imposed by the pledges prescribed by the **Executive Order**, see the discussion under the subcaption *The "Clinton Pledge,*** in 1.11:600, above.
1.11:670 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Trade or Treaty Negotiations (18 USC § 207(b))

Section 207(b), also added by the 1989 amendments, is unique among the post-employment prohibitions of the Act in that it turns on the use of certain sensitive information rather than on efforts to influence governmental action. Along with section 207(f), it differs from the other five post-employment prohibitions in section 207 in prohibiting the aiding or advising of others and not solely representational contacts with government personnel.

Specifically, section 207(b) provides that for one year after termination of government service, no officer or employee of either the executive or the legislative branch (including Members of Congress) who within one year prior to such termination "personally and substantially participated" in any "ongoing trade or treaty negotiation" and had access to information about the negotiations that is exempt from disclosure under the Freedom of Information Act (FOIA), 5 USC § 552, may, on the basis of such information, knowingly represent, aid or advise any other person (except the United States) concerning such ongoing negotiations.

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (b) is subject to only three of those exceptions, namely, nos. (1) -- Official government duties; (3) -- International organizations; and (6) -- Testimony.

It should be noted that although this statutory prohibition is limited to a one-year period following employment, a lawyer who is subject to that prohibition will likely be subject to a restraint on use of the information in question that is imposed by Rule 1.6 of the Rules of Professional Conduct, and that is without a time limit. See DC Rule 1.6(f) (making clear that the obligation to preserve confidences and secrets of a client continues after termination of the lawyer's employment).

The meaning of the phrase "personal and substantial participation," also an operative term in section 207(a)(1), is explored under 1.11:610, above. The OGE Summary adds that "[i]t is not necessary that a former employee have had actual contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation." Id. at 6.

"Trade negotiation" is defined by section 207(b)(2)(A) as negotiations taking place after the President has determined to negotiate a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988 ((OTCA) 19 USC § 2902). The OGE Summary states that trade negotiations become "ongoing" at the earlier of public announcement of a determination by the President or the giving of notice to Congress of his intention to enter into an agreement, which must be given at least 90 days prior to entering into a trade agreement under 19 U.S.C. § 2903(e)(1)(A). Id. at 6. A "treaty," in turn, is defined by section 207(b)(2)(B) as "an international agreement made by the President that
requires the advice and consent of the Senate." According to the OGE Summary, treaty negotiations become ongoing "at the point when both (1) the determination has been made by a competent authority that the outcome of a negotiation will be a treaty, and (2) discussions with a foreign government have begun on a text." Id. at 6. For the prohibition to apply, a former employee's personal involvement in the negotiations must have occurred after, and not before, the negotiations become "ongoing." Id.

The OGE Summary states that "[t]rade and treaty negotiations both cease to be ongoing when an agreement or treaty enters into force or when all parties to the negotiation cease discussion based on a mutual understanding that the agreement or treaty will not be consummated." Id. The OGE Summary does not address situations where such a cessation has occurred but the parties shortly thereafter change their positions and resume negotiations where they left off. Since the Act's restriction lasts for only one year in any event, it would seem prudent to assume that negotiations resumed within less than a year might well be treated as ongoing, rather than new, negotiations.

Assuming that a former government employee has participated personally and substantially in an ongoing trade or treaty negotiation (in the last year of government employment), he or she may not "knowingly represent, aid or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates," but the prohibition takes hold only if such representation is "on the basis of" information concerning the negotiations that he or she "knew or should have known" was designated by the appropriate department or agency as subject to a national security classification or otherwise exempt from disclosure under FOIA. Section 207(b)(1); OGE Summary at 7.

The OGE Summary also states that representation, aid or advice will have been given "on the basis of" restricted information if the "representation, aid or advice either involves a disclosure of covered information to any person, or could not have been made or rendered had the former employee not had actual knowledge of covered information." Id. The OGE Summary adds, however, that a former employee may utilize "information from an agency record which, at the time of his post employment activity, is no longer exempt from disclosure under the Freedom of Information Act." Id.

The OGE Summary states that representation involves appearances before or communications with "any third party," including (but not limited to) "any employee of the executive, legislative or judicial branch of the Federal Government, including a Member of Congress." Id. Unlike the other prohibitions of section 207, this representation need not be intended to influence the taking of official action; it need only be "concerning" the treaty negotiations. A former government employee "aids or advises" another person "when he assists that person other than by communicating to or appearing before a third party." Id. Because it is not enough simply to refrain from disclosing restricted information, it may be difficult to determine or demonstrate that a particular representation has not been in violation of the Act where the former employee had access to substantial amounts of information that was exempt from disclosure.
The OGE Summary points out as well that "even though a trade or treaty negotiation may not yet have become ongoing at the time of an employee's participation, the negotiation may nonetheless have had specific parties identified to it, thus triggering the lifetime restriction set forth in Section 207(a)(1)." This is consistent with the position taken by OGE in an informal advisory letter issued in 1987. See OGE Informal Advisory Opinion 87 x 3 (March 4, 1987).
1.11:680   Prohibition with Respect to Payment for Represenational Services Before the Government (18 USC § 203).

Section 203(a) prohibits

- receipt of compensation for representational services before any department, agency, court, etc. of the United States,

- by anyone who at the time the services were performed, whether by that person or by another, was an officer, employee or judge of the executive, legislative or judicial branch or any agency of the United States,

- in relation to any "particular matter" in which the United States is a party, or has a direct and substantial interest.

In addition, section 203(a)(2) prohibits the knowing offer or payment of any such compensation for representational service rendered or to be rendered.

Section 203(b) sets out parallel prohibitions affecting employees of the District of Columbia government.

Section 203 overlaps substantially with section 205 (discussed under 1.11:690, below), and to some degree also with section 209 (1.11:699, below). Both section 203 and section 205 concern representational activities in matters involving the government, but the former applies to receipt or payment of compensation for such activities, and applies broadly to matters in which the government is a party or has a direct and substantial interest; while the latter applies to the representational activities themselves, and applies whether or not compensation is involved, but it applies, more narrowly, only to representational activities involving a claim against the government. The overlap between section 203 and section 209 lies in the fact that both prohibit receipt or payment of compensation to government personnel, the key difference being that under section 203 the prohibited compensation is for representational services to others and under section 209 it is for services provided to the government.

Section 203 has different mental state requirements for recipients and for payers of compensation for representational services. A payer is liable only if it "knowingly" gives, offers or promises compensation for representational services. The recipient, however, violates section 203 whether or not his or her receipt was "knowing." In explaining this discrepancy, the United States District Court for the District of Columbia observed,

[T]he only logical explanation . . . for Congress' inclusion of the term "knowingly" in one subsection and its exclusion in the other is Congress' intent to treat government employees receiving payments from those interested in matters in which the United States is a party or has a direct or substantial interest more harshly than the donors of such payments.

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A violation of section 203 does not require any showing of evil intent. See United States v. Alexandro, 675 F.2d 34, 43 (2nd Cir.), cert. denied, 459 U.S. 835 (1982); United States v. Evans, 572 F.2d 455, 481 (5th Cir.), cert. denied sub nom. Tate v. United States, 439 U.S. 870 (1978); OGE Informal Advisory Opinion 88 x 6 (March 10, 1988). But see United States v. Johnson, 419 F.2d 56, 60 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970) (court reads scirent requirement into predecessor statute to section 203). As the Court observed in Evans:

"The purpose of [Section 203] is to reach any situation in which the judgment of a government agent might be clouded because of payments or gifts made to him by reason of his position "otherwise than as provided by law for the proper discharge of official duty." Even if corruption is not intended by either the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee, or the inefficient management of public affairs. Th[is] statute[ . . . is] a congressional effort to eliminate the temptation inherent in such a situation."

572 F.2d at 480. Indeed, the court further found that "it is not [even] necessary . . . that the official actually be capable of providing some official act as quid pro quo at the time." Id. at 479; see also United States v. Freeman, 813 F.2d 303, 306 (10th Cir. 1987) ("We do not limit our interpretation of [section 203] to require that the government employee perform an illegal service."). By similar reasoning, in Stern v. General Electric Co., 924 F.2d 472 (2d Cir. 1991), the court held that section 203 would not be violated by a corporation's PAC making contributions to Members of Congress knowing that the contributions could be converted (legally) to the Members' personal use. "Criminal intent under section 203 turns not on what the contributor expects the recipient to do with the money, but rather on what the contributor expects to receive for that money." Id. at 478.

However, evil intent may be relevant in determining whether the violation amounts to a felony, on the one hand, or a misdemeanor, on the other, under section 216 of the Act, which prescribes the penalties attached to all provisions of the Act. (Section 216 is discussed under 1.11:600, above.)

The 1989 amendment to section 203 explicitly provides that the section applies only to "representational" services, codifying the consistent prior holdings of both the courts and the Office of Government Ethics. See e.g., United States v. Myers, 692 F.2d 823 (2nd Cir. 1982), cert. denied sub nom. Lederer v. United States, 461 U.S. 961 (1983); OGE Informal Advisory Opinions 89 x 7 (May 31, 1989) and 88 x 3 (March 2, 1888). There is, however, no requirement that these representational services relate to a proceeding that is actually pending at the time compensation is received, Myers, 692 F.2d at 853 n.26.)

The term "representational services" clearly encompasses a wide array of activities
commonly involved in the practice of law. As explained by the Office of Government Ethics, "[r]epresentational service is [seeking on behalf of another, a] discretionary action [from the Government]. It includes any of a broad spectrum of activities beyond formal representation in courtroom or in agency proceedings by an attorney." OGE Informal Advisory Opinion 88 x 3 (March 2, 1988) (brackets in original). It appears that rulemaking may be considered an "other particular matter," for section 203 purposes, as it is for purposes of section 207 (see 1:11:610, above), and thus a representational service within the prohibition of section 203, even though section 203, unlike section 207, was not modified with respect to the meaning of the term "particular matter" by the 1989 amendments.

"Such representations must involve communications made with the intent to influence and must concern an issue or controversy." OGE Informal Advisory Opinion 89 x 7 (May 31, 1989). Thus, the "provision of purely factual information or the submission of documents not intended to influence are not representational acts," id.; see also OGE Informal Advisory Opinions 81 x 21 (June 25, 1981) and 85 x 3 (March 8, 1985) (receipt of compensation for preparation and signing by Government employee of another's income tax return does not violate section 203).

A major change in the scope of section 203 made by the 1989 amendments was the addition of representational services before a court to the list of prohibited services. Prior to this amendment, representational services rendered before a court were barred only under section 205 (which substantially overlaps with section 203 but also covers unpaid services). See 1.11.690, below.

Section 203 does provide two exceptions that were added by the 1989 amendments. Both of these exceptions have particular relevance to lawyers, and the second is relevant to a law firm that has a "special Government employee" (such as an independent counsel) connected with the firm.

First, any government employee can provide paid or unpaid representational services for his immediate family (parents, spouse or children) or representational services as guardian, executor, administrator, trustee or other personal fiduciary, provided that the employee has not participated "personally or substantially" in the matter as a government employee and the matter is not the subject of his or her official responsibility. Section 203(d). This exception is subject to approval by the Government official responsible for the appointment of the government employee. Id.

Second, a "special Government employee" can act as an agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States provided that the head of the department or government agency concerned with the grant or contract certifies in writing that the national interest so requires and publishes such certification in the Federal Register. Section 203(e).

Section 203 now also expressly allows a government employee to provide testimony under oath or make statements required to be made under penalty of perjury. This exception, which
had been part of the predecessor statute to sections 203 and 205, had been inadvertently
omitted from section 203 when the two sections were amended in 1962 to stand alone.
*United States v. Wallach*, 935 F.2d 445, 471 (2d Cir. 1991), held that a conspiracy to
violate section 203 could be found if a person anticipating appointment as a federal official
accepted payment in return for agreement to lobby on an enterprise's behalf while holding
federal office.

Although section 203 is not limited to lawyers, it is of particular pertinence to them. In
addition to the core prohibition, on a lawyer in government receiving compensation for
representing another before the government, and on sharing the compensation received by
others (such as law-firm partners) for such representations, section 203 has potential
application to lawyers in two less obvious circumstances. One has to do with compensation
of lawyers who join a firm after leaving government, and the other relating to compensation
of "special Government employees" who concurrently work for a law firm.

**Lawyers Entering a Law Firm from Government.**

Because section 203 focuses on the date that representational services were rendered rather
than the date compensation was received, paid or offered, lawyers leaving government
service and the law firms to which they go must be aware of the restrictions of section 203 as
they may affect the lawyer's compensation after joining the firm. As the Office of Legal
Counsel of the Department of Justice has explained:

> This post-employment reach of section 203 especially affects situations in
> which a former government employee joins or rejoins a law partnership or
> similar firm. The literal language of [section 203] makes it unlawful for the
> former government employee to share in any fees received by the firm for
> services in a matter covered by the statute and rendered by the firm at any
time during the period of his government employment -- even though the
> matter was never before his agency and did not come to his attention before
> he left the government, and even if during his government employment he had
> no part in, or even knowledge of, the service rendered by another.

Memorandum of the Department of Justice Office of the Legal Counsel, *General
Restrictions Regarding Future Employment of Government Officers and Employees*
(Nov. 12, 1976), at 8 (hereinafter the *1976 OLC Memorandum*).

This restriction normally will not affect a firm's compensation to former government lawyers
entering a firm as associates, since their fixed salary cannot be traced directly to any services
before the government. See *1976 OLC Memorandum at 9* (section 203 "does not apply to
a person who receives a fixed salary as an employee of the firm."). The firm must be careful,
however, if it pays a bonus over and above the fixed salary to the associate, for the bonus
must not be calculated on the basis of firm earnings that include compensation for
representational services provided by the firm before the government. See *OGE Informal
Advisory Opinion 84 x 13 (June 15, 1984)* (advising a law firm in which an "of counsel"

lawyer had been appointed as an assistant independent counsel that a bonus paid to that lawyer over and above his fixed salary "may not be calculated on any amount that includes fees generated by the firm's representations of clients on matters 'pending in' the Department of Justice while he served as a special Government employee of the Department”).

A firm must, however, take appropriate steps to ensure that former government lawyers entering the firm as partners do not receive such compensation. Partners ordinarily share in the profits of a law firm, but a partner joining a firm after government service must not share in any profit derived from representational services performed by the firm before the executive branch or courts during that partner's government service. See OGE Informal Advisory Opinion 88 x 3 (March 2, 1988) (government employee who is a partner in a law firm is "barred from receiving any partnership share, any bonuses, or any other form of payment derived from compensation for the representational services of others [before a government agency]"); OGE Informal Advisory Opinion 90 x 3 (March 1, 1990) (same, re former government employee joining law firm); OGE Informal Advisory Opinion 90 x 10 (May 9, 1990) (Section 203 would prevent a retired military officer serving as an officer of a corporation that acts as an agent for federal employees in pursuing private personal property loss and damage claims against the government from sharing in fees earned by the corporation in representing such persons during the time he was on active duty or employed by the government). Likewise, OGE has ruled that a government employee could not receive compensation by way of dividends instead of salary from a company that provides representational services on behalf of third parties, since such compensation is tied to the profitability of the firm which in turn is tied to the prohibited services. OGE Informal Advisory Opinion 89 x 7 (May 31, 1989). Because section 203 imposes criminal liability upon the payer as well as the payee in such instances, such payment would expose to criminal sanction both the other partners of the firm who knowingly share the fee with the returned partner and a client who pays for such services knowing that the former government lawyer will share the fee. See 1976 OLC Memorandum at 9 n.11.

There are two practical approaches that a law firm can take to avoid a violation of section 203 in these circumstances. One is to separate the fees received from representations before the government during the pertinent period from other fees that the partner is eligible to share, and have the partner in question share only in the latter fees. See OGE Informal Advisory Opinion 84 x 3 (March 19, 1984): "In practical terms [the affected partner] and the other members of [the] firm must maintain a bookkeeping arrangement which segregates funds they receive for such representations from those in which [the affected partner is] eligible to share. They may not make up any resulting disparity so that [the affected partner does] not suffer any economic loss." The other approach is to pay the incoming partner a fixed salary for such period as may be necessary to assure that no further fees for representational services before the government during the partner's government service remain to be received. See OGE Informal Advisory Opinion 84 x 6 (May 1, 1984) ("The payment of a salary, instead of the grant of a partnership interest, to a lawyer who has left the service of the Federal Government for practice as a principal in a law firm is a means of avoiding the specific prohibition of 18 U.S.C. § 203."). OGE Informal Advisory Opinion 93 x 31 (October 26, 1993) approved a proposed arrangement under which a law firm would
compensate two partners who had recently left the government on the basis of estimated receipts from billings for services provided after their government service, rather than actual receivables, which might include fees for services rendered before they left government. The amounts based on the estimate would be paid regardless of how accurate the estimate proved to be. The Opinion observed that in subsequent years adjustment would have to be made for fees for services affected by section 203 only in the case of a "particularly dilatory client" or a fee in a "long-lived contingency fee case."


As explained under 1.11:600 above, a "special Government employee," as defined by section 202(a) of the Act, is an officer or employee of the executive or legislative branch of the United States government or any independent agency of the United States or the District of Columbia who is "retained, designated, appointed, or employed" to perform temporary duties on behalf of the government, with the expectation of serving in a government position for 130 days or less during any period of a year; certain part-time United States Commissioners and magistrates; and, regardless of the number of days of appointment, independent counsel, and persons appointed by independent counsel.

Since it is often the case that a "special Government employee" does not work full-time for the Government, a lawyer might work at a law firm concurrently with his or her responsibilities as a special Government employee -- and, indeed, most independent counsel have done so. A firm that has a partner who accepts such a position and continues his or her relationship with the firm must consider how, in light of section 203, the partner can be compensated. (The issue affects only partners because, as explained above, associates in a firm, paid a salary and not sharing in the firm's profits, should not be impacted by section 203 because their salaries cannot be traced directly to any services before the government, let alone before any particular agency.) The restrictions covering "special Government employees" under section 203 are more lenient than those covering full-time government employees. Under section 203(c) a "special Government employee" is prohibited only from receiving compensation for representational services in particular matters involving a specific party or parties in which the employee has participated "personally and substantially" in his or her government work or which are pending before a Government department or agency in which the employee has served for more than sixty days in the preceding year. See OGE Informal Advisory Opinion 84 x 4 (April 6, 1984)(independent counsel and his lawyer staff can continue to be compensated by their law firms, so long as they don't share in compensation received by the firm for services before the Department of Justice after serving as independent counsel for more than sixty days). See also United States v. Mitchell, 397 F. Supp. 166, 171 (DDC 1974), aff'd on other grounds sub nom. United States v. Haldeman, 559 F.2d 31 (DC Cir. 1976), cert. denied sub nom. Ehrlichman v. United States, 431 U.S. 933 (1977) (dismissing contention that special assistant to the Special Prosecutor violated section 203 in maintaining his connection with a law firm).

The firm, therefore, must ensure that partners who are "special Government employees" do
not share profits derived from cases involving such representational services before the department or agency in which the partner is employed. See OGE Informal Advisory Opinion 84 x 4 (April 6, 1984) (advising an independent counsel that his firm "would have to take measures to ensure that any compensation [he] might continue to receive from the firm was not attributable to services the firm performed in relation to matters pending in the Justice Department"). See also OGE Informal Advisory Opinion 84 x 13, supra. Again, there are two ways of assuring that the lawyer who is serving simultaneously as a government employee and a law firm partner does not receive compensation forbidden by section 203: segregating the firm's profits from representations before the pertinent government agency into a separate profit account in which that partner does not share; and putting that partner on a fixed salary. Where the amounts involved are small, the first is likely to be the better alternative. Where the partner's "special Government employee" status is extensive in scope or duration, however, the firm would probably be better served by adopting the fixed salary method.
Prohibition on Representation of Others Before the Government (18 USC § 205)

Section 205(a) prohibits officers and employees of all three branches of the federal government from (1) acting as agent or attorney in prosecuting any claim against the United States, or receiving any compensation for assisting in the prosecution of any such claim; or (2) acting as agent or attorney for anyone before any "department, agency, court, court-martial, officer, or civil, military or naval commission" with respect to any "covered matter" in which the United States is a party or has a direct and substantial interest. The prohibitions apply only to such representational actions undertaken "other than in the proper discharge of . . . official duties." (It should be noted that the prohibition of section 205(a)(1) on receipt of compensation overlaps somewhat the prohibition of section 203, as explained at the beginning of the discussion of that provision, under 1.11:680, above.)

The prohibitions clearly contemplate representation of another; they do not apply to self-representation, OGE Informal Advisory Opinion 96 x 11 (July 5, 1996), although they would apply to representation of a group of which the employee is a member, see 18 Op. Off. Legal Counsel No. 36 (1994), discussed below.

Subsection (b) of section 205 applies the same prohibitions as subsection (a), but with respect to prosecuting or receiving compensation for assisting in claims against the District of Columbia, and for acting as agent or attorney for anyone before any "department, agency, court, officer, or commission" with respect to a "covered matter" in which the District of Columbia government is a party or has a direct and substantial interest, but applies them only to officers or employees of the District of Columbia and of the Office of the United States Attorney for DC.

The term "covered matter" is defined in section 205(h) as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter" -- a definition identical to that of "particular matter" as used in the various prohibitions of section 207 except that "rulemaking" is not included in the listing of examples of a "matter." (See 1.11:610, above.) 18 Op. Off. Legal Counsel No. 36 (1994) ruled that section 205 would preclude current federal employees from representing the National Association of Assistant United States Attorneys before the Department of Justice regarding compensation, workplace issues, and other issues that focus on the interests of assistant United States attorneys. Such issues, the Opinion stated, would be "covered matters" under section 205 even though "discussions of broad policy directed toward a large and diverse group" would be permissible, because assistant United States attorneys are a "discrete and identifiable class of persons or entities." Id. at 1. The Opinion relied, in this connection, on the regulation that OGE had issued defining the term "particular matter" as that term is used in section 208, as

encompass[ing] only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of
persons. Such a matter is covered . . . even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons.

*Id.* at 9 (Quoting 5 CFR § 2635.402(b)(3)). (This point is discussed more fully under the subtopic "Particular Matter," under 1.11:695, below.)

The elements of a violation of section 205 were summarized in OGE Informal Advisory Opinion 96 x 6 (March 19, 1996) as follows:

First, the employee must be acting as an agent or attorney for anyone, other than himself. The services must be representational in that they must be designed to influence rather than to seek information or provide behind-the-scenes assistance. Next, the employee's representation must be made before [a] department, agency, court, or other specified entity. Finally, the representation must be made in relation to a particular matter in which the United States is a party or has a direct and substantial interest.

Section 205(c) provides that a "special Government employee" is subject to the prohibitions of subsections (a) and (b) only with respect to a "covered matter" involving a "specific party or parties" (1) in which he has participated personally and substantially as either a regular or a special Government employee; or (2) which is pending in the department or agency in which he is serving -- but this second prohibition does not apply to one who has served in the department or agency no more than 60 days in the preceding 365 days.

Section 205(d) provides that the prohibitions of subsections (a) and (b) do not apply to an officer or employee acting as agent or attorney, without compensation, for

(A) any person in connection with "disciplinary, loyalty, or other personnel administration proceedings,"

(B) with certain exceptions (specified in subsection (d)(2)) any "cooperative, voluntary, professional, recreational, or similar" nonprofit organization or group, a majority of whose members are current employees of the pertinent government, or their spouses or dependent children.

The exemption is contingent on the representation being "not inconsistent with the faithful performance of [the employee's] duties."

Section 205(e) provides an exemption for representation, with or without compensation, of a parent, spouse, child or "any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary." Excerpted from the
exemption, however, are matters in which the officer or employee has participated personally and substantially in an official capacity, or in matters "subject of his official responsibility," unless approved by the "official responsible for appointment to his position."

Section 205(f) provides an exemption from the prohibitions of subsections (a) and (b) for "special Government employees" acting as agent or attorney for another in the performance of work "under a grant by, or a contract with or for the benefit of," the United States if the head of the department or agency concerned with the grant or contract certifies in writing that "the national interest so requires," and publishes the certification in the Federal Register.

Section 205(g) provides that "[N]othing in [section 205] prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt."

Section 205(i) (added in 1996, evidently in response to 18 Op. Off. Legal Counsel No. 36 (1994), discussed above) provides that nothing in the section "prevents an employee from acting pursuant to [several specified sets of provisions of the United States Code dealing with labor-management relations or] any provision of any other Federal or District of Columbia law that authorizes labor-management relations between an agency or instrumentality of the United States or the District of Columbia and any labor organization that represents its employees."

A tangential aspect of the limitation of the prohibitions of subsections (a) and (b) to actions "other than in the discharge of . . . official duties" is illuminated by OGE Informal Advisory Opinion 95 x 12 (November 15, 1995) (discussed more fully under 1.11:610, above), pointing out that a representation exempt from section 205 on this ground would likely be subject to the post-government employment restriction of section 207(a)(1).

Section 205 is not interpreted by any regulation. However, OGE has pointed out that the regulations interpreting section 207 provide guidance as to the meaning of "direct and substantial interest [on the part of the United States]" that is applicable to section 205 as well. OGE Informal Advisory Opinion 94 x 7 (February 7, 1994). That Opinion addressed the question whether section 205 would forbid the representation by a government lawyer of a private person in a lawsuit in a federal court against a private law school, asserting a claim under a federal statute forbidding discrimination against persons with disabilities by recipients of federal financial assistance. The federal government was not a named party in the case, but the Opinion pointed out that this did not necessarily mean that the government did not have a "direct and substantial interest" in the case, so as to bring section 205 into play. The Opinion suggested that inquiry be made of the agency or agencies whose regulations or policies might be implicated in the case, to determine whether there was such a government interest in the matter. In addition, the regulations interpreting "particular matter," under section 208, have been held applicable to defining a "covered matter" under section 205, as explained in the discussion of 18 Op. Off. Legal Counsel No. 36 (1994), above.
16 Op. Off. Legal Counsel No. 59 (1992) addressed a proposal by the Chief Judge of the United States Court of Veterans Appeals (since redesignated the United States Court of Appeals for Veterans Claims), to recruit lawyers in the executive branch to serve, on a pro bono basis, as "master amici" in cases before that Court where the appellants were without representation. A "master amicus" would not formally undertake representation of an appellant in such a case, but rather would "advise the Court of any nonfrivolous issue capable of being raised by the appellant," and would brief any such issue. The Opinion held that such an arrangement would not avoid the proscription of section 205(a)(1) against acting as agent or attorney for prosecuting a claim against the United States.

Van Ee v. Environmental Protection Agency, 55 F. Supp. 1 (DDC 1999), was a suit by an employee of the EPA who wished to continue to address other federal agencies on behalf of various environmental groups such as the Sierra Club and the Nevada Wildlife Foundation on matters of public concern unrelated to his work for the EPA, seeking a determination that such activities were not subject to 18 USC § 205 or related OGE ethics standards. The EPA had ruled that his communications with federal agencies on behalf of any group in an attempt to influence federal policy would violate § 205, and that although he could properly make such communications purely on his own behalf, he could not do so in a manner that would "create the appearance" that he was doing so on behalf of another. Plaintiff contended that section 205 did not cover his conduct; that if it did, it was unconstitutional under the First Amendment when applied to his speech; and that in any event he could not constitutionally be disciplined for merely creating an appearance of a violation of the statute.

In connection with the first contention, plaintiff argued that "covered matters" under the statute consist only of formal legal or quasi-legal representation in formal proceedings or transactions involving the government, but the Court held that the term is not so limited. Id. at 6. Plaintiff also argued that he did not seek to act as an "agent or attorney" for the organizations on whose behalf he acts, again urging, unsuccessfully, that that phrase should be limited to "legal or quasi-legal" representation. Id. at 7. Plaintiff further contended that Congress had not intended section 205 to extend to representations other than those seeking money, property or "valuable privileges"; but the Court, while acknowledging that such representations may have been what Congress principally had in view, held that the language of the statute swept more broadly. Id. at 8.

As to plaintiff's constitutional claim, the Court rejected defendants' contention that the First Amendment was not implicated because no speech was restricted, and held, on the contrary, that section 205 and the OGE regulations imposed a burden on speech and induced employees to curb their expression, by providing a disincentive for speaking on behalf of others as well as themselves. Id. At 10. The Court then, however, applied the "Pickering/NTEU balancing test" [referring to Pickering v. Board of Education, 391 US 563 (1968) and United States v. National Treasury Employees Union, 513 US 454 (1995)], weighed "the plaintiff's interests in commenting upon matters of public concern,
against the government's interest in promoting the efficiency of its public services," id. at 12, and concluded that section 205 imposed a permissible restriction on plaintiff's conduct. Id. at 16.

Finally, the Court rejected plaintiff's argument that he could not be punished merely for "appearing" to violate section 205, relying on the Supreme Court's holding in Crandon v. United States, 494 U.S. 152, 164 (1990), that Congress has an interest in regulating, and the authority to address, appearances of impropriety. Id.


1.11:695  Prohibition with Respect to Acts Affecting a Personal Financial Interest (18 USC § 208)

Section 208(a) prohibits, with specified exceptions and exemptions, any officer or employee (including a "special Government employee") of the executive branch or of any independent agency of the United States, any Federal Reserve bank director, officer or employee, and any officer or employee of the District of Columbia from "participat[ing] personally and substantially" in that capacity in any "particular matter" in which, to his knowledge, he, his minor child or spouse, a general partner, an organization in which he serves as director, officer, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement covering prospective employment, has a financial interest. To establish a violation of section 208(a),

[T]he Government must prove beyond a reasonable doubt that the defendant
1) was an officer or employee of the executive branch or of an independent agency,
2) participated personally and substantially in his official, governmental capacity in a matter, and 3) knew that he, his spouse, or another statutorily-listed person had a financial interest in that particular matter.

United States v. Nevers, 7 F.3d 59, 62 (5th Cir. 1993) (a case in which the defendant, while employed as a trade specialist for the International Trade Administration, attempted to persuade a client of that agency to sign an agreement with a company in which his wife had a financial interest).

A ready means of avoiding a violation is disqualification of the government employee (which simply means not participating in the particular matter, see 5 CFR § 2640.103(d)); or, where prospective employment is involved, postponement of any negotiation until the matter is completed. Waivers are also available in some circumstances, as are some categorical exemptions – both of which are discussed under the subcaption Waivers and Exemptions, below.

The statutory provision is elaborated in 5 CFR Parts 2635 and 2640. The first of these, titled Standards of Ethical Conduct for Employees of the Executive Branch, lays down rules of ethical conduct on several subjects quite distinct from that of section 208 (specifically, Gifts from Outside Sources, Gifts Between Employees, Misuse of Position, and Outside Activities), but it also specifically implements and in some respects adds administrative restrictions to the statutory ones in section 208, in three of its subparts, namely, Subpart D -- Conflicting Financial Interests; Subpart E – Impartiality in Performing Official Duties; and Subpart F – Seeking Other Employment. The focus of the other regulation, 5 CFR Part 2640, is indicated by its title, Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208(Acts Affecting a Personal Financial Interest).

17 Op. Off. Legal Counsel No. 3 (1993) held that a government employee/inventor who assigns his rights in an invention to the United States and accepts the government's payment
of amounts tied to the resulting royalties, pursuant to the Federal Technology Transfer Act of 1986, 15 U.S.C. §§ 1501-34, could continue to work on the invention without violating either section 208 or section 209. However, he could not, consistently with section 208, take official action with respect to an agreement for development of the invention entered into between the United States (which had retained the domestic patent rights) and a company with which the employee/inventor (who had retained foreign patent rights) had a contract for foreign commercial exploitation of the patent.

Two circumstances in which section 208(a) problems may arise that are likely to be of particular concern to lawyers and law firms -- and that are separately addressed below -- are those where there are discussions about (or a subsisting arrangement for) future employment between a lawyer in government and a law firm with business before that lawyer's agency, and those where the spouse of a government employee is a lawyer who has business (or whose firm has business) before the agency where the employee works. In the first instance, the crux is that if the law firm with which the lawyer in government is negotiating (or has an "arrangement") about employment is involved in a "particular matter" before the lawyer's agency, then it has a "financial interest" in that matter which, under section 208, is a bar to the lawyer's participation in the matter. In the second situation, the crux is that the government employee whose spouse who is involved in a particular matter before the employee's agency has an imputed "financial interest" in that matter, which again bars the employee's participation in the matter.

"Particular matter"

The term "particular matter," as used in section 208(a), is not separately defined in the Act, but it appears at the end of a series of examples -- "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation [or] arrest" -- identical to those employed in the definition of "particular matter" in section 207(i) of the Act (which applies only to section 207), except for not including the term "rulemaking." However, 5 CFR § 2640.103 (a)(1) states that "particular matter" as used in section 208 "includes only matters that involve deliberation, decision or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons" (emphasis added), and adds:

The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not, however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons.

Id. Among the examples given to illustrate the foregoing are these two:

Example 3: A regulation published by the Department of Agriculture applicable only to companies that operate meat packing plants is a particular matter.

Example 4: A change by the Department of Labor in health and safety regulations
applicable to all employers in the United States is not a particular matter. The change in the regulations is directed to the interests of a large and diverse group of persons.

*Id.* See also 5 CFR § 2635.402(b)(3) (providing a substantively identical definition). As described below, under the subcaption Waivers and Exemptions, the regulations addressing exemptions under section 208(b), in 5 CFR Part 2640, invoke a similar distinction (one not found in the statutory text), between a "particular matter involving specific parties" and a "particular matter of general applicability."

Similarly, the Office of Legal Counsel of the Department of Justice has interpreted section 208(a) to apply to "rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a 'direct and predictable effect' on a firm with which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner." *2 Op. Off. Legal Counsel 151, 155 (1978).* See also OGE Informal Advisory Opinion 97 x 2 (March 5, 1997) (observing that a rulemaking affecting all the members of a particular industry can have a direct and predictable effect on the financial interests of the industry's trade association, and so present a bar, for one involved in that rulemaking, to negotiating for post-government employment with the trade association). Thus, the term "particular matter" as used in section 208 is interpreted by authoritative sources to have essentially the same meaning as the identical term as used in section 207, despite the presence in the latter statutory provision, and the absence from the former, of the word "rulemaking."

The phrase "personal and substantial participation" is not defined in the statute but again is explained in the pertinent regulation, 5 CFR § 2640.103(a)(2). That regulation states that "[t]o participate 'personally' means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter." *Id.* And "substantial" participation means that the employee's involvement is of significance to the matter, even though the participation was not determinative of the outcome of a particular matter. *Id.* In determining whether an employee was "participating" in a particular matter, the courts have generally adopted a broad, common-sense approach. Thus, in interpreting the catch-all provision of the clause in section 208(a) detailing the types of participation covered ("decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise"), the Seventh Circuit held that "or otherwise" should be construed "in a realistic and relatively inclusive fashion." *United States v. Irons, 640 F.2d 872, 876 (7th Cir. 1981).* The court held that the intention behind section 208 was "to proscribe rather broadly employee participation in business transactions involving conflicts of interest and to reach activities at various stages of these transactions, including those activities specifically enumerated." *Id.* Thus, the court held that the acts of "causing delivery to be made of equipment" and "receiving payment of monies for such equipment" were covered under section 208 since they were acts that executed or completed a contract or matter. *Id.* at 874. See also OGE Informal Advisory Opinion 92 x 25 (December 10, 1992) ("[T]he concept of participation is not limited to formal actions or final events but may apply to preliminary activities or matters in a formative stage").
"Financial Interest"

The term "financial interest" is also liberally construed. A party has a financial interest "where there is a real possibility of gain or loss as a result of developments in or resolution of a matter." United States v. Gorman, 807 F.2d 1299, 1303 (6th Cir. 1986), cert. denied, 484 U.S. 815 (1987). There is no de minimis exception to the "financial interest" requirement. See OGE Informal Advisory Opinion 87 x 6 (April 1, 1987). "All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment." Gorman, 807 F.2d at 1303. See generally, Annotation, What Constitutes Acts Affecting Personal Financial Interests Within the Meaning of 18 U.S.C. § 208(a), Penalizing Participation by Government Employees in Matters in Which They Have a Personal Financial Interest, 59 A.L.R. Fed. 872 (1982).

However, the two regulations interpreting section 208 apply something of a limiting construction to the term "financial interest," at least in the contexts there addressed – namely, disqualification and waiver. Both regulations effectively require that the financial interest be one on which the "matter" in question will have a "direct and predictable effect" – a phrase that does not appear in the statutory text (though it is based on a longstanding interpretation of the statute: see 2 Op. Off. Legal Counsel 151, 155 (1978)). Thus, 5 CFR § 2635.402(b)(1) provides:

(i) A particular matter will have a direct effect on a financial interest if there is 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. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if 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 . . . .

(ii) A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount . . . is immaterial.

An identical definition of the phrase "direct and predictable effect" is to be found in 5 CFR § 2640.103(a)(3).

To violate section 208(a), a government employee must have knowledge of the pertinent financial interest in the particular matter in which he or she is participating. Gorman, 807 F.2d at 1304. Section 208(a) is, however, a strict liability statute: establishing a violation does not require proof of scienter or an intent to violate it. United States v. Hedges, 912 F.2d 1397, 1400 (11th Cir. 1990). "Actual corruption or actual loss suffered by the government are not elements of the crime," id. at 1402; see also Gorman, 807 F.2d at 1304 ("Section 208 sets forth an objective standard of conduct which is directed not only at dishonor, but also at conduct which tempts dishonor").
It bears note that among the persons and entities that section 208(a) refers to as potentially having a financial interest in a particular matter that would be imputed to a government employee, is an *organization* in which the employee is "an officer, director, trustee, general partner or employee." This clearly encompasses nonprofit organizations, and the financial interest of such organizations is attributed to the government employee regardless of whether there is compensation for the services rendered by the employee to the organization. See 5 CFR § 2635.403(c)(2).

In *In re Segal, 145 F. 3d 1348 (DC Cir. 1998)(per curiam)*, involving an application for reimbursement of attorney fees incurred by the target of an independent counsel investigation that did not result in indictment, the target had been chief executive officer of the Corporation for National and Community Service, which was established to manage the federal government's community service programs. He had established, and served as a director and officer of, a private, nongovernmental charitable organization that sought private donations to support the work of the governmental corporation, and, in his capacity as CEO of the governmental corporation, had engaged in fund raising for the benefit of the nongovernmental organization. Since that organization's financial interests were attributed to him, this was found to be a misdemeanor violation of section 208, but the independent counsel did not prosecute, finding that the target did not possess knowledge of the financial interest – which, according to the decision, is "not necessary for a technical violation of the law, but . . . is required by Department of Justice guidelines before charges are brought." *Id.* at 1350.

*OGE Informal Advisory Opinion 97 x 5 (March 25, 1997)* observed that while there is no prohibition on spouses working in the same agency, one spouse could not hire the other or even recommend the other spouse for promotion without running afoul of section 208 (as well as the "anti-nepotism" statute, 5 USC § 3110).

**Waivers and Exemptions**

Ameliorating the broad reach of the prohibitions imposed by section 208(a), subsection (b) provides for a number of exceptions, both by individual waiver and by categorical exemption. Specifically,

Subsection (b)(1) provides for individual waivers in circumstances where the official responsible for the appointment of the government employee or officer, after full disclosure, makes a written determination that the pertinent "interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or employee." The general requirements for issuance of such waivers are set out in 5 CFR § 2640.301(a), and § 2640.301(b) offers a list of factors that may be considered in determining whether a "disqualifying financial interest is sufficiently substantial to be deemed likely to affect the integrity of the employee's services to the Government."

Subsection (b)(2) of section 208 provides that OGE, by general rule or regulation,
"applicable to all or a portion of all officers and employees covered by this section," may exempt a particular kind of financial interest as "being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees." Pursuant to this provision, OGE has, in Subpart B of 5 CFR 2640, issued regulations exempting certain mutual funds, unit investment trusts and employee benefits (§ 2640.201); certain interests in securities (§ 2640.202); and several miscellaneous circumstances (§ 2640.203).

Subsection (b)(3) provides for individual waivers in the case of a "special Government employee" serving on (or being considered for appointment to) an advisory committee within the meaning of the Federal Advisory Committee Act, where the appointing officer certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest. This provision is implemented by 5 CFR § 2640.302.

Finally, subsection (b)(4) provides a blanket exemption for financial interests that would be affected by a particular matter where the interest results solely from specified birthrights related to status as a native American Indian or Alaskan native.

As has been mentioned, 5 CFR Part 2640, in addressing exemptions under section 208(b), makes a distinction, not found in the statutory text, between a "particular matter involving specific parties" and a "particular matter of general applicability." The first is defined by reference to the statutory phrase that precedes "particular matter" ("judicial or other proceeding, [etc.]"), and is asserted typically to involve "a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties." § 2640.102(l). The second "means a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties." § 2640.102(m). An employee is required to disqualify him- or herself from either sort of "particular matter" where a tainting "financial interest" is in the picture, unless the disqualifying interest has been exempted or the employee has obtained an individual waiver under section 208(b). § 2640.103(d).

The different categories of "particular matter" have differential impact, however, in the determination of whether a particular financial interest qualifies for a categorical exemption under the regulations implementing section 208(b)(2), as "too remote or too inconsequential to affect the integrity of the services" of the government employee. See § 2640.201(c)(2) (exempting employee participation in a particular matter of general applicability affecting a state or local government where the disqualifying financial interest in the matter arises because of participation in a pension plan established by that government), and § 2640.202(a) & (b) (setting out different standards governing de minimis exemptions for matters involving specific parties and those of general applicability).

As has been noted, a violation of section 208(a) does not require a showing of scienter. Furthermore, a valid waiver may become void if the financial interests of the prospective employer or the official responsibilities of the employee change and such change was not
considered by the grantor of the waiver. See OGE Informal Advisory Opinion 88 x 13 (September 12, 1988) (opining that Attorney General Meese's section 208(b)(1) waivers obtained with regard to telecommunications matters were defective where Mr. Meese had not provided full disclosure regarding his telecommunication industry holdings).

Additional Regulatory Restrictions

The provisions of 5 CFR 2635 Subpart E, titled Impartiality in Performing Official Duties, extend the disqualification of government employees from participating in certain matters beyond the reach of section 208(a), to include circumstances where there may be "an appearance of loss of impartiality in the performance of . . . official duties." 5 CFR § 2635.501(a). Thus, §2635.502(a) requires advance authorization from an employee's agency before the employee may participate in a particular matter involving a specific party or parties when the employee either knows that the matter "is likely to have a direct and predictable effect on the financial interest of a member of his household," or else knows that "a person with whom he has a covered relationship is or represents a party to such matter," and "where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter." A "covered relationship" is defined by § 2635.502(b)(1) to mean a relationship with –

(i) A person with whom the employee "has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction" – a definition that excludes and extends well beyond "employment," the term used in section 208.

(ii) A member of the employee's household, or a relative with whom the employee has a "close personal relationship" -- both of which go beyond the spouse and minor child referred to in section 208(a).

(iii) A person "for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as "officer, director . . . [or any of the positions forbidden to the employee by section 208(a)].""

(iv) A person for whom the employee had acted as "officer, director . . . [etc.]" within the last year. Section 208(a), of course, applies only to concurrent, not past representations by the employee.

(v) An organization, other than a political party, in which the employee is an "active participant." Section 208(a), in contrast, is limited to organizations in which the government employee is an "officer, director, . . . [etc.]"

One further regulatory disqualification relating to financial interests is imposed by 5 CFR § 2635.503, again subject to agency waiver: a two-year bar from participating in any particular matter in which a former employer is a party or represents a party, if the employee received an "extraordinary payment" from that employer prior to entering government service; the two
years commencing to run with the date of receipt of the payment. "Extraordinary payment" is defined as any item worth $10,000 or more, paid (1) on the basis of a decision made after it was known to the former employer that the employee was being considered for or had accepted a government position, and (2) other than pursuant to an established compensation, partnership or benefits program.

It should be noted that unlike sections 203 and 209 (discussed under 1.11:680 above and 1.11:699 below, respectively), the prohibitions of section 208 do not apply to third parties, but only to the government employees who have the actual or imputed "financial interest." Thus, a law firm cannot be criminally charged under section 208 for recruiting a government lawyer for a position in the firm, even if the firm is directly involved in a matter before the government lawyer, but the lawyer in such circumstances is at jeopardy; and similarly, it is the government employee and not the employee's spouse or the spouse's law firm that is at risk where the lawyer or firm represent a client in a matter in which the employee participates.

Applicability to Law Firm Recruitment:

It bears note, with respect to the restriction on negotiating for post-government employment, that there is a parallel provision in Model Rule 1.11, though that provision is not included in the DC version of Rule 1.11. Thus, MR 1.11(c)(2) prohibits a lawyer serving as a public officer or employee (other than as a law clerk) from negotiating for private employment with any person who is involved as a party or lawyer for a party in a matter in which the government lawyer is participating personally and substantially.

A violation of section 208 in this context requires that (1) the defendant, who was at the time in question a government employee, negotiated or reached an arrangement concerning employment with a third party; (2) the third party had a financial interest in a matter in which the defendant participated personally and substantially; and (3) the defendant knew of the third party's interest. See Gorman, 807 F.2d at 1303. Clearly within the prohibition is the situation where a lawyer who entered the government from a law firm has a commitment to return to the firm after government service. 3 Op. Off. Legal Counsel 278 (1979)(section 208 does not preclude a lawyer's returning to a former firm pursuant to a pre-departure agreement, but the lawyer must observe that provision's restrictions while in government); see also OGE Informal Advisory Opinion 93 x 20 (August 27, 1993)(holding that the fact that there is a binding contractual agreement – in this instance evidently a labor agreement not subject to renegotiation – is immaterial). Less clearcut, and more hazardous, are circumstances where there is not such a subsisting arrangement, but only the prospect of one.

The regulations define "negotiations" broadly, as meaning

[D]iscussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position.
5 CFR § 2635.603(b)(1)(i). Although 5 CFR Part 2635 in other respects goes beyond the statutory provision and simply establishes regulatory standards of conduct for executive branch employees, in the present instance it appears to offer a valid interpretation of the statutory term as well. Courts have uniformly held that the terms "negotiate" and "arrangement" are to be broadly construed and given their common, everyday meaning. See United States v. Schaltenbrand, 930 F.2d 1554, 1558 (11th Cir. 1991); Hedges, 912 F.2d at 1403; Gorman, 807 F.2d at 1303; United States v. Conlon, 628 F.2d 150, 154-55 (DC Cir. 1980). Thus, in Schaltenbrand, the court rejected the defendant's argument that a "negotiation" does not begin until a formal offer of employment has been made. While agreeing that "[p]reliminary or exploratory talks do not constitute negotiation," 930 F.2d at 1558 (quoting Hedges, 912 F.2d at 1403 n.2), the court held that where there is evidence of "active interest on both sides" concerning a "specific position," this requirement for a section 208(a) offense is met. As the court noted, "[t]he whole purpose of `negotiation´ is for each side to present its position to the other party, in the hopes that it can attract the other party to eventually submit to a binding agreement." Id. at 1559. The court held, therefore, that where the defendant had applied for a position with the potential employer, the potential employer had invited him to its offices, the two sides had discussed the qualifications needed for the specific position in detail, and the defendant had agreed to take action to remedy his failure to meet certain of these qualifications, there was "negotiation" under section 208. Id. See also Hedges, 912 F.2d at 1403 ("That all of the terms of the agreement were not settled at that time, does not foreclose the fact that negotiations for employment were discussed.").

The regulations also define "employment" broadly, to include

[A]ny form of non-Federal employment or business relationship involving the provision of personal services by the employee, whether to be undertaken at the same time as or subsequent to Federal employment. It includes but is not limited to personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner or trustee.

5 CFR § 2635.603(a).

Once it has been established that the parties were negotiating for future employment, the government must show that the prospective employer had a "financial interest" in a "particular matter" in which the government employee was "participat[ing]" "personally and substantially." In order to establish such a financial interest on the part of the recruiting law firm, it must ordinarily be the case that the law firm is representing a client in a matter in which the recruited lawyer is participating; it is not enough that a client of the law firm is a party to the matter, if it is not represented by the law firm in that matter. Thus, in Air Line Pilots Ass'n, Int'l v. United States Dep't of Transp., 899 F.2d 1230 (DC Cir. 1990), the Court held that the then-Secretary of the Department of Transportation (DOT) had not violated section 208 in negotiating for employment at a law firm despite the fact that the firm represented a client that was before DOT in another matter, in which the law firm was not representing that client. The Court held that it was "sheer speculation" to argue that the Secretary's employment negotiations could have been advanced by the outcome of the matter.
involving the firm's interest and cited with approval the following bright-line rule:

[N]o participation by [the government employee] when a law firm that might employ him served as counsel in the case; but no bar to his [or her] participation when the firm did not so serve, though the matter involved a client represented in other matters by the firm.

_Id._ at 1232. In so ruling, the Court directly rejected the proposition that a government employee must be "disqualifi[ed] from any matter affecting a client of a prospective employer." _Id._ The Court noted that such a rule "would mean, effectively, that high government officials could not, before leaving their posts, negotiate with many, if any, of the District's large law firms." _Id._

Another regulation, _5 CFR § 2635.604(d),_ provides that an agency may allow an employee to take annual leave or leave without pay, or take other appropriate action while seeking employment, if the alternative would be disqualification of the employee from "matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired." _OGE Informal Advisory Opinion 95 x 7 (June 2, 1995)_ says that the agency may _require_ such a leave of absence. A variant situation was addressed in _OGE Informal Advisory Opinion 96 x 19 (October 18, 1996),_ which asserted that a government employee may have a financial interest in the outcome of a matter if there is a concrete prospect of employment with an entity involved, and the opportunity depends on the outcome, even if there are no actual negotiations about the employment in question.

**Applicability to Spouses Where One Is in Government and the Other Is a Lawyer in the Private Sector**

The possible application of section 208 in this context arises when the lawyer spouse, or that spouse's law firm, represents a client in the particular matter. As the regulation states,

An employee is prohibited by . . . 18 U.S.C. § 208(a) from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

_5 CFR § 2635.402(a)._ The imputed interests include those of the employee's spouse, _§ 2635.402(b)(2)(i)._ The employee need not actually share in the spouse's financial interest in order for the prohibition to apply. As explained in _OGE Informal Advisory Opinion 96 x 10 (April 25, 1996),_ section 208 "establishes the status of marriage, not shared control and ownership of assets, as the prerequisite for imputing a spouse's financial interests to a Government employee [who] has knowledge of those interests." What is involved

is not a rebuttable presumption that the Government employee will benefit from his
spouse's financial interests . . . . The issue is whether the Government employee will be participating in matters that could directly and predictably affect his spouse's financial interests.

Id. (Emphasis in original).

OGE Informal Advisory Opinion 95 x 1 (February 13, 1995) addressed circumstances where the husband of the head of a governmental agency was a partner in a law firm whose clients included major institutions some of which appeared before the agency. The husband had undertaken not to represent any clients before the agency during his wife's tenure, and she had disqualified herself from any matters in which his firm represented clients before the agency. The Opinion concluded that these arrangements were sufficient (though it did not explicitly hold that the former was required) for compliance with the applicable prohibition, and that the agency head should consider whether administrative ethics rules dealing with impartiality would preclude her participation. It also held that "where the clients are not being represented by [the firm] in a particular [agency] matter, the matter usually would not have a direct and predictable effect on the law firm's or [the spouse's] financial interests." Id. (Brackets in original.) It did allow that there might be "unusual cases" -- where, for example, agency action might literally put the law firm's client out of business -- that would have an adverse effect upon the law firm's, and therefore the lawyer spouse's interest. To the same effect, see Air Line Pilots Ass'n Int'l, supra.


1.11:699  Prohibition with Respect to Non-Governmental Compensation for Governmental Services (18 USC § 209)

Section 209(a) of the Act prohibits any officer or employee of the executive branch or of any independent agency of the United States, or of the District of Columbia, from receiving "any salary, or any contribution to or supplementation of salary," as compensation for his services as such, from any source other than the United States, "except as may be contributed out of the treasury of any State, county, or municipality." It also forbids any person or entity to pay, make any contribution to or in any way supplement the salary of any such officer or employee "under circumstances which would make its receipt a violation" of the subsection.

As has been noted under 1.11:680, above, section 209 overlaps section 203 to some degree, for both provisions prohibit payment to and receipt of compensation by government personnel, the critical difference being that under section 209 the prohibited compensation is for services rendered to the government and under section 203 if is for services to others. It may deserve mention that there is also some overlap with certain of the prohibitions in 18 USC § 201, which addresses bribery of public officials. See United States v. Jackson, 850 F. Supp. 1481, 1495 (D. Kan. 1994) (explaining that section 209 differs from sections 201(b)(1) and 201(c) in the element of requiring that the payment be made as compensation for services as a government employee).

"Special Government employees" (described under 1.11:600, above), and government employees serving without compensation, are excepted from the prohibition by section 209(c); see Exchange National Bank of Chicago v. Abramson, 295 F. Supp. 87, 90 (D. Minn. 1969); OGE Informal Advisory Opinion 84 x 13 (June 15, 1984) Also exempted are participants in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan, maintained by a former employer (section 209(b)); payment of relocation expenses incidental to certain executive exchange or fellowship programs (section 209(e)); and certain payments to injured employees made by a nonprofit organization qualified under § 501(c)(3) of the Internal Revenue Code (section 209(f)).

As the Supreme Court has observed, the prohibition in section 209(a) rests on three basic concerns:

First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers. Crandon v. United States, 494 U.S. 152, 165 (1990) (quoting, with approval, Association of the Bar of the City of New York, Conflict of Interest and Federal Service 211 (1960)). These three concerns are balanced against a weighty opposing consideration: "Such
regulation, while setting the highest moral standards, must not impair the ability of the Government to recruit personnel of the highest quality and capacity." Id. at 166 (quoting President Kennedy).

A variety of circumstances can raise issues under section 209(a). Acceptance of money for a speech given in an official capacity would clearly violate section 209. See OGE Informal Advisory Opinion 94 x 14 (July 15, 1994); see also 5 CFR § 2635.807(a)(prohibiting receipt of compensation from any source other than the government for teaching, speaking or writing "that relates to the employee's official duties." OGE Informal Advisory Opinion 88 x 12 (July 27, 1988) held that a research fellowship offered by a college to eligible recipients regardless of whether they were government employees, and specifically intended "not to diminish or replace the [recipient's] usual or expected compensation," would be forbidden to a government employee by section 209. OGE Informal Advisory Opinion 92 x 6 (February 25, 1992) asserted that section 209 would be violated if union officials who were also government employees, and who spent 100% of their duty time on union activities in accordance with an agreement between the agency and the union, were also compensated by the union for the time so spent.

Various kinds of profit-making activities engaged in "on the side" by government employees that exploit their positions as such have been held to violate section 209. Thus, in United States v. Moore, 765 F. Supp. 1251 (E.D. Va. 1991) the defendant was a civilian employee of the Navy, an engineer with expertise in circuit breaker electrical contacts and related components, who also had a 49% interest in a company that made such products and sold them to the Navy. He had not disclosed that interest to the Navy, and he had helped the company get several contracts for such products from the Navy. He had received $100,000 in dividends from the company. He pled guilty to a criminal information charging him with a violation of section 209(a) and then was sued by the government for recovery of the $100,000 that he had thus received, one count alleging a violation of section 209(a) and a second count a violation of section 208. The Court held that he was collaterally estopped by his plea to the criminal charge from denying that he had committed a breach of his fiduciary duty to the government, albeit not from contesting the amount owed by reason of the breach.

In Jordan v. Axicon Systems, Inc., 351 F.Supp. 1134 (DDC 1972), aff'd, 489 F.2d 1272 (DC Cir. 1974) a former government employee brought suit against a private employer seeking damages for breach of an employment agreement under which, while in government (as chief of the Tire Branch of the Department of Transportation's National Highway Traffic Safety Administration), he promoted computers to tire companies in connection with newly enacted tire safety legislation. The court held the contract to be unenforceable as contrary to Executive Order 11222 and in clear violation of sections 208 and 209 of the Act.

Not all receipt or payment of money to or for the benefit of a government employee is prohibited; the payment must be made in compensation for government service. Thus, in United States v. Muntain, 610 F.2d 964 (DC Cir. 1979), an official in the Department of Housing and Urban Development was charged with violation of section 209 for having received $800 from a labor union as reimbursement for travel expenses of his wife and
himself on a charter tour trip to Ireland organized by the union. The official was on leave at the time, and the Court concluded that "the payment to Muntain was for services having nothing to do with HUD business or with any responsibilities Muntain may have had to the Government as an employee of the United States." Id. at 970. OGE Informal Advisory Opinion 93 x 21 (August 30, 1993) held that contributions to a legal defense fund for an employee facing administrative disciplinary charges would not violate section 209 because they would not constitute compensation for services as an employee of the United States. The Opinion relied on Crandon, supra, in reading the statutory prohibition narrowly, and overruled the earlier OGE Informal Advisory Opinion 85 x 19 (December 12, 1985), which had come to the opposite conclusion in the analysis of payments from a legal defense fund.

OGE Informal Advisory Opinion 92 x 7 (February 26, 1992) held that section 209 does not prohibit bestowal on or receipt by a government employee of an award (in this case a "Regents' Distinguished Alumnus Award" or an "Alumni Achievement Award") that consists solely of a certificate, with no associated monetary stipend. Even if there is a cash element, the Opinion asserts, the prohibition does not apply to an award for public service or other meritorious service that is bona fide, i.e., is not intended to compensate for government service.

17 Op. Off. Legal Counsel No. 3 (1993) held that a government employee/inventor who assigns his rights in an invention to the United States and accepts the government's payment of amounts tied to the resulting royalties, pursuant to the Federal Technology Transfer Act of 1986. 15 U.S.C. §§ 1501-34, may continue to work on the invention without violating section 209. (The Opinion also addressed section 208, and is discussed more fully under 1.11:695, above.)

OGE Informal Advisory Opinion 87 x 11 (Sept. 9, 1987) held that a "President's Discretionary Fund," established in honor of a university's former president now serving as a Commissioner of a government agency, and endowed by a corporation on whose board of directors he had served, does not violate section 209: "Even if money for the establishment of this honorary fund were to be viewed as compensation to the employee, it would not run afoul of [section 209] because . . . it is in recognition of the employee's past services . . . and is not related to his recent appointment to the Commission."

5 Op. Off. Legal Counsel 126 (1981) held that payment by a private foundation of legal fees incurred in connection with Senate confirmation hearings of a Cabinet member was not a violation of section 209, since the legal services provided served a legitimate governmental function, cognizable under the Presidential Transition Act.

Payments to Persons Entering Government Service

A number of the authorities applying section 209 address payments of various sorts made by private entities to employees who are departing for government employment. These are likely to be of particular interest to lawyers entering government service, and to law firms
that they leave in order to do so: for example, the firm may have an interest in encouraging a young lawyer to spend some time in government; also, a withdrawing law firm partner will typically receive from the firm various sums that might raise questions under section 209. In this connection, too, a central issue is whether the payment in question is intended to supplement the government employee's salary. Also of critical importance is the issue of when the payment or payments are made, in relation to the recipient's status as a government employee.

2 Op. Off. Legal Counsel 267 (1978) held that the employer of a White House Fellow could not, consistently with section 209, reimburse her for the cost of temporary living quarters in Washington while she and her husband maintained a home elsewhere. "The payment of a Government employee's living expenses due to his Government service is a classic example of a supplementation of Government salary prohibited by section 209." Id. at 267-68. Also held to be impermissible were the employer's paying the White House Fellow's moving expenses to Washington and the accrual during the Fellow's leave of vacation time and sick leave. On the other hand, 5 Op. Off. Legal Counsel 150 (1981) held that payment of moving expenses to a university faculty member going into the Department of Justice was not a violation of section 209 where the payment was made pursuant to the university's "Professional Development Program," akin to a sabbatical program, and was not designed or administered to favor federal employment over other forms of professional development leave. 6 Op. Off. Legal Counsel 224 (1982) held that an employer could rent an employee's house during the employee's participation in the President's Executive Exchange Program, so long as it paid no more than the market price and actually used the house or at least excluded the employee from using it, but that section 209 would prohibit an arrangement under which the property would not be used at all, or the employee would continue to have use of the property, because this would mean that the employer was subsidizing the employee's government service.

Crandon, supra, the only Supreme Court decision construing section 209, interpreted it narrowly, to require that the payment be made while the recipient is in government, and not before (or, by implication) after government service. There, the Court addressed a challenge to a compensation plan under which The Boeing Company had provided lump sum severance packages for five employees who were leaving Boeing to enter government service. The payments had been made prior to the commencement of their government responsibilities, but had been in amounts that were "intended to mitigate the substantial financial loss each employee expected to suffer by reason of his change in employment." Id. at 154. Each of the payments had been made unconditionally: "None of the employees promised to return to Boeing at a later date nor did Boeing make any commitment to rehire them." Id. at 156. Although section 209 is a criminal statute and at that time entailed no provision for enforcement by civil proceedings, this was a civil suit, in which the government asserted a "common law" claim, seeking as relief from Boeing the aggregate amount of the payments made and, with respect to the individual recipients of the payments, the imposition of a constructive trust upon the moneys received. (The provision for civil relief for violation of the several prohibitions of the Act, in section 216, was enacted shortly before the Court's decision in Crandon.) The District Court had dismissed the complaint, holding that section
209(a) did not apply because the payments were made before the recipients became
government employees and that the payments were not intended to compensate them for
government service. The Court of Appeals reversed, holding that employment status of the
recipients at the time the payments were made was not an element of a violation of section
209, and that the purpose of supplementing their compensation as government employment
brought the matter within the prohibition of that provision. United States v. Boeing Co.,
Inc., 845 F.2d 476 (4th Cir. 1988). The Supreme Court reversed again, holding, in an
opinion by Justice Stevens, that although section 209(a) was ambiguously worded, it was
properly construed as prohibiting only payments made or received, respectively, at a time
when the recipient was an employee of the government. 494 U.S. at 159. The Court
observed that

At least two of the three policy justifications for the rule -- the concern that the
private paymaster will have an economic hold over the employee and the concern
about bitterness among fellow employees -- apply to ongoing payments but have little
or no application to an unconditional preemployment severance payment.

Id. at 166. As to the third such consideration,

Of course, the concern that the employee might tend to favor his former employer
would be enhanced by a generous payment, but the absence of any ongoing
relationship may mitigate that concern, particularly if other rules disqualify the
employee from participating in any matter involving a former employer. Thus,
although the policy justifications for § 209(a) are not wholly inapplicable to
unconditional preemployment severance payments, they by no means are as directly
implicated as they are in the cases of ongoing salary supplements.

Id. Justice Scalia, in a concurring opinion joined by Justices O'Connor and Kennedy, agreed
that the government had failed to prove a violation of section 209(a) but for quite different
reasons. He disagreed with the majority's view that payments made before or after the term
of federal employment are necessarily excluded from that provision's prohibition, but argued
that the prohibition applies only to supplementation of salary, and not, despite much contrary
authority in the form of opinions of the OLC and opinions and regulations promulgated by
OGE (as well as some court decisions), to compensation of any other kind; that salary means
periodic payments, and thus the prohibition does not apply to lump sum payments, whenever
and for whatever purpose made, id at 168-184 (with the possible exception of payments
whose amounts were computed "on the basis of so much per month or so much per year that
each recipient promised to serve," id. at 183).

Crandon effectively overruled some prior authority that looked only to the nature of the
payments made, and not to the time when they were made, in relation to the period of
government service. See. e.g., OGE Informal Advisory Opinion 89 x 8 (June 30, 1989)
(refusing to approve a severance package that would provide an employee leaving for a two
year stint in the government with three lump sum payments made at six month intervals upon
her return to the company; the fact that the payments were to be much more generous than

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the employer's usual hiring bonuses indicated that their real purpose was to supplement the employee's government salary). Insofar as prior authority examined the purpose and effect of payments made and received during government service, however, that authority remains valid. See, e.g., OGE Informal Advisory Opinion 85 x 11 (Aug. 23, 1985), disapproving a severance arrangement under which a prospective nominee to a Senate-confirmed position who was chairman of the board of a corporation and planned to return to that position would receive two payments "for past services" at a year's interval (and evidently during his government service): "[T]he inference can be drawn that availing oneself [of] the several available benefit plans of the company coupled with an intent to return creates, in effect, a leave of absence situation where the severance arrangement is used simply to supplement Federal salary. A true severance payment would occur at the end of [the individual's] service to the corporation." Id.

An OGE opinion that does not address the point of timing of the payments but presumably remains authoritative with respect to the determination of whether the payments had a proper purpose is OGE Informal Advisory Opinion 84 x 12 (June 14, 1984) which approved a payment made by a law firm to a partner who withdrew to accept a presidential appointment. The firm's partnership agreement provided for a minimum payment for withdrawing partners, but also allowed for larger payments to partners who had made "extraordinary contributions" to the firm. In this instance, such a larger payment was involved. After evaluating the firm's practice in ten previous cases, OGE concluded that the payment in this instance was in line with firm's past practice after "carefully weighing the indicia of intent as represented by the prior personnel practices of [the] law firm; the nature, size and stated purpose of the payment; and the expressed nature of the services [the attorney] performed while in the employ of the law firm." Id.

Thus, the practical result of Crandon, so far as lawyers and law firms are concerned, appears to be that at least as section 209 now stands, a law firm can, consistently with that provision, make to a lawyer departing the firm for government a severance payment that is calculated to cushion the financial sacrifice entailed by government service, or promise a bonus similarly calculated upon the lawyer's return from government, provided that payment is actually made before the government service commences, (in the first case) or after it has been completed (in the second). (It might nonetheless be sensible to secure a confirming opinion from OGE before launching on such a course.) If, however, any portion of the severance payment is to be disbursed during the lawyer's government service, then it must be justified as an entitlement wholly unrelated to that government service.
1.11:700  DC Conflict of Interest Statutes and Regulations

As has been pointed out in the discussion of the federal conflict of interest statutes under 1.11:600, above, some – though not all – of those statutes impose on DC government employees, with respect to their dealings with agencies of the DC government, the same prohibitions as they impose on federal employees in their dealings with their governmental employer. These dual-application statutes are addressed under 1.11:710, immediately below. In addition, there are two sets of statutory provisions and related regulations applying solely to DC employees: these are treated under 1.11:720.

1.11:710  Federal Statutes Also Applicable to DC Government Employees

Only two of the federal post-employment statutory provisions, in 18 USC § 207, apply by their terms to DC as well as federal government employees – namely, subsections (a)(1) and (a)(2) [discussed under 1.11:601 and 1.11:620, respectively, above]. None of the other five prohibitory subsections of section 207 – that is, subsections (b) through (f) [discussed under 1.11:630 through 1.11:670, above] – has dual application. To be sure, some of the implementing subsections of section 207 also affect subsection (a) of that provision, and thus are involved in its application to DC employees. This is so of subsection (i)'s definitions of the terms "participated" and "particular matter" [discussed under 1.11:610, above]; and the exceptions with respect to official government duties, international organizations, scientific or technological information, and testimony, in subsections (j)(1), (3), (5) and (6) [also discussed under 1.11:600, above].

In contrast to the limited applicability of the federal post-employment prohibitions to DC government employees, all four of the federal statutory restrictions on conflicts on interest arising during government service – 18 USC §§ 203, 205, 208 and 209 [discussed under 1.11:680 through 1.11:699, above] – apply fully to DC government employees. The penalty provision applicable to all of the federal conflicts statutes, 18 USC § 216 [also discussed under 1.11:600, above], also governs those statutes when applied to DC government employees. As will be seen, the DC regulations impose additional, administrative penalties on some matters that are criminally punishable under the federal statutory provisions.

As to interpretive authority, to the extent that the federal prohibitions with dual application have been implemented or interpreted by regulation, by judicial decision or by opinions of the Office of Government Ethics (OGE) or the Office of Legal Counsel in the Department of Justice (OLC), that authority is, mutatis mutandis, valid also with respect to the application of the prohibitions to employees of the DC government (and, as will be seen under 1.11:720, below, the pertinent DC regulations explicitly adopt by reference certain of the federal regulations). The discussion of that body of federal authority under the pertinent subdivisions of 1.11:600, above, need not be repeated here.
There are, however, three OGE Informal Advisory Opinions that explicitly address the application of certain of the federal statutory prohibitions to DC government employees. Two of these opinions concern the post-employment prohibitions of 18 USC § 207(a) and the other concerns 18 USC § 203's prohibitions relating to compensation for representational services; all three respond to inquiries about the applicability of the statutory prohibitions to members and staff of the Council of the District of Columbia (the District's legislative body). The first of these, OGE Informal Advisory Opinion 86 x 18 (December 9, 1986), addressed the question whether the prohibitions of 18 USC § 207 applied to former employees of the DC Council. Although the inquirer contended that the DC Home Rule Act (District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774; codified at D.C. Code §§ 1.201-1.299.7) had changed the Council from an executive agency (appointed by the President) to a legislative body (elected by the DC citizenry), the Opinion held (and stated that OLC concurred) that there was nothing in the legislative history of 18 USC § 207 to support the proposition that it applied to less than all employees of the DC government, regardless of branch. As to the kinds of legislation passed by the Council to which the post-employment prohibitions of the two subsections might apply, the Opinion observed that the impact of the prohibitions would vary according to the type of legislative activity engaged in [by the former DC Council employee] while with the Government, and in many instances the impact may be limited because of the requirement of particular matters involving specific parties. 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.

Id.

OGE Informal Advisory Opinion 97 x 9 (May 21, 1997), after first observing that OGE does not provide advice to or about current or former employees of the DC government except in "unusual circumstances," which were not here presented, proceeded nonetheless to respond to several questions posed by a former member of the DC Council. One question addressed was whether any of the post-employment prohibitions applicable to federal executive branch employees that were added to 18 USC § 207 by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat.1716 (1989) – specifically, subsections (c), (d), (e), and (f) (see 1.11:630 through 1.11:660, above) – apply also to former DC employees. The answer was no.

Several questions addressed by Opinion 97 x 9 were directed to the application of the two provisions of 18 USC § 207 that do apply to DC government employees – i.e., subsections (a)(1) and (a)(2). In this connection, although the inquirer hadn't explicitly raised the issue, the Opinion confirmed the view, previously expressed in Opinion 86 x 18, above, that the legislative branch of the DC government was not beyond the reach of those subsections, specifically holding in this instance that they applied to former members of the DC Council (whereas the earlier Opinion had addressed former employees of the Council). Another question posed was whether the prohibition of those
two provisions applied to contacts by a former Council member with the current Council. **Opinion 97 x 9** ducked this question, saying that it should be addressed in the first instance by the DC government. Still another question was as to the effect of a recusal from a particular matter while the employee is in the government. The **Opinion** observed that recusal ordinarily avoids a post-government employment problem under subsection (a)(1) of 18 USC § 207, but not under subsection (a)(2). And yet another question related to a distinction, as respects the kinds of legislation to which the prohibitions would attach, between "legislation of general applicability" and "legislation involving a specific party." The **Opinion** responded by referring to the passage in **Opinion 86 x 18** that is quoted in the discussion of that **Opinion**, above.

A further inquiry addressed by **Opinion 97 x 9** concerned the significance of compensation in determining whether a particular post-government employment contact with a governmental agency is prohibited. Specifically, the inquirer, noting that those prohibitions don't apply to self-representation, asked if pro bono representation of an organization by an officer or member of the organization would be considered to be self-representation for this purpose. The answer was, in substance, that if a former employee was acting on behalf of an organization rather than on his or her own behalf, the prohibitions would apply. Finally, the inquirer sought and received assurance that the two post-employment prohibitions do not apply to the provision of "behind-the-scenes" advice to others regarding contacts with the DC government.

**OGE Informal Advisory Opinion 93 x 22 (September 3, 1993)** opined that 18 USC § 203 applies to members of the District of Columbia Council. In so holding, it rejected arguments (1) that the statute's legislative history suggests that the legislative intent was to exclude legislative and judicial personnel from its coverage, and (2) that the conflict of interest prohibitions in District of Columbia Campaign Finance Reform and Conflict of Interest Act, Pub. L. No. 93-376, 88 Stat. 447 (1974), that were codified at DC Code § 1-1461 (discussed under 1.11:720, below) were the only conflict of interest provisions that Congress intended to make applicable to Council members.
There are two sets of partially overlapping and intermeshing statutory provisions, and related regulations, addressing conflicts of interest on the part of employees of the DC government, reflecting the dual legislative authority over the District – an elected local legislature and the federal Congress -- that was established by the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). The statutory provisions are found in two chapters of Title I, Administration, of the DC Code, namely, Chapter 6, which bears the title Merit System, and Chapter 14, titled Election Campaigns; Lobbying; Conflict of Interest. Chapter 6 derives from legislation adopted by the local legislative body, the DC Council; Chapter 14 finds its principal source in federal legislation. Both sets of statutory and regulatory provisions include quite sweeping proscriptions regarding the conduct of employees, present and (in the case of Chapter 6) former, of the DC government, and make detailed provision for administrative enforcement, although the administrative agencies charged with that enforcement are different. In addition, both sets of provisions contemplate the issuance of advisory opinions on, inter alia, conflict of interest issues – but again, by different agencies. A final point of intersection/overlap relates to the population of employees covered by the two sets of provisions: the provisions of Chapter 6, and the regulations issued thereunder, apply to all DC government employees (and in some cases to former employees) save those of a few independent agencies, while the provisions of Chapter 14 and the regulations thereunder apply only to elected officials and incumbent employees of relatively senior status (including those of the independent agencies not reached by Chapter 6).

Chapter 6

Chapter 6 of Title I of the DC Code, Merit System, which derives from DC Law 2-139, DC Reg. 5740 (1979), establishes a "comprehensive merit system of personnel management for the government of the District of Columbia," §1-601.1(1), and its 37 subchapters cover the subject comprehensively indeed. Of particular pertinence to conflicts of interest are the three provisions of subchapter XIX, Employee Conduct. One of those provisions, § 1-619-2, titled Conflicts of interest, reads in its entirety as follows:

No employee of the District government shall engage in outside employment or private business activity or have any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.

This prohibition is implemented by the regulations in Chapter 18 of Title 6 of the DC Municipal Regulations, discussed below, but there is no reported judicial authority applying or interpreting it.

Another provision of the subchapter is § 1-619.1, titled Standards of conduct, which, in subsection (b), provides that "The Mayor shall issue rules and regulations governing the
ethical conduct of all District employees." The regulations discussed below were issued pursuant to this authority.

The third pertinent provision of the statutory subchapter is § 1-619.3, titled Ethics counselors; codification of advisory opinions. It provides in subsection (a) that each agency head shall appoint an employee to serve as the ethics counselor for the agency, and that the Mayor shall appoint an ethics counselor for the District of Columbia. The Mayor has designated the DC Corporation Counsel as Ethics Counsel for the District of Columbia, and Corporation Counsel has redelegated the responsibility to a lawyer in the Corporation Counsel's office. Subsection (b) provides that such ethics counselors "shall issue advisory opinions concerning potential conflicts of interest which are presented by employees of the agency for resolution," the opinions to be issued within 15 days of receipt of an inquiry. Subsection (c) provides that the resulting opinions "shall be considered advisory opinions authorized under subsection (c) of § 1-1435, and shall be published in the District of Columbia Register." (The referenced statutory section is discussed under the subcaption Chapter 14, below.) As of the time this discussion was drafted (September 1999), no advisory opinion had yet been published pursuant to subsection (c) of § 1.619.3, but a compilation of opinions was under preparation in the Corporation Counsel's Office. Subsection (e) of § 1-619.3 provides that enforcement authority with respect to the provisions of Chapter 6, insofar as they apply to elected officials and senior-level employees otherwise subject to Chapter 14 (discussed under that subcaption, below) lies with the Board of Election and Ethics (rather than with the heads of agencies, as with all other employees who are subject to Chapter 6).

Chapter 6, unlike Chapter 14, contains no provision for criminal penalties or administratively-imposed fines. Enforcement of the standards of employee conduct set by § 1-619.2 and by the regulations issued under the authority of § 1-619.1 is by administrative action by the pertinent agency, subject to review by an Office of Employee Appeals whose operations are described in §§ 1-106.1 - 11. Additionally, § 1-616.5 provides for a sort of qui tam civil damage action, which may be brought by "any citizen," to

recover funds which have been improperly paid by the District government while there exists any conflict of interest on the part of the employee or employees directly or indirectly responsible for such payment.

There are no reported decisions applying or interpreting § 1-616.5.

The regulations issued under the authority of § 1-619(b) that deal with conflicts of interest (among other issues of employee conduct) are contained in Chapter 18, Employee Conduct, of the DC Personnel Regulations (which in turn are to be found in Title 6, Government Personnel, of the DC Municipal Regulations). These regulations, which were promulgated in 1983 (and most recently amended in 1993), implement not only the conflict of interest provisions of the DC Code, but in addition the Federal statutory provisions that apply to DC as well as federal government employees (discussed in 1.11:710, immediately above).
Section 1802 of the regulations, elaborating on § 1-619.3(e) of the Code, makes clear that the regulations generally apply to all DC employees, but the applicable enforcement authority depends on the seniority level of the employee affected: if the employee is at a sufficiently senior level to be subject to D.C. Code § 1-1461 (discussed under the subcaption Chapter 14 below), then enforcement authority lies in the Board of Elections and Ethics; otherwise, the enforcement authority is the head of the employee’s agency. Administrative "remedial actions," additional to "any penalty prescribed by law," are addressed by § 1801 of the regulation, which specifically lists four types of administrative remedy: changes in assigned duties; "divestment by the employee of his or her conflicting interest"; "corrective or adverse action" pursuant to § 1-617.1(d) of the Code; and "disqualification for a particular assignment." A separate administrative process is provided by § 1815 of the regulations for enforcement of the pertinent post-employment prohibitions. The sole sanction that may result from the latter proceedings is a mayoral order barring the former employee, for up to five years, from representational contacts with the former employee's agency (§ 1815.23).

The subjects of ethics counselors and advisory opinions are addressed by §§ 1811 and 1812, respectively, of the regulations.

The principal substantive provisions of the Employee Conduct regulations pertinent here are those dealing with post-employment conflicts of interest, contained in § 1814 of those regulations. These elaborate on, and in two significant respects add to, the applicable post-employment prohibitions in 18 USC § 207. This is done in a fashion that is difficult to untangle – a result of the fact that the regulation has not yet been updated to reflect the changes in section 207 that were made, effective January 1, 1991, by the Ethics Reform Act of 1989. The prohibitions in section 207 that are in terms applicable to DC as well as federal employees are the permanent prohibition of subsection (a)(1) [see 1.11:610, above] and the two-year post-employment prohibition of subsection (a)(2) [see 1.11:620, above]. The regulations reiterate the substance of both of these prohibitions (in § 1814.4 and §§ 1814.6 through 1814.9, respectively), but in doing so refer to the provisions as they stood prior to the Ethics Reform Act's amendments. This is made clear by the fact that the regulations incorporate by reference the federal regulations interpreting section 207 prior to those amendments, which are now found in 5 CFR Part 2637 but which the DC regulation refers to by their pre-1990 designation of 5 CFR Part 737 (see §§ 1814.2 and 1814.3; see also the definition of "senior employee" in § 1814.1, making reference to 18 USC § 207(b)(ii), which was rescinded by the Ethics Reform Act). The substance of what is now subsection (a)(1) of section 207 constituted, prior to the changes wrought by the Ethics Reform Act, the entirety of subsection (a); the substance of what is now subsection (a)(2) was subsection (b)(i) as it then stood.

The regulations also effectively add to the two prohibitions imposed by section 207 two others borrowed from that source: one that section 207 imposes only on former federal and not DC employees, and the other a prohibition that the statute no longer imposes on either group. As to the first of these, the regulations make applicable to former senior employees of the DC government (defined in § 1814.1) a prohibition roughly corresponding to the prohibition in subsection (c) of section 207 [discussed under 1.11:630, above], which
imposes on former senior federal employees a one-year post-employment prohibition on representational contacts with their former agencies regarding any matter on which they are seeking official action, regardless of whether they had participated personally and substantially in or had official responsibility over the matter while in government (see §§ 1814.10 - 1814.14). This statutory prohibition carried the same lettering before the Ethics Reform Act, but was altered by that Act both in formulation and in some details of substance. The prohibition, however, did not in its prior form and still does not apply to former DC employees but only federal ones. As to the other prohibition borrowed from the federal statute, the regulation specifically refers (in the definition of "Senior Employee," in § 1814.1) to the prohibition of former subsection (b)(ii) of section 207, which imposed a two-year post-employment ban on former employees of both the federal and the DC governments assisting in representations by others, and restates (in § 1814.10), as a regulatory prohibition, the substance of that provision. That subsection of section 207, however, was eliminated by the Ethics Reform Act and is no longer in effect.

Other substantive prohibitions relating to conflicts of interest are found in the following sections of the Employee Conduct regulations:

-- Section 1803, titled Responsibilities of Employees, sets out various prohibitions, including one on receipt of compensation from a private source for services to the government (§ 1803.6) -- a prohibition that, as the regulation recognizes, is also imposed by 18 USC § 209 [discussed under 1.11:699, above].

-- Section 1804, Outside Employment and Other Outside Activity, imposes, inter alia, a restriction on maintaining a financial interest in or serving as an officer or director of an organization that is likely to be affected by government action taken or recommended by the employee (§ 1804.1(d)) -- a kind of conflict addressed more centrally by 18 USC § 208 [discussed under 1.11:695, above]; and one on serving in a representative capacity for any outside entity in any matter before the District of Columbia (§ 1804.1(h)) -- this time echoing 18 USC § 205 [discussed under 1.11:690].

-- Section 1805, Financial Interest, also addresses, albeit more broadly, conflicts of interest of the sort with which 18 USC § 208 is concerned: it prohibits knowing acquisition, by the employee or a member of his or her "immediate household," of property whose possession "could unduly influence or give the appearance of unduly influencing" the employee's official conduct (§ 1805.1); and acquiring an interest in or operating a commercial enterprise that is "in any way related, directly or indirectly, to the employee's official duties" or to matters "over which the employee could wield any influence" (§ 1805.2).

-- Section 1813, which is principally concerned with the subject stated by its title, Reporting of Financial Interests, also includes the following two substantive prohibitions:
1813.1. No employee of the District government shall engage in outside employment or private business activity or have any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.

1813.18. Notwithstanding the filing of the annual statement required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflict-of-interest provisions of 18 U.S.C. § 208, or this chapter.

Chapter 14

Chapter 14 of Title I of the DC Code derives from the District of Columbia Campaign Finance Reform and Conflict of Interest Act, Pub. L. No. 93-376, 88 Stat. 447 (1974). The Chapter bears the title Election Campaigns; Lobbying; Conflict of Interest, and is principally concerned with the first two of the three topics so referred to. A single section, § 1–1461, titled Conflict of interest, specifically addresses the third of those topics, setting out a number of prohibitions on the subject. As has been mentioned, the conflict of interest prohibitions in Chapter 14, unlike those in Chapter 6, above, do not apply to all DC government employees, but only to those in positions above a certain level of seniority. Specifically, all but two of the prohibitions of § 1-1461 apply to all "public officials" of the District of Columbia; the two exceptions apply to subsets of the same. "Public officials" are defined by § 1-1461(i)(1) as persons required to file financial statements under § 1-1462. The latter provision, titled Disclosure of financial interest, requires annual filings of detailed financial statements by specified elected officials, namely the Mayor, DC's representatives in Congress, members of the Council and members of the School Board; persons serving as subordinate agency heads, persons serving in positions designated within the Excepted Service (see DC Code §§ 1-610.1 through 1-610.3) and paid at a rate of GS-13 or better, and "statutory officeholders" (see DC Code § 1-610.8); and members of a wide array of administrative boards, which are listed in extenso in § 1-1462. (The substance – though not the timing – of the disclosure requirements of § 1-1462 has application to non-incumbent candidates for public office as well as incumbents, and thus such candidates are caught in the definition of "public officer" in § 1-1461, but all of the substantive prohibitions of that section clearly have application only to persons who are actually in office.)

The list of conflict of interest prohibitions in § 1-1461 commences with the following declaration of principle:

(a) The Congress declares that elective and public office is a public trust, and any effort to realize personal gain through official conduct is a violation of that trust.

This is followed by a series of subsections setting out the following prohibitions applicable to all public officials:
(b) No public official shall use his or her official position or office to obtain financial gain for himself or herself, any member of his or her household, or any business with which he or she or a member or his or her household is associated, other than that compensation provided by law for said public official.

(c) No person shall offer or give to a public official or a member of a public official's household, and no public official shall solicit or receive anything of value, including a gift, favor, service, loan gratuity, discount, hospitality, political contribution, or promise of future employment, based on any understanding that such public official's official actions or judgment or vote would be influenced thereby, or where it could reasonably be inferred that the thing of value would influence the public official in the discharge of his or her duties, or as a reward, except for political contributions publicly reported . . . and transactions made in the ordinary course of business of the person offering or giving the thing of value.

(d) No person shall offer or pay to a public official, and no public official shall solicit or receive any money, in addition to that lawfully received . . . in his or her official capacity, for advice or assistance given in the course of the public official's employment or relating to his or her employment.

(e) No public official shall use or disclose confidential information given in the course of or by reason of his or her official position or activities in any way that could result in financial gain for himself or herself or for any other person.

The two prohibitions in § 1-1461 that are applicable only to elected officials are these:

(f) No member or employee of the Council of the District of Columbia or Board of Education of the District of Columbia shall accept assignment to serve on a committee the jurisdiction of which consists of matters (other than of a de minimis nature) in which he or she or a member of his or her family or a business with which he or she is associated, has financial interest.

(h) Neither the Mayor nor any member of the Council of the District of Columbia may represent another person before any regulatory agency or court of the District of Columbia while serving in such office.

Subsection (g) of § 1-1461 prescribes the actions to be taken when a public official "would be required" to take action affecting a personal or familial financial interest. There are no reported court decisions applying or interpreting any of the prohibitory provisions of § 1-1461. Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment, 364 A.2d 610, 613 (DC 1976) does make glancing reference to what is now § 1-1461(g)). As noted under 1.11:700, above, OGE Informal Opinion 93 x 22 rejected a contention that Congress had intended § 1-1461 to comprise the only conflict of interest prohibitions applicable to members of the DC Council (to the exclusion, in that instance, of 18 USC § 203).
Violations of the prohibitions of § 1-1461 (as well as other provisions of Chapter 14, and in addition those of Chapter 13, which also addresses the subject of elections, though not that of conflicts of interest) are subject to criminal penalties, provided by § 1-1471, of up to a $5,000 fine or 6 months imprisonment. Prosecutions are brought by the United States Attorney. Administrative enforcement authority is vested in the District of Columbia Board of Elections and Ethics, whose powers are prescribed by § 1-1435. Although the Board is authorized to refer violations to the United States Attorney, see §§ 1-1431(c) and 1-1432(c), it is also empowered by § 1-1435(b)(1) and (2) to assess, in administrative proceedings, civil penalties of up to $50 per day for violation of any provision of Chapter 14 or Chapter 13. It is also empowered by § 1-1435(b)(3) to prescribe a schedule of fines for such violations, which may be imposed "ministerially" by the Director of the Office of Campaign Finance, which fines are subject to a limit of $50 per day and $500 in the aggregate. When a civil penalty imposed by the Board is not paid, the Board is authorized by § 1-1435(b)(4) to seek enforcement by the Superior Court. The Board is also authorized, by § 1-1435(c), to issue, in response to inquiries from persons affected, "advisory opinions" about the applicability of any provision of Chapter 14 (or of Chapter 13).

The Director of Campaign Finance, referred to above in connection with the civil penalties that can be imposed ministerially, is appointed by the Mayor but operates as a sort of executive arm of the Board. The Director is charged, among other things, with investigating alleged violations of Chapter 14 (§ 1-1432), and performing other duties prescribed by the Board (§1-1435).

The Board of Elections and Ethics has issued two sets of regulations that have relevance to the present discussion: one addressing Conflict of Interest, which comprises Chapter 33 of the DC Municipal Regulations; and the other addressing Investigation and Hearings, which is Chapter 37 of the same.

The regulations in Chapter 33 include, in § 3302, a substantial delegation by the Board to the Director of its advisory functions, authorizing the Office of Campaign Finance (OFC) to issue "interpretive opinions" in response to inquiries; review of these can be sought by the requester from the Board; and the Board's response becomes an "advisory opinion" which is published in the District of Columbia Register. No such "advisory opinions" have been issued in recent years. The "interpretive opinions" issued by the OFC are not published, but they may be viewed at the OFC's offices, and copies of particular opinions will be furnished upon request.

The prohibitory provisions of these regulations, found in § 3301, do little more than repeat, in somewhat simplified and watered-down form, the statutory prohibitions in § 1-1461, set out above. Thus, § 3301.1 of the regulation tracks § 1-1461(b) of the Code, but says "the public official shall avoid the use" rather than saying "No public official shall use" public office to obtain financial gain. Similarly, § 3301.2 tracks § 1-1461(c) on receipt of anything of value in exchange for official action; § 3301.3 tracks § 1-1461(d) on payment of receipt of money in return for advice or assistance given in the course of the public official's
employment; § 3301.4(a) tracks § 1-1461(e) regarding use or disclosure of confidential information; and § 3301.4(b) tracks § 1-1461(f), regarding committee assignments.

The regulations in Chapter 37 prescribe in some detail the conduct of investigations. Section 3711 of those regulations sets out the schedule of fines that may be "ministerially" imposed by the Director pursuant to § 1-1435(b)(3) of the Code.