

for such a purpose should not be regarded as having participated substantially in the matter, except when such considerations also are the subject of the employee's proposed representation. (See § 2637.202(b)(3) of this part.) Such an employee could theoretically cause a halt in a program for non-compliance with standards under his or her jurisdiction, but lacks authority to initiate a program or to disapprove it on the basis of its substance.

(3) *Role of official responsibility in determining substantial participation.* "Official responsibility" is defined in § 2637.202(b)(1). "Personal and substantial participation" is different from "official responsibility." One's responsibility may, however, play a role in determining the "substantiality" of an employee's participation. For example, ordinarily an employee's forbearance on a matter is not substantial participation. If, however, an employee is charged with responsibility for review of a matter and action cannot be undertaken over his or her objection, the result may be different. If the employee reviews a matter and passes it on, his or her participation may be regarded as "substantial" even if he or she claims merely to have engaged in inaction.

(e) *Agency responsibility in complex cases.* In certain complex factual cases, the agency with which the former Government employee was associated is likely to be in the best position to make a determination as to certain issues, for example, the identity or existence of a particular matter. Designated agency ethics officials should provide advice promptly to former Government employees who make inquiry on any matter arising under these regulations.

§ 2637.202 Two-year restriction on any former Government employee's acting as representative as to a particular matter for which the employee had official responsibility.

(a) *Basic prohibition of 18 U.S.C. 207(b)(i).* No former Government employee, within two years after terminating employment by the United States, shall knowingly act as agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the

intent to influence, make any oral or written communication on behalf of any other person (1) to the United States, (2) in connection with any particular Government matter involving a specific party (3) if such matter was actually pending under the employee's responsibility as an officer or employee within period of one year prior to the termination of such responsibility.

(b) *"Official responsibility"*—(1) *Definition.* "Official responsibility" is defined in 18 U.S.C. 202 as, "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 actions."

(2) *Determining official responsibility.* Ordinarily, the scope of an employee's "official responsibility" is determined by those areas 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 having responsibility for an employee who actually participates in the matter within the scope of his or her duties.

(3) *Ancillary matters and official responsibility.* "Administrative" authority as used in the foregoing definition means authority for planning, organizing and controlling matters rather than authority to review or make decisions on ancillary aspects of a matter such as the regularity of budgeting procedures, public or community relations aspects, or equal employment opportunity considerations. Responsibility for such an ancillary consideration does not constitute responsibility for the particular matter, except when such a consideration is also the subject of the employee's proposed representation.

Example 1: An agency's comptroller would not have official responsibility for all programs in the agency, even though she must review the budget, and all such programs are contained in the budget.

Example 2: Within two years after terminating employment, an agency's former comptroller is asked to represent Q Company in a dispute arising under a contract which

was in effect during the comptroller's tenure. The dispute concerns an accounting formula, under the contract, a matter as to which a subordinate division of the comptroller's office was consulted. She may not represent Q Company on this matter.

(4) *Knowledge of matter pending required.* In order for a former employee to be barred from representing another as to a particular matter, he or she need not have known, while employed by the Government, that the matter was pending under his or her official responsibility. However, the former employee is not subject to the restriction unless at the time of the proposed representation of another, he or she knows or learns that the matter had been under his or her responsibility. Ordinarily, a former employee who is asked to represent another on a matter will become aware of facts sufficient to suggest the relationship of the prior matter to his or her former agency. If so, he or she is under a duty to make further inquiry, including direct contact with an agency's designated ethics official where the matter is in doubt.

(5) *Self-disqualification.* A former employee cannot avoid the restrictions of this section on the ground by self-disqualification with respect to a matter for which he or she otherwise had official responsibility. However, self-disqualification is effective to eliminate the restriction of section 207(a).

(c) *"Actually pending."* "Actually pending" means that the matter was in fact referred to or under consideration by persons within the employee's area of responsibility, not that it merely could have been.

Example 1: A staff lawyer in a department's Office of General Counsel is consulted by procurement officers on the correct resolution of a contractual matter involving Q Company. The lawyer renders an opinion resolving the question. The same legal question arises later in several contracts with other companies, but none of the disputes with such companies is referred to the Office of the General Counsel. The General Counsel has official responsibility for the determination of the Q Company matter. The other matters were never "actually pending" under that responsibility, although as a theoretical matter, such responsibility extended to all legal matters within the department.

(d) *Other essential requirements.* All other requirements of the statute must be met before the restriction on representation applies. The same consider-

ations apply in determining the existence of a "particular matter involving a specific party," a representation in an "appearance," or "intent to influence," and so forth as set forth under § 2637.201 of this part.

Example 1: During her tenure as head of an agency, an officer's subordinates undertook major changes in agency enforcement standards involving occupational safety. Eighteen months after terminating Government employment, she is asked to represent Z Company which believes it is being unfairly treated under the enforcement program. The Z Company matter first arose on a complaint filed after the agency head terminated her employment. She may represent Z Company because the matter pending under her official responsibility was not one involving "a specific party." (Moreover, the time-period covered by 18 U.S.C. 207(c) has elapsed.)

(e) *Measurement of two-year restriction period.* The statutory two-year period is measured from the date when the employee's responsibility in a particular area ends, not from the termination of Government service, unless the two occur simultaneously. The prohibition applies to all particular matters subject to such responsibility in the one-year period before termination of such responsibility.

Example 1: The Director, Import/Export Division of A Agency retires after 26 years of service and enters private industry as a consultant. He will be restricted for two years with respect to all matters which were actually pending under his official responsibility in the year before his retirement.

Example 2: An employee transfers from a position in A Agency to a position in B Agency, and she leaves B Agency for private employment 9 months later. In 15 months she will be free of restriction insofar as matters which were pending under her responsibility in A Agency in the year before her transfer. She will be restricted for two years in respect of B Agency matters which were pending in the year before her departure for private employment.

§ 2637.203 Two-year restriction on a former senior employee's assisting in representing as to a matter in which the employee participated personally and substantially.

(a) *Basic prohibition of 18 U.S.C. 207(b)(ii).* No former Senior Employee (see § 2637.102(a)(6)), within two years after terminating employment by the United States, shall knowingly represent or aid, counsel, advise, consult,