



United States  
**Office of Government Ethics**

1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

DCN: 12142

June 30, 1994

Mary A. Hook  
Acting General Counsel and  
Designated Agency Ethics Official  
Defense Base Closure and Realignment Commission  
Suite 1425  
1700 North Moore Street  
Arlington, VA 22209

Dear Ms. Hook:

This is in reply to your letter of June 6, 1994, in which you request this Agency's advice regarding the application of the post-employment restrictions in 18 U.S.C. § 207 to former employees of the Defense Base Closure and Realignment Commission (the Commission). Specifically, you have asked whether a particular matter considered and resolved by the Commission in a past round of base closures is the same particular matter in a new, successive round of closures for purposes of 18 U.S.C. § 207(a)(1) and (a)(2).<sup>1</sup> You also have asked if former Commission employees can perform behind-the-scenes work (at a corporation or as independent consultants) to assist communities on base closure issues.

As you have pointed out, this Agency's regulations regarding 18 U.S.C. § 207 provide that "[i]n determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related

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<sup>1</sup> Under 18 U.S.C. § 207(a)(1), no former employee of the executive branch may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest. Under 18 U.S.C. § 207(a)(2), for two years after his Government service terminates, no former employee of the executive branch may knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of his employment with the United States.

Ms. Mary A. Hook

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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). You have included in your letter a thorough and comprehensive analysis which applies the criteria listed in this regulation to the base closure rounds. After reviewing your analysis, we agree with your conclusion that the Commission's consideration of particular bases in 1993 is not the same "particular matter" for purposes of 18 U.S.C. § 207(a)(1) and (a)(2) in subsequent base closure rounds.<sup>2</sup>

The restrictions at 18 U.S.C. § 207(a)(1) and (a)(2) do not apply unless a former employee communicates to or makes an appearance before the United States on behalf of some other person. For these purposes, the "United States" refers to any employee of any department, agency, court, or court-martial of the United States (but not of the District of Columbia). Therefore, a former employee is not prohibited by 18 U.S.C. § 207(a)(1) and (a)(2) from providing "behind-the-scenes" assistance in connection with the representation of another person.

Other provisions regarding post-employment activities do contain restrictions on behind-the-scenes assistance. Under 18 U.S.C. § 207(f), for one year after his service in a "senior" or "very senior" position terminates, a former "senior" employee or former "very senior" employee may not knowingly, with the intent to influence a decision of an employee of a department or agency of the United States in carrying out his official duties, represent a *foreign entity* before any department or agency of the United States or aid or advise a foreign entity. Under 18 U.S.C. § 207(b), for one year after his Government service terminates, a former employee may not knowingly represent, aid, or advise on the basis of certain "covered information," any other person (except the United States) concerning any *ongoing trade or treaty negotiation* in which, during his last year of Government service, he participated personally and substantially as an employee. In addition, former employees remain covered by statutory restrictions prohibiting the release of classified information, and the disclosure of proprietary or source selection information regarding a Federal agency procurement.

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<sup>2</sup> The only part of your analysis with which we do not agree is that the Commission's work is not a particular matter for purposes of 18 U.S.C. § 207 since a "rulemaking, legislation, the formulation of general policy, standards or objectives" would not be a particular matter according to 5 C.F.R. § 2637.201(c)(4), and the Commission's work "is the prelude to legislating." The Commission's base closure activities are not actions of general application excluded by the cited regulation. This misapprehension, however, would not affect the remainder of your analysis or negate your conclusion.

Ms. Mary A. Hook  
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We trust the advice provided in this response will be of assistance to you. Please let us know if you need anything further from this Agency.

Sincerely,

A handwritten signature in cursive script, appearing to read "Stephen D. Potts".

Stephen D. Potts  
Director

June 6, 1994

Mr. Steven D. Potts  
Director  
Office of Government Ethics  
1201 New York Avenue N.W.  
Suite 500  
Washington, D.C. 20005

Dear Mr. Potts,

I am writing to seek three separate informal legal opinions regarding the application of post-employment restrictions under 18 U.S.C. 207 and to employees of the Defense Base Closure and Realignment Commission.

I have previously sought counsel with Office of Government Ethics (OGE) Desk Officer Kent Wayland and Associate General Counsel Stewart Rick and Deputy General Counsel Jane Ley. Our discussions resulted in agreement that due to the high visibility of the Commission and its unique statutory obligations, it would be appropriate for the Commission to seek an opinion from OGE. The Commission and the employees involved are sensitive to the possible conflicts and desire to fully meet the standards as required by law.

The main questions rests on the definition of the "same particular matter", and whether a particular matter considered and resolved by the Commission in a past round of base closures is the same particular matter in a new, successive round of closures for purposes of 18 U.S.C. 207 (a) (1) and (a) (2).

The secondary question is, can the employees perform behind-the-scenes work (at a corporation or as independent consultants) to assist communities on base closure issues under the 5 C.F.R. Part 2637 and 18 U.S.C. 207 restrictions?

In order to determine if the issues raised in subsequent base closure rounds are the same particular matter considered by the earlier Commission, or if the issues are a new matter, the Commission has relied on the interpretation of same particular matter in implementing regulations issued by OGE.

In determining whether the two particular matters are the same the various factors should be considered: the extent to which

the matters involve the same basic facts, related issues, same or related parties, time elapsed and the same confidential information and the continuing existence of an important federal interest.

Rulemaking, legislation, the formulation of general policy, standards or objectives, or other is not such a matter.<sup>1</sup>

The following pages are provided to explain the unique statutory responsibilities of the Commission and to provide our interpretation of why, due to the numerous factors discussed, the matters considered by one Commission in its particular round are unique and separate from matters considered by another Commission in future base closure rounds.

## **Part I: Background**

### **A. Defense Base Closure and Realignment Commission Process**

The Defense Base Closure and Realignment Commission Act of 1990 (the Act), (Attachment 1) was enacted into law by Congress in order to provide a fair process that will result in the timely closure and realignment of military installations inside the United States, section 2901 (b). The Commission is required to meet in 1991, 1993, and 1995. In years 1992 and 1994, the commission staff is required by law to reduce to a maximum of 15 and the sole commissioner is the Chairman.

The Commission is an advisory executive branch entity that serves as an agency but is only advisory in nature. Its sole responsibility is to provide recommendations to the President. It has no rulemaking authority.

Each January, prior to the commencement of each base closure round, the President nominates Commissioners to serve until the end of the Congressional session for which they are appointed. (The Chairman serves until the confirmation of a successor.) The President may nominate Commissioners who have served in earlier base closure rounds, or nominate new persons. Commissioners undergo Senate confirmation.

The Commission's role in the base closure process begins in March when the Secretary of Defense publishes and transmits to Congress and to the Commission the recommendations for closures and realignments. For the next four months the Commission conducts an independent review of the Secretary's recommendations, under high public scrutiny and through an extremely open process. In conducting its review, the Commission must find that the

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<sup>1</sup> 5 C.F.R. 2637.201 (c)(4).

recommendations it submits are consistent with the Department of Defense's (DoD) force structure plan and the final selection criteria. The Commission votes on the Secretary's recommendations and submits its own recommendations to the President by July 1st.

Upon acceptance of the Commission's recommendations by the President, the Commission's statutory obligations for that round are fulfilled. The President transmits his recommendations to Congress and, absent a joint resolution of the Congress within a narrow timeframe, the recommendations are enacted into law. The 1991 and 1993 Commission recommendations were accepted by the President and Congress and are now law.

## **B. Force Structure**

The Secretary of Defense is responsible for developing a six-year force structure plan which assesses national security threats and the force structure needed to meet them. Section 2903 (a) (1) (2). The plan, which also assesses the anticipated levels of funding available for national defense, does not specify directly or indirectly any military installation within the United States that will be closed (Attachment 2). The Secretary is to provide a force structure plan to the Commission for each base closure round.

The Secretary of Defense and the Commission use this force structure plan to determine the infrastructure "capacity" required to house, train and support the forces set out in the plan. The force structure does not specify the number, types of bases, or names of bases to be closed. Rather, it is the source for generating the required base structure for the array of forces stationed within the continental United States.

The 1995 force structure plan will be provided by the Secretary of Defense by January 1995 for the 1995 base closure round. The unofficial yet reliable position is that the force structure plan will be based on a new threat assessment, counter-threat strategy, and new troop levels for the 1995 round.

## **C. Final Selection Criteria**

The Commission must also assess the Secretary's recommendations based on the final selection criteria. The Act requires the Secretary of Defense to publish in the Federal Register the selection criteria (Attachment 3) for notice and comment. The Act also specifies that any proposed amendments to the final selection criteria must be published in the Federal Register, be open for public comment, and be accepted by Congress.

In conducting its review of the Secretary's recommendations, the Commission must not only find that the recommendations are consistent with the force structure plan, but also consistent with the current final selection criteria.

In order to change any of the Secretary's recommendations, the Commission must find that the Secretary of Defense deviated substantially from the force structure plan and the final selection criteria. The Commissioners determine what is necessary to find substantial deviation. Therefore, with each new membership of Commissioners, the standard necessary for achieving substantial deviation is unique.

## **Part II: Unique Characteristics of Each Closure Round**

### **A. Secretary of Defense Recommendations**

The Department of Defense review process clearly reflects the unique characteristics inherent in each separate round of base closures.

By statute, the Secretary of Defense must submit recommendations to the Commission. Based on data and recommendations received from each Service, the Secretary selects the recommendations for closure and realignment.

In the previous closure rounds each Service devised its own methods of analysis. Those methods were different for each round of closures. For example, in 1991, the Air Force divided bases into five categories, 10 subcategories, and used a questionnaire of 83 subelements to determine closure candidates. In 1993, the Air Force divided bases into only four categories, 11 subcategories, and extended the questionnaire to contain 160 subelements. A base considered in a category in 1991 with four other bases was considered in a completely different category in 1993. Therefore, the evaluation was based on completely different priorities.

In preparation for the 1995 base closure round, the Secretary of Defense has mandated changes in the review and analysis methodology used by each of the Services as noted in the attached guidance published by the Department of Defense (Attachment 4). According to this guidance, the entire base-closure analysis for the 1995 round will undergo an additional layer of scrutiny at DoD. Five distinct joint-service groups have been established to review those areas where DoD believes interservicing can reduce the DoD infrastructure. The result will create entirely different interservice groupings or categories never before presented to or analyzed by the Commission in previous rounds.

### **B. The Commission's Review Process**

The Commission's review process clearly reflects the unique characteristics inherent in each separate round of base closures.

The Commission is mandated by its statute to undertake what

amounts to an "audit" of the Secretary's recommendations on closures and realignments. The Commission hires approximately 60 employees each round (having dismissed about three-quarters of its staff in the off-year) devises its own review and analysis methods, visits each major base under consideration for closure or realignment, and holds public hearings on the recommended closures.

Just as there are variations in the Services' review and analysis processes for previous base closure rounds, the Commission's review and analysis methodology has evolved and changed in each base closure round. Furthermore, the Commission is not required to adhere to the methodology used by the Services when reviewing the Secretary's recommendations. For example, in 1993 the Air Force analyzed flying installations based upon three subcategories - missile bases, large aircraft bases, and small aircraft bases. An overall score was given to each installation based upon criteria established in each subcategory. The Commission independently devised its own rating system which treated all bases as flying bases (regardless of the missile, large, or small aircraft base categorization used by the Air Force) and also employed different criteria for rating purposes.

Secondly, since it is impossible to predict how the Services and the Commission will conduct future analyses, it is equally speculative to anticipate what issues will be analyzed by and presented to the Commission in each round. For example, a base which received a high rating for a particular attribute in 1991 which contributed to keeping that base off the closure list, could have been ranked significantly lower in the 1993 analysis thus contributing to its inclusion on the closure list.

Undoubtedly, countless factors including changes in the force structure plan, mission and troop requirements, international conditions, and weapon and deployment issues, affect both the types of bases recommended for closure and realignment, as well as the methods used to derive the list of candidates. For example, in 1991 the Air Force reviewed its base structure according to the mission performed at each base, either tactical or strategic. In 1993, a new major command structure within the Department of the Air Force, based on lessons learned in Desert Storm, altered the basing structure, thereby requiring both the Secretary and the Commission to group bases into a new head-to-head format. This change caused a base considered by the 1991 Commission to be selected for retention because it was a highly-rated strategic base; however, that same base rated very differently in 1993 under the new command structure.

Finally, although the Commission staff and the communities may use information from previous closure rounds, (which is available to the public) the Commission views each round as a new process for evaluation and public comment purposes. If a category was considered by an earlier Commission, and base x was closed, the

new Commission "assumes" this closure and proceeds to consider the category without reviving the previously recommended closure.

### **Part III: Fact Pattern**

Although there are hundreds of possible basing scenarios, the following is one illustration of the Commission's process to assist the evaluation and application of "particular matter."

During the 1993 closure round, the Secretary of Defense recommended to the Commission the closure of Alpha Naval Shipyard. The closure of a shipyard was based in part on the decrease in ships as reflected in the force structure plan.

In order to determine whether Alpha Shipyard was the appropriate shipyard for closure and whether more shipyards could be closed, the Commission investigated, researched and compared Alpha shipyard to four other east coast shipyards. While the Commission decided to categorize the shipyards according to east and west coast, the bases could have been analyzed nationally, regardless of location.

The communities of the five shipyards testified and provided information to the Commission in support of keeping each of their shipyards open. The arguments were based largely on military value issues set forth in the final selection criteria which the Commission is statutorily required to use in its analysis (see Attachment 3).

The 1993 Commission found that the Secretary did not deviate substantially from the force structure plan and final selection criteria and, therefore, voted to accept the Secretary's recommendation to close Alpha Naval Shipyard.

In 1995, the Commission will conduct a separate round of closures and realignments. Once again the Secretary could recommend a shipyard for closure -- "Beta Shipyard". In its evaluation of Base Beta, Alpha shipyard will not be included since it is already slated for closure by the 1993 Commission.

The shipyard communities will once again present arguments as to why their particular shipyard should remain open. However, the set of circumstances under which Beta Shipyard will be assessed are separate and distinct from those reviewed in 1993. Obviously, if the circumstances were identical, then Beta Shipyard would not even be recommended for closure in 1995 since it was not deemed appropriate or necessary to close in 1993.

Several factors make the 1995 assessment of Beta Shipyard separate and distinct from the 1993 analysis. First, it is being recommended for closure based upon a new force structure plan.

Additionally, since it is impossible to predict how the Services and the Commission will conduct their analyses, it is equally speculative to anticipate what issues will be analyzed by and presented to the Commission and how the attributes of Beta Shipyard will be judged against the final selection criteria. For example, the ultimate decision on a closure recommendation may rest on a factor that was not the determining factor in 1993. In 1993 the main issue was to maintain a shipyard on the east coast with a dry dock. In the 1995 round, the determining issue may be the location of the shipyard in relationship to Canada. This "decisive factor" may be known early in the process, thus easy to distinguish it from the previous closure round, or it may only be determined upon final votes in June of 1995. Finally, due to all of these circumstances, Base Beta may not even be competing against the same bases it was compared to in 1993.

#### **Part IV: Analysis**

The analysis below offers rationale as to why the matters in each base closure round are different "particular matters" for purposes of 18 U.S. C. 207 (a) (1) and (a) (2).

The "particular matters" considered in deliberations and recommendations during the 1991 and 1993 Defense Base Closure and Realignment Commission rounds are separate and distinct from the matters before the Commission in subsequent closure rounds.

In determining whether the two particular matters are the same the various factors should be considered: the extent to which the matters involve the same basic facts, related issues, same or related parties, time elapsed and the same confidential information and the continuing existence of an important federal interest. 5 CFR 2637.201 (c)(4).

#### Different Facts

As the Commission considers the closure of a base, the focus of the Commission's interest is not the matter it considered in an earlier closure round but the facts presented for the current closure. The Commission will review current DoD data, gather new data, and participate in pertinent and relevant discussions with the community and elected officials. Whether or not the same or some variation of facts were relevant in 1991 or 1993, the 1995 Commission is not deciding a previous matter - it will be reviewing newly-presented facts in light of a new force structure plan and final selection criteria to determine a new matter before the Commission.

The Secretary of Defense will recommend bases for closure based not on 1993 studies but on analyses conducted by each Service during 1994. The Commission's evaluation and recommendations will

reflect the data submitted by the Secretary in 1995. Because military policy is constantly evolving it is highly unlikely the information presented to the Commission in 1995 will mirror the information presented to the Commission in 1993. For example, DoD is focusing on new joint servicing agreements and the result will likely be novel approaches and combinations in choosing closure candidates.

The 1995 force structure plan, to be used by the Secretary and the Commission, will reflect, among other things, changes in the troop and mission requirements and military reasons. Therefore priorities for consideration of closing bases in 1995 could be dramatically different. The category groupings submitted by the Services to the Secretary and reviewed by the Commission may be different. There may be instances where the facts are similar and groupings and categories include the same parties, however it is almost impossible that the facts will result in identical situations.

#### Parties

There could be as many as eight newly-appointed Commissioners. (The President may reappoint previous members.) Additionally, the Service Secretaries and the Secretary of Defense have changed since the 1993 round, and the majority of Commission staff will be different. The community that had a base closed in a previous round will not be a party to the 1995 discussions. There may be additional new communities to a previously considered category or fewer communities in that category.

#### Time Frame

The 1995 round occurs two years after the 1993 round. The Commission in 1994 does not consider any bases for closure or realignment.

#### Confidential Information

The Commission conducts all its business in a public forum. The information presented to the Commission, including testimony, is available upon request and in the Commission's public library. The only confidential information is classified data. If classified data was relevant in 1993, it may or may not be relevant again in 1995.

#### Important Federal Interest

The continuing federal interest in the 1993 round is to insure compliance with the law that mandates the 1993 closures be implemented. The federal interest in the 1995 round is for the Commission to conduct a fair and timely process to result in closures. The Commission will deliberate on relevant material

presented in 1995 by the Secretary of Defense, the communities and the public.

### Specific Claim

As quoted in OGE's Advisory Opinion 80 x 4:

The term "particular matter" as used in 18 U.S.C. 207 is restricted to a particular contract, a particular case, a particular proceeding or particular claim and the like.<sup>2</sup>

As noted in the legislative history, the word "particular" emphasizes that the restriction applies to a specific case or matter and not to a general area of activity.<sup>3</sup>

In this case, the specific case or claim is the one-time consideration and vote to either reject or recommend a base for closure based upon the unique circumstances specific to a particular round of closures. The claim or proceeding was the "vote" in 1993 and not the general consideration of bases in a particular category in 1995.

Each new Commission has a duty to review and vote on both the Secretary's and its own recommendations and to transmit its independent recommendations to the President. In 1995, the Commissioners will conduct entirely new investigative hearings and trip visits to the bases. There will be meetings and fact-gathering activities regardless of the information obtained in earlier closure rounds. The Commissioner's votes will be based upon consistency with the force structure plan and final selection criteria for the 1995 particular round of closures. Each 1995 Commission vote will be on a specific case and will be based on all newly gathered data.

### Legislating and Rulemaking Exception

Implementing regulations issued by OGE state that a particular matter is **not** to be considered as "rulemaking, legislation, the formulation of general policy, standards or objectives."<sup>4</sup> It appears that the Commission's work, although advisory in nature is the

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<sup>2</sup> OGE Opinion 80 x 4 reference to B. Manning, Federal Conflict of International Laws 55 (1960).

<sup>3</sup> OGE Opinion 80 x 4 reference to H.R. No. 748, 87th Congress, 1st Session (20) 1961.

<sup>4</sup> 5 C.R.F.2637.201 (c)(4).

prelude to legislating and thus is not particular matter for purposes of 18 U.S.C. 207.

### Finality

There are three entirely separate rounds of closures, 1991, 1993 and 1995. Each round the President appoints new Commissioners, staff is hired to replace employees let go after previous rounds, and the list of recommendations submitted by the Secretary of Defense for consideration by the Commission is a new list.

Each base closure round takes place with the assumption that the bases recommended for closure by the earlier Commissions are final decisions and have the force and effect of law. In fact, the Secretary of Defense must begin implementation of closures within two years of the closure recommendations becoming law.

### Conclusion

Due to the separate and distinct closure rounds, the new force structure and ever-changing military environment, the two year time lapse, the finality attached to previous closure rounds, the specific claim and proceeding that was completed and is now enacted into law, it is clear that the Commission's consideration of particular bases in 1993 is not the same particular matter in subsequent base closure rounds.

### **Part V: Employees Seeking Counsel**

Communities with bases under consideration by the Commission often hire consultants to gather information, present the communities' best arguments, analyze another base's deficiencies, and research problem areas in order to prevent closure or realignment recommendations by the Commission.

The employees seeking counsel on the consequences of 18 U.S.C. 207 are considering employment, for a corporation or as independent consultants, to assist the communities in matters before the Commission.

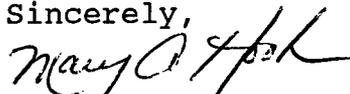
One individual is a special government employee who is a presidentially-nominated and Senate-confirmed commissioner. This employee participated in hearings, visited sites, and ultimately debated and voted on 1993 recommendations to the President. There is no doubt that he participated personally and substantially in base closure matters for the 1993 rounds of closures.

The other employee is an executive level IV equivalent staff director with responsibilities during both the 1991 and 1993 Commissions for staff functions including hiring employees,

recommending policies to the Chairman and Commissioners, determining internal policies for investigating, gathering, and analyzing information and the presentation of data to the Commissioners. Although he played an active role in the overall daily functioning of the Commission, he did not advise Commissioners on base closure candidates nor did he vote on closures. The policy of the Commission precludes any staff member from offering recommendations to the Commissioners. Staff's role is limited to analyzing and providing information and generating options for the Commissioner's review.

If you need any additional information, or clarification please feel free to contact me at (703) 696-0504. Thank you for your assistance.

Sincerely,



Mary A. Hook  
Acting General Counsel  
DAEO

CONFIDENTIAL MEMO

To: Jim Courter, Chairman  
Matt Behrmann, Staff Director

From: Mary Ann Hook, Acting General Counsel *MAH*

Date: June 7, 1994

In regard to post-employment restrictions, I want to advise you on two specific matters and provide information for you to review on other post-employment matters.

**I. 18 U.S.C. 203. Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government**

This statute restricts compensation that an employee may receive from a firm or company that relates to income generated by the firm or company while an employee was working for the government.

There are more narrow restrictions for special government employees than for regular employees (see attached). However, for our purposes it may apply equally to all high level Commission employees.

To quote Office of Government Ethics Opinion (OGE) 90 x 10:

This statute would prevent you from sharing in any fees earned by the corporation for representing clients to or before the United States Government (except Congress) if those representations were made at a time when you were on active duty or otherwise employed by the Federal Government. For example, this restriction would not prohibit you from receiving a straight salary from the firm, but it would prohibit you from receiving a distribution of bonus that was calculated in any part based on the corporation's receipt of such fees.

As you can see from the statute, the restriction depends on the extent of the employee's participation and what is determined to be a "particular matter". (The issue currently before OGE.)

During the meeting with OGE and Mr. Potts, I suggest this provision be discussed as it relates to the Commission for post employment.

**II. 18 U.S.C. 207 (f) Restrictions Relating to Foreign Entities**

For one year after service, no former senior (or very senior) employee may represent, aid, or advise a foreign entity with the intent to influence certain government officials. (See attached

Attorney Client Privileged Communication

statute.)

Foreign entity means the government of a foreign country not a foreign corporation unless it exercises functions of a sovereign.

Represents means acting as an agent or making an appearance on behalf of the entity to or before any employee of a department or agency.

Aids or advises a foreign entity is when he assists the entity other than by making such a communication or appearance. Such "behind the scenes" assistance to a foreign entity could include for example, drafting a proposed communication to an agency advising on an appearance before a department or consulting on other strategies designed to persuade departmental or agency decision makers to take certain action.

A former or senior employee's representation, aid, or advice is only prohibited if made or rendered with the intent to influence an official discretionary decision or a current departmental or agency employee. (Quoted from OGE Opinion 90 x 17).

**III. Attachments**

I have attached an article interpreting the post employment restrictions under 18 U.S.C. 207. (I believe I provided you the same article a month and a half ago.) Also attached is the code sections discussed above.

Also attached are the regulations that relate to negotiating for employment while a government employee.

If you have any questions please don't hesitate to let me know.

May 17, 1994

M E M O R A N D U M

To: Matt Behrmann, Staff Director  
Commission Staff

From: Mary Ann Hook  
Designated Agency Ethics Official  
Acting General Counsel

Re: Post-Employment Restrictions  
Working Behind-the-Scenes for an Entity with Business  
Before a Government Agency

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A. Introduction

There are numerous statutes and regulations that govern the role government employees may undertake after leaving the government. The restrictions vary according to the level of employee, responsibilities and subject matter of the issue involved. 18 U.S.C. 207 is the primary source of post-employment restrictions applicable to government employees.

The rules were not adopted to prevent an employee from accepting a position or limit behind-the-scenes work. Quoting the Office of Government Ethics, "None of the provisions bar any individual, regardless of rank or position, from accepting employment with any private or public employer after government service. Section 207 only prohibits individuals from engaging in certain activities on behalf of persons or entities other than the United States whether or not done for compensation."<sup>1</sup>

B. Lifetime Restriction

18 U.S.C. section 207 (a)(1) is a lifetime restriction that is to prevent an employee from participating in a matter while in government and later acting on behalf of a person or entity, other than the government, to exert influence on the same matter back to the government. There are no time restrictions for a government employee regarding acceptance of new employment nor his initiation of behind-the-scenes work for that employer.

Below is a quote from the Office of Government Ethics' memorandum interpreting the restriction in regard to a former employee and his ability to accept employment with an entity doing business before

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<sup>1</sup> Summary of Post-Employment Restrictions of 18 U.S.C. Admin. Code, Office of Government Ethics, coordinated with the Department of Government Justice, November

May 17, 1994

the government, on the same particular matter before the government and being able to perform behind-the-scenes work.

In regard to 18 U.S.C. section 207 (a) (1):

A former employee is not prohibited by this restriction from providing "behind-the-scenes" assistance in connection with the representation of another person. Moreover, the restriction prohibits only those communications (oral or written) and appearances that (formal and informal)<sup>2</sup> are made "with the intent to influence." A communication can be made orally, in writing, or through electronic transmission. An appearance extends to a former employee's mere physical presence at a proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An intent to influence the United States may be found if the communication of appearance is made for the purpose of seeking a discretionary government ruling, benefit, approval or other action or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular government action to be taken. Accordingly, the prohibition does not apply to an appearance or communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.<sup>3</sup>

In an opinion of the Office of Government Ethics regarding whether a former government officer of an agency may assume presidential duties of a private company that has business before his former agency:

The statutory restrictions are focused on representational activities before, as well as communications to, a Department or agency by a former Government employee. Thus, for example, no limitation would be placed on (the officer's involvement in the internal governance of the Organization's) business, including the internal administration of matters on which representational activities would be forbidden. No limitation would be placed on his capacity to speak to the public or to the Congress on any matter. Further, the applicable post-employment restrictions would be personal to him and would not

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<sup>2</sup> office of Government Ethics, Opinion 89 x 20, 1989, page 61.

<sup>3</sup> Summary of Post-Employment Restrictions of 18 U.S.C. 207, Office of Government Ethics, coordinated with the Department of Governmental Administration, 1992.

be imputed to any other employee of the organization.<sup>4</sup>

C. Two-year Restriction

18 U.S.C. section 207 (a) (2) is a two year restriction that is identical to (a) (1) except that the ban is of a shorter duration, requires only that an individual have had official responsibility for a matter while employed not like (a) (1) where he had participated personally and substantially in that matter.

The restrictions regarding appearances, communications before the government and behind the scene work are the same as outlined above.

D. One-year Restriction

18 U.S.C. section 207 (c) is a one year restriction that is to prevent an employee from knowingly making with the intent to influence, any communication to or appearance (on any matter) before an employee of a department or agency in which he served, for a period of a one-year period after termination of employment from the agency.

Like the lifetime restriction discussed above, the provision prohibits communications to and appearance before the government, and does not prohibit behind-the-scenes assistance.<sup>5</sup>

E. Exceptions

18 U.S.C. 207 (j) is an exception that states that a former employee is not restricted by any of the substantive provisions of section 207 from engaging in post-employment activities performed in carrying out official duties on behalf of the United States. This exception also extends to activities undertaken in carrying out official duties as an elected official of a state or local government.

F. Disclaimer

The Office of Government Ethics has not provided clear guidance regarding application of the above post-employment restrictions to Commission employees. The Commission has discretion to interpret

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<sup>4</sup> Office of Government Ethics, Opinion 80 x 9, November 24, 1980, page 71.

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fact patterns to determine if and when the 18 U.S.C. 207 prohibitions apply to a former employee. This memo is not an attempt to determine whether a subject matter or entity could pose a conflict for an individual, rather it is to provide guidance on the ability of a former employee to manifest employment with private company, or entities with business before the Commission and the ability of an employee to perform behind-the-scenes work without violating the post employment restrictions of 18 U.S.C. 207 or the corresponding regulations.

**Rules to Note When Leaving Government**

**While still an employee yet pending termination from government:**

1. Do not participate in any matter that your future employer is involved with while you are a government employee - unless you receive a waiver.
2. Do not use your time or government position (including title) to solicit clients for your private sector job.
3. Do not use your official position to gain special inside, nonpublic knowledge in anticipation of using it upon leaving the government. Nonpublic information is information that has not been disseminated to the general public and is not authorized to be made available to the public upon request.
4. Do not notify your supervisor and DAEO and seek disqualification if you are seeking employment or have an arrangement concerning prospective employment if your official duties would affect the financial interests of a prospective employee or of a person with whom he has an arrangement concerning prospective employment.

**Laws and Regulations**

18 U.S.C. 208 An employee is prohibited from participating personally and substantially in a particular matter in which to his knowledge, he, his spouse, child, general partner, or organization in which he is serving as officer, director, trustee, general partner or employee, or person or organization with which he is negotiating for, or has arrangement concerning prospective employment, has a financial interest.

5 CFR 2635.604 Employee shall not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interest of a prospective employer with whom he is seeking employment within the meaning of 2635.603 (b). Disqualification is accomplished by not participating in the particular matter.

5 CFR 2635.606(a) An employee shall be disqualified from taking official action in a particular matter that has a direct and predictable effect on the financial interests of the person with whom he is employed or with whom he has an arrangement concerning future employment, unless authorized by a waiver.

May 17, 1994

M E M O R A N D U M

To: Matt Behrmann, Staff Director  
Commission Staff

From: Mary Ann Hook  
Designated Agency Ethics Official  
Acting General Counsel

Re: Post-Employment Restrictions  
Working Behind-the-Scenes for an Entity with Business  
Before a Government Agency

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A. Introduction

There are numerous statutes and regulations that govern the role government employees may undertake after leaving the government. The restrictions vary according to the level of employee, responsibilities and subject matter of the issue involved. 18 U.S.C. 207 is the primary source of post-employment restrictions applicable to government employees.

The rules were not adopted to prevent an employee from accepting a position or limit behind-the-scenes work. Quoting the Office of Government Ethics, "None of the provisions bar any individual, regardless of rank or position, from accepting employment with any private or public employer after government service. Section 207 only prohibits individuals from engaging in certain activities on behalf of persons or entities other than the United States whether or not done for compensation."<sup>1</sup>

B. Lifetime Restriction

18 U.S.C. section 207 (a)(1) is a lifetime restriction that is to prevent an employee from participating in a matter while in government and later acting on behalf of a person or entity, other than the government, to exert influence on the same matter back to the government. There are no time restrictions for a government employee regarding acceptance of new employment nor his initiation of behind-the-scenes work for that employer.

Below is a quote from the Office of Government Ethics' memorandum interpreting the restriction in regard to a former employee and his ability to accept employment with an entity doing business before

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<sup>1</sup> Summary of Post-Employment Restrictions of 18 U.S.C. 207, Office of Government Ethics, coordinated with the Department of Justice, November 4, 1992, page 1,2.

the government, on the same particular matter before the government and being able to perform behind-the-scenes work.

In regard to 18 U.S.C. section 207 (a) (1):

**A former employee is not prohibited by this restriction from providing "behind-the-scenes" assistance in connection with the representation of another person. Moreover, the restriction prohibits only those communications (oral or written) and appearances that (formal and informal)<sup>2</sup> are made "with the intent to influence." A communication can be made orally, in writing, or through electronic transmission. An appearance extends to a former employee's mere physical presence at a proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An intent to influence the United States may be found if the communication of appearance is made for the purpose of seeking a discretionary government ruling, benefit, approval or other action or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular government action to be taken. Accordingly, the prohibition does not apply to an appearance or communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.<sup>3</sup>**

In an opinion of the Office of Government Ethics regarding whether a former government officer of an agency may assume presidential duties of a private company that has business before his former agency:

The statutory restrictions are focused on representational activities before, as well as communications to, a Department or agency by a former Government employee. Thus, for example, **no limitation would be placed on (the officer's involvement in the internal governance of the Organization's) business, including the internal administration of matters on which representational activities would be forbidden. No limitation would be placed on his capacity to speak to the public or to the Congress on any matter.** Further, the applicable post-employment restrictions would be personal to him and would not

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<sup>2</sup> Office of Government Ethics, Opinion 89 x 20, 1989, page 61.

<sup>3</sup> Summary of Post-Employment Restrictions of 18 U.S.C. 207, Office of Government Ethics, coordinated with the Department of Justice, November 4, 1992, page 3.

be imputed to any other employee of the organization.<sup>4</sup>

C. Two-year Restriction

18 U.S.C. section 207 (a) (2) is a two year restriction that is identical to (a) (1) except that the ban is of a shorter duration, requires only that an individual have had official responsibility for a matter while employed not like (a) (1) where he had participated personally and substantially in that matter.

The restrictions regarding appearances, communications before the government and behind the scene work are the same as outlined above.

D. One-year Restriction

18 U.S.C. section 207 (c) is a one year restriction that is to prevent an employee from knowingly making with the intent to influence, any communication to or appearance (on any matter) before an employee of a department or agency in which he served, for a period of a one-year period after termination of employment from the agency.

Like the lifetime restriction discussed above, the provision prohibits communications to and appearance before the government and **does not prohibit behind-the-scenes assistance.**<sup>5</sup>

E. Exceptions

18 U.S.C. 207 (j) is an exception that states that a former employee is not restricted by any of the substantive provisions of section 207 from engaging in post-employment activities performed in carrying out official duties on behalf of the United States. This exception also extends to activities undertaken in carrying out official duties as an elected official of a state or local government.

F. Disclaimer

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<sup>4</sup> Office of Government Ethics, Opinion 80 x 9, November 24, 1980, page 71.

<sup>5</sup> Id at 8.

May 17, 1994

fact patterns to determine if and when the 18 U.S.C. 207 prohibitions apply to a former employee. This memo is not an attempt to determine whether a subject matter or entity could pose a conflict for an individual, rather it is to provide guidance on the ability of a former employee to manifest employment with private company, or entities with business before the Commission and the ability of an employee to perform behind-the-scenes work without violating the post employment restrictions of 18 U.S.C. 207 or the corresponding regulations.