Office of Government Ethics
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Letter to a Private Attorney dated November 9, 1993

This is in reply to your letter dated October 6, 1993, on behalf of [your client]. In your letter, you request the opinion of this Agency as to the manner in which the lifetime post-employment restriction in 18 U.S.C. § 207 would apply to your client. Your request was prompted by your disagreement with an opinion which you received on this subject from your client's former employer, [a Federal agency].

At the outset, it should be noted that regulations implementing 18 U.S.C. § 207 assign agencies the primary responsibility for providing advice to former employees regarding post-employment restrictions, because that advice is fact specific and the agency is in the best position to ascertain the facts. See 5 C.F.R. §§ 2637.101(c)(8) and 2637.201(e). An agency's opinion regarding the application of 18 U.S.C. § 207 to one of its former employees is entitled to weight. CACI., Inc.-Federal v. United States, 719 F.2d 1567, 1576 (Fed Cir. 1983).

The Office of Government Ethics (OGE) may assist agency ethics officials in situations involving unresolved or complex issues. However, OGE does not serve in an appellate capacity, absent unique issues. We do not view the facts of this case as presenting such issues. Nonetheless, we note that in a letter to your client dated September 16, 1993, the [agency] informed him that he could appeal or seek an independent review of its opinion by contacting OGE. Consequently, we offer the following informal guidance about this case.

Your client was [a] Regional Counsel [of the agency] from March 1982 until October 1983. He is now in private practice and is seeking to represent a certain [entity] before the [agency] with respect to a current [agency] investigation and proposed [agency] administrative and judicial action. The [agency's] Alternate Designated Agency Ethics Official (ADAEO) has determined that while your client was an [agency] employee, he participated personally and substantially in an informal attempt by the [agency] to stop the controlling shareholder of that same [entity] from taking part in the conduct of the [entity's] affairs. The [agency's] ADAEO also has determined that this informal removal attempt was a

"particular matter involving a specific party or parties" for purposes of 18 U.S.C. § 207 and that it is the same such matter as the current investigation/proposed actions, because it arose from the same nucleus of operative facts. Accordingly, by letter dated August 23, 1993, your client was advised that he may not represent the [entity] with respect to the current investigation and proposed actions.

When your client's employment with the [agency] ended, he became permanently barred by the provisions of 18 U.S.C. § 207(a) then in effect from knowingly acting as agent or attorney for any other person (except the United States) in connection with any "particular matter involving a specific party or parties" in which the United States is a party or has a direct and substantial interest, and in which he had participated "personally and substantially" while he was an [agency] employee.**1** A "particular matter involving a specific party or parties" typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. 5 C.F.R. § 2637.201(c)(1). To have participated "personally and substantially" means that the participation was both direct and of actual or apparent significance to the matter. 5 C.F.R. § 2637.201(d)(1).

In determining whether two particular matters are the same, various factors should be considered: 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. 5 C.F.R. § 2637.201(c)(4). "The parties, facts, and subject matter must coincide to trigger the prohibition of § 207(a)." United States v. Medico Industries, Inc., 784 F.2d 840, 843 (7th Cir. 1986). In this regard, parties may be related or coincide even though the specific party or parties involved in the matter at the time of the post-employment representation is or are different from the specific party or parties involved in the matter at the time of the former employee's participation.

It appears that both the informal removal attempt and the current investigation/proposed actions are particular matters involving a specific party or parties, and that they are the same particular matter involving a specific party or parties for purposes of 18 U.S.C. § 207(a). It is our understanding that the informal removal attempt was prompted initially by concerns about some of the [business] being [done] by the [entity with] its

principal shareholder and his immediate family, related interests, and business associates; later, the informal removal attempt regarding the [entity's] principal shareholder focused on his conviction of a crime involving personal dishonesty or a breach of trust, which would provide an alternative approach to achieving his removal from participation in the affairs of the [entity]. In the current investigation and proposed actions, the [agency] is alleging that the [entity's] principal shareholder has continued to participate in the affairs of the [entity] notwithstanding the informal removal attempt, and that the [entity] has continued to [do business] which [is] related to the [business] which prompted the informal removal attempt. Thus, the informal removal attempt and the current investigation/proposed actions do seem to have a common "nucleus of operative facts," as that term is used in United States v. Medico Industries, Inc., supra, at 843.

We note the assertion you made in your letter to the [agency] dated September 10, 1993, that "because no action was ever initiated," the informal removal attempt "does not appear ever to have become a matter, let alone `a particular matter' within the meaning of 18 U.S.C. § 207." Formal action in the sense to which you are referring is not required in order for something to be a "particular matter" under 18 U.S.C. § 207. Indeed, internal deliberations within an agency may be a "particular matter." Much of the work with respect to a particular matter is accomplished before the matter reaches its final stage. For example, an employee may personally participate in an investigation to determine whether the Government should file a formal action. Further, he might recommend, based upon his investigation, that the formal action be undertaken. If such an employee could at that point, before the actual filing of the action, leave the Government and contend that he was not barred by section 207 because his work did not extend to participation in an actual "judicial or other proceeding," the purpose of 18 U.S.C. § 207 would be undermined. See 2 Op. O.L.C. 313, 315 (1978).

Documents which your client obtained from the [agency] and which you enclosed with your letter to this Agency indicate that while your client was an [agency] employee, he concurred in writing with an [agency] [employee's] suggestion that before pursuing formal action against the [entity's] principal shareholder, an informal attempt should be made to get him to cease participating in the [entity's] affairs; and that your client represented the [agency] at a meeting to achieve that informal resolution. Such participation would be "personal and substantial" under 18 U.S.C.

§ 207(a).

In view of the foregoing, our advice regarding the application of 18 U.S.C. § 207 in this case would be the same as that which was given to your client by the [agency]. He may not engage in the contemplated post-employment activity.

Sincerely,

Stephen D. Potts
Director

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1 Your letter specifically requested "an opinion concerning the possible application of 18 U.S.C. § 207 (a)(2)" to your client. However, the two-year bar set forth in that provision is irrelevant to your inquiry because it was not cited by the [agency] as the basis for its opinion, and because that provision does not apply to former employees who, like your client, left Government service before January 1, 1991. A similar two-year bar that was in effect at the time your client left the [agency], in what used to be 18 U.S.C. § 207 (b)(i), expired for your client in October 1985.