

## **Departmental Ethics Office Quick Guide: Certain Post-Employment Restrictions in 18 U.S.C. § 207**

After you leave your position at the U.S. Department of the Interior (DOI), there are a series of Executive Branch post-employment ethics restrictions in 18 U.S.C. § 207 that will be applicable to your activities as well as to the work that you may do for a future employer. These restrictions do not bar you from accepting employment with any private or public employer. They do, however, impose certain limitations on potential appearances and communications that you may make as a representative of a third party back to the Federal government and certain limitations on other types of assistance that you may provide to third parties.

The purpose behind the post-government restrictions in 18 U.S.C. § 207 is to prevent you from “switching sides” on a matter in which you were involved when you worked for DOI. The scope and duration of your post-government restrictions will depend on your role and involvement and is a fact-intensive determination.

The DEO has prepared this quick guide as an aid to help you understand and apply the post-government restrictions in 18 U.S.C. § 207(a)(1) and (a)(2), the two most common post-employment restrictions, but it should not be used in lieu of consultation and tailored ethics guidance from the DEO. While using this quick guide, please consult the definitions of key terms included at the end of the quick guide. Key terms are highlighted in bold throughout the quick guide.

### **DEO Contact Information**

Please contact the DEO for additional assistance or guidance on any post-Government employment questions and remember that additional restrictions, including but not limited to those in the Ethics Pledge, may limit your post-government activities beyond the limitations discussed in this quick guide. Contact the Departmental Ethics Office at [DOI\\_Ethics@sol.doi.gov](mailto:DOI_Ethics@sol.doi.gov) or Tel: (202) 208-7960.

#### **I. Permanent Restriction Under 18 U.S.C. § 207(a)(1): Steps to Determine Whether the Lifetime Ban on “Switching Sides” Applies**

Section 207(a)(1) of Title 18 of the U.S. Code imposes a lifetime ban on a **former employee communicating** with, or **appearing** before, any **employee of the United States**, with an **intent to influence** that employee **on behalf of any other person** (other than the employee), on any **particular matter involving specific parties** in which the United States is either a party or has a direct and substantial interest, and in which the **former employee personally** and **substantially** participated at any time while an officer or employee of the DOI, Executive Branch, or an independent agency that is not a part of the legislative or judicial branches. The

lifetime ban<sup>1</sup> aims to prevent former Executive Branch employees who have participated in **particular matters involving specific parties** from “switching sides” and representing someone else on the same **particular matter involving specific parties**<sup>2</sup> before the United States.

In order to determine whether you will be subject to the lifetime ban set forth in 18 U.S.C. § 207(a)(1), please review the following questions and consult the definitions of the highlighted key terms at the end of the quick guide.

1. Will you be making a **communication** or **appearance to or before an employee of the United States**?
  - a. If no, then the lifetime ban will not apply. Please note that providing **behind-the-scenes** assistance to a **person** is not prohibited, provided that the assistance does not involve a **communication** to or **appearance** before an **employee of the United States**. If, however, a **former employee** intends that information that is conveyed to an **employee of the United States** be attributed to him, that constitutes a **communication** by the **former employee** and is not considered **behind-the-scenes** assistance.
  - b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on certain **particular matter(s) involving specific parties** may be limited by the lifetime ban. Please proceed to question 2.
2. Will the **communication** or **appearance** be made with the **intent to influence an employee of the United States**?
  - a. If no, then the lifetime ban will not apply.
  - b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on certain **particular matter(s) involving specific parties** may be limited by the lifetime ban. Please proceed to question 3.
3. Will the **communication** or **appearance** be made **on behalf of any other person**?
  - a. If no, then the lifetime ban will not apply.

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<sup>1</sup> The restriction lasts for the life of the **particular matter involving specific parties** in which the employee participated **personally** and **substantially**, not the lifetime of the **former employee**.

<sup>2</sup> The lifetime ban applies only to **communications** or **appearances** in connection with the same **particular matter involving specific parties** in which the you participated as a Government employee. The same **particular matter involving specific parties** may continue in another form or in part. In determining whether two **particular matters involving specific parties** are the same, all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed. Please consult the DEO for further guidance on whether a **communication** or **appearance** is on the same **particular matter involving specific parties**.

- b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on certain **particular matter(s) involving specific parties** may be limited by the lifetime ban. Please proceed to question 4.
4. Will the **communication** or **appearance** be made about a **particular matter involving specific parties**?
  - a. If no, then the lifetime ban will not apply.
  - b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on the **particular matter(s) involving specific parties** in question may be limited by the lifetime ban. Please proceed to question 5.
5. Is the United States a party to, or does it have a direct and substantial interest<sup>3</sup> in the **particular matter involving specific parties** that is the subject of your **communication** or **appearance**?
  - a. If no, then the lifetime ban will not apply.
  - b. If unsure, then a determination is required under 5 C.F.R. §§ 2641.201(j)(2)(i)-(ii). Please consult with the DEO for assistance with this determination.
  - c. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on the **particular matter(s) involving specific parties** in question may be limited by the lifetime ban. Please proceed to question 6.
6. Did you work on **particular matters involving specific parties** (grants, contracts, licenses, permits, applications, litigation, *etc.*) while at the Department?
  - a. If no, then the lifetime ban will not apply. The lifetime ban only applies to **particular matters involving specific parties**. Particular matters of general applicability are not covered by the lifetime ban, including legislation, rulemaking of general applicability, formulation of general policies, standards or objectives, or other particular matters of general applicability.

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<sup>3</sup> The United States does not have to be a party to the **particular matter involving specific parties** (*e.g.*, a false claims against the Government case that is being pursued by a whistleblower and not the Government) and the **particular matter involving specific parties** does not have to be pending in a Federal forum for the United States to be a party or have a direct and substantial interest (*e.g.*, a matter pending in a State court). *See* 5 C.F.R. § 2641.201(j). However, the United States does not necessarily have an interest in a **particular matter involving specific parties** simply because a Federal statute is at issue or the matter is pending in a Federal court.

- b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** regarding the identified **particular matter(s) involving specific parties** may be limited by the lifetime ban. Please proceed to question 7.
7. Did you **participate personally and substantially** in any of the identified **particular matters involving specific parties** that are the subject of your **communication or appearance**?
- a. If no, then the lifetime ban will not apply to the identified **particular matter(s) involving specific parties**.
- b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** regarding the identified **particular matter(s) involving specific parties** in which you **personally and substantially participated**<sup>4</sup> may be limited by the lifetime ban. Please proceed to question 8.
8. Will you be making a **communication or appearance** about the same **particular matter involving specific parties**<sup>5</sup> that you worked on while a **former employee**?
- a. If no, then the lifetime ban will not apply to the identified **particular matter(s) involving specific parties**.
- b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** regarding the identified **particular matter(s) involving specific parties** will be limited by the lifetime ban and you are prohibited from making the **communication or appearance** unless a statutory exception applies. Please see guidance from the DEO on potentially applicable statutory exceptions.

II. Two-Year Ban on Matters Pending Under Your Official Responsibility in 18 U.S.C. § 207(a)(2): Steps to Determine Whether the “Official Responsibility Ban” Applies

Section 207(a)(2) of Title 18 of the U.S. Code imposes a two-year ban on **communicating** with, or **appearing** before, any **employee of the United States**, with an **intent to influence** that employee **on behalf of any other person** (other than yourself), on any **particular matter involving specific parties** in which the United States is either a party or has a direct and substantial interest, and which was **pending** under your **official responsibility** during your last year of Government service.

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<sup>4</sup> Please note that a two-year official responsibility ban established in 18 U.S.C. § 207(a)(2) and discussed in Section II below will apply if the **particular matter involving specific parties** was **pending** under your **official responsibility** but you did not **personally and substantially participate** in that **particular matter involving specific parties**. If you **participated personally and substantially**, then lifetime ban applies to the **particular matter involving specific parties**.

<sup>5</sup> See fn. 2, *supra*.

In order to determine whether you will be subject to the official responsibility ban set forth in 18 U.S.C. § 207(a)(2), please review the following questions and consult the definitions of the highlighted key terms at the end of the quick guide.

1. Will you be making a **communication** or **appearance to or before an employee of the United States**?
  - a. If no, then the official responsibility ban will not apply. Please note that providing **behind-the-scenes** assistance to a **person** is not prohibited, provided that the assistance does not involve a **communication** to or **appearance** before an **employee of the United States**. If, however, a **former employee** intends that information that is conveyed to an **employee of the United States** be attributed to him, that constitutes a **communication** by the **former employee** and is not considered **behind-the-scenes** assistance.
  - b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on certain **particular matter(s) involving specific parties** may be limited by the official responsibility ban. Please proceed to question 2.
2. Will the **communication** or **appearance** be made with the **intent to influence an employee of the United States**?
  - a. If no, then the official responsibility ban will not apply.
  - b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on certain **particular matter(s) involving specific parties** may be limited by the official responsibility ban. Please proceed to question 3.
3. Will the **communication** or **appearance** be made **on behalf of any other person**?
  - a. If no, then the official responsibility ban will not apply.
  - b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on certain **particular matter(s) involving specific parties** may be limited by the official responsibility ban. Please proceed to question 4.
4. Will the **communication** or **appearance** be made about a **particular matter involving specific parties**?
  - a. If no, then the official responsibility ban will not apply.
  - b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on the **particular matter(s) involving specific parties** in

question may be limited by the official responsibility ban. Please proceed to question 5.

5. Is the United States a party to, or does it have a direct and substantial interest<sup>6</sup> in the **particular matter involving specific parties** that is the subject of your **communication** or **appearance**?
  - a. If no, then the official responsibility ban will not apply.
  - b. If unsure, then a determination is required under 5 C.F.R. §§ 2641.201(j)(2)(i)-(ii). Please consult with the DEO for assistance with this determination.
  - c. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on the **particular matter(s) involving specific parties** in question may be limited by the official responsibility ban. Please proceed to question 6.
6. During your last year of service at the Department, were there **particular matters involving specific parties pending** under your **official responsibility**?
  - a. If no, then the official responsibility ban does not apply.
  - b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** on the **particular matter(s) involving specific parties** in question may be limited by the official responsibility ban. Please proceed to question 7.
7. Will you be making a **communication** or **appearance** about a **particular matter involving specific parties** that was **pending** under your **official responsibility**<sup>7</sup> during your last year of Government service?
  - a. If no, then the official responsibility ban will not apply to the identified **particular matter(s) involving specific parties**.
  - b. If yes, then your ability to **appear** before or **communicate** with an **employee of the United States** regarding the identified **particular matter involving specific parties** will be limited by the official responsibility ban and, absent an exception or waiver, you are prohibited from making the **communication** or **appearance** for two years after termination of your Government service.

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<sup>6</sup> See fn. 3, *supra*.

<sup>7</sup> Please note that the lifetime ban established in 18 U.S.C. § 207(a)(1) and discussed in Section I above will apply if you also **participated personally** and **substantially** in a **particular matter involving specific parties** that was **pending** under your **official responsibility**.

## 18 U.S.C. § 207 – Definition of Key Terms

**Agency.** The definition of “agency” includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or Government corporation. It includes any independent agency not in the legislative or judicial branches. 5 C.F.R. § 2641.104.

**Appearance.** A former employee makes an “appearance” when he/she is physically present before an employee of the United States, in either a formal or informal setting. Although an appearance also may be accompanied by certain communications, an appearance need not involve any communication by the former employee. 5 C.F.R. § 2641.201(d)(2).

**Behind-the-scenes.** A former employee is involved in “behind-the-scenes” work if he/she is providing assistance to another person that does not involve a communication to or an appearance before an employee of the United States. 5 C.F.R. § 2641.201(d)(3).

**Communication.** A former employee makes a communication when he imparts or transmits information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in written correspondence, by electronic media, or by any other means. This includes only those communications with respect to which the former employee intends that the information conveyed will be attributed to himself, although it is not necessary that any employee of the United States actually recognize the former employee as the source of the information. 5 C.F.R. § 2641.201(d)(1).

**Employee of the United States.** An “employee of the United States” is defined as the President, Vice President, and any current employee who is detailed to or employed by any: Agency (as defined above); Independent agency in the executive, legislative, or judicial branch; Federal court; or court-martial. 5 C.F.R. §2641.201(f)(1).

**Former employee.** A “former employee” is an individual who has completed a period of service as an employee. Unless otherwise indicated, the term encompasses a former senior employee and a former very senior employee. An individual becomes a former employee at the termination of Government service, whereas an individual becomes a former senior employee or a former very senior employee at the termination of service in a senior or very senior employee position. 5 C.F.R. §2641.104.

**Official responsibility.** “Official responsibility” means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government

action. Ordinarily, the scope of a former employee's official responsibility is determined by those functions assigned by statute, regulation, Executive order, job description, or delegation of authority. 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 who supervises a person, including a subordinate, who actually participates in the matter or who has been assigned to participate in the matter within the scope of his/her official duties.

A nonsupervisory former employee does not have "official responsibility" for his/her own assignments. Additionally, the authority to direct Government action concerning only ancillary or nonsubstantive aspects of a matter, such as budgeting, equal employment, scheduling, or format requirements does not, ordinarily, constitute "official responsibility" for the matter as a whole. 5 C.F.R. § 2641.202(j)(1).

A matter is actually pending under an employee's official responsibility if it has been referred to the employee for assignment or has been referred to or is under consideration by any person he supervises, including a subordinate. 5 C.F.R. § 2641.201(j)(2).

Official responsibility for a matter is not eliminated through recusal from or avoidance of personal participation in the matter. 5 C.F.R. § 2641.202(j)(5).

**On behalf of any other person.** A former employee makes a communication or appearance on behalf of another person if the former employee is acting as the other person's agent or attorney or if:

- (i) The former employee is acting with the consent of the other person, whether express or implied; and
- (ii) The former employee is acting subject to some degree of control or direction by the other person in relation to the communication or appearance.

A former employee does not act "on behalf of another person" merely because his/her communication or appearance is consistent with the interests of the other person, is in support of the other person, or may cause the other person to derive a benefit as a consequence of the former employee's activity. 5 C.F.R. § 2641.201(g).

The term "person" excludes the former employee himself or any sole proprietorship owned by the former employee. 5 C.F.R. § 2641.201(g)(2). The term does include, however, an individual, corporation, company, association, firm, partnership, society, joint stock company, or any other organization, institution, or entity, including any officer, employee, or agent of such person or entity. It applies to commercial ventures and nonprofit organizations as well as to foreign, State, and local governments. 5 C.F.R. § 2641.104.

**Participate.** To "participate" means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or to purposefully forbear in order to affect the outcome of a matter. An employee can participate in particular matters that are pending other than in his/her own agency.



An employee does not participate in a matter merely because he/she had knowledge of its existence or because it was pending under his/her official responsibility. An employee does not “participate” in a matter unless he/she does so in his/her official capacity. 5 C.F.R. § 2641.201(i)(1).

**Particular matter involving specific parties.** A “particular matter involving specific parties” is a matter that typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case. 5 C.F.R. § 2641.201(h)(1).

When a “particular matter involving specific parties” begins depends on the facts. A particular matter may involve specific parties prior to any formal action or filings by the agency or other parties. Much of the work with respect to a particular matter is accomplished before the matter reaches its final stage, and preliminary or informal action is covered by the prohibition, provided that specific parties to the matter actually have been identified. With matters such as grants, contracts, and other agreements, ordinarily specific parties are first identified when initial proposals or indications of interest, such as responses to requests for proposals (RFP) or earlier expressions of interest, are received by the Government; in unusual circumstances, however, such as a sole source procurement or when there are sufficient indicia that the Government has explicitly identified a specific party in an otherwise ordinary prospective grant, contract, or agreement, specific parties may be identified even prior to the receipt of a proposal or expression of interest. 5 C.F.R. § 2641.201(h)(4).

For contracts, grants, and other agreements a new matter typically does not arise simply because there are amendments, modifications, or extensions of a contract (or other agreement), unless there are fundamental changes in objectives or the nature of the matter. 5 C.F.R. § 2641.201(h)(5)(ii)(A). Generally, successive or otherwise separate contracts (or other agreements) will be viewed as different matters from each other, absent some indication that one contract (or other agreement) contemplated the other or that both are in support of the same specific proceeding. 5 C.F.R. § 2641.201(h)(5)(ii)(B). Finally, a contract is almost always a single particular matter involving specific parties. However, under compelling circumstances, distinct aspects or phases of certain large umbrella-type contracts, involving separate task orders or delivery orders, may be considered separate individual particular matters involving specific parties, if the Department determines that articulated lines of division exist. 5 C.F.R. § 2641.201(h)(5)(ii)(C).

Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not “particular matters involving specific parties.” International agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such

factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests. 5 C.F.R. § 2641.201(h)(2).

**Pending.** A matter is actually pending under an employee’s official responsibility if it has been referred to the employee for assignment or has been referred to or is under consideration by any person he/she supervises, including a subordinate. A matter remains pending even when it is not under “active” consideration. There is no requirement that the matter must have been pending under the employee's official responsibility for a certain length of time. 5 C.F.R. § 2641.202(j)(2).

**Person.** The definition of “person” includes an individual, corporation, company, association, firm, partnership, society, joint stock company, or any other organization, institution, or entity, including any officer, employee, or agent of such person or entity. Unless otherwise indicated, the term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State and local governments. 5 C.F.R. § 2641.104. However, the term “person” excludes the former employee himself or any sole proprietorship owned by the former employee. 5 C.F.R. § 2641.201(g)(2).

**Personally.** To participate “personally” means to participate: directly, either individually or in combination with other persons; or through direct and active supervision of the participation of any person an employee supervises, including a subordinate. 5 C.F.R. §2641.201(i)(2).

**Substantially.** To participate “substantially” means that the employee’s involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, 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 also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Provided that an employee participates in the substantive merits of a matter, his/her participation may be substantial even though his/her role in the matter, or the aspect of the matter in which he/she is participating, may be minor in relation to the matter as a whole. Participation in peripheral aspects of a matter or in aspects not directly involving the substantive merits of a matter (such as reviewing budgetary procedures or scheduling meetings) is not substantial. 5 C.F.R. §2641.201(i)(3).

**To or before.** A communication “to” or appearance “before” an “employee of the United States” is one:

- (i) Directed to and received by an “agency”; independent agency in the executive, legislative, or judicial branch; Federal court; or court-martial, even though not addressed

to a particular employee, *e.g.*, as when a former employee mails correspondence to an agency but not to any named employee; or

(ii) Directed to and received by an employee in his/her capacity as an employee of an agency (as defined above); independent agency in the executive, legislative, or judicial branch; Federal court; or court-martial, *e.g.*, as when a former employee directs remarks to an employee representing the United States as a party or intervenor in a Federal or non-Federal judicial proceeding. A former employee does not direct his/her communication or appearance to a bystander who merely happens to overhear the communication or witness the appearance. 5 C.F.R. §2641.201(f)(2).

A former employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to be making a prohibited communication or appearance if the forum is not sponsored or co-sponsored by an entity listed above; is attended by a large number of people; and a significant proportion of those attending are not employees of the United States. A former employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely available publication. 5 C.F.R. §2641.201(f)(3).

**With the intent to influence.** A former employee makes a communication or appearance “with the intent to influence” when the communication or appearance is made for the purpose of: (i) seeking a Government ruling, benefit, approval, or other discretionary Government action; or (ii) affecting Government action in connection with an issue or aspect of a matter which involves an appreciable element of actual or potential dispute or controversy. 5 C.F.R. § 2641.201(e)(1). Under some circumstances, a former employee's mere physical presence, without any communication by the former employee concerning any material issue or otherwise, may constitute an appearance with the intent to influence an employee of the United States. 5 C.F.R. § 2641.201(e)(4).

Certain communications to and appearances before employees of the United States are not made “with the intent to influence,” including, but not limited to, communications and appearances made solely for the purpose of: (i) making a routine request not involving a potential controversy, such as a request for publicly available documents or an inquiry as to the status of a matter; (ii) making factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action, such as conveying factual information regarding matters that are not potentially controversial during the regular course of performing a contract; (iii) signing and filing the tax return of another person as preparer; or (iv) purely social contacts. 5 C.F.R. § 2641.201(e)(2).