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MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
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SUBJECT: "Particular Matter Involving Specific Parties,"
"Particular Matter," and "Matter"

Perhaps no subject has generated as many questions from ethics officials over the years as the difference between the phrases "particular matter involving specific parties" and "particular matter." These phrases are used in the various criminal conflict of interest statutes to describe the kinds of Government actions to which certain restrictions apply. Moreover, because these phrases are terms of art with established meanings, the Office of Government Ethics (OGE) has found it useful to include these same terms in various ethics rules. A third term, "matter," also has taken on importance in recent years because certain criminal post-employment restrictions now use that term without the modifiers "particular" or "involving specific parties."

It is crucial that ethics officials understand the differences among these three phrases. OGE's experience has been that confusion and disputes can arise when these terms are used in imprecise ways in ethics agreements, conflict of interest waivers, and oral or written ethics advice. Therefore, we are issuing this memorandum to provide guidance in a single document about the meaning of these terms and the distinctions among them.

Because the three phrases are distinguished mainly in terms of their relative breadth, the discussion below will proceed from the narrowest phrase to the broadest.

Particular Matter Involving Specific Parties

The narrowest of these terms is "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but the meaning remains the same, focusing primarily on the presence of specific parties.

1. Where the Phrase Appears

This language is used in many places in the conflict of interest laws and OGE regulations. In the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used to describe the kinds of Government matters to which the life-time and two-year representational bans apply. 18 U.S.C. § 207(a)(1), (a)(2). Occasionally, ethics officials have raised questions because section 207 includes a definition of the term "particular matter," section 207(i)(3), but not "particular matter involving specific parties"; however, it is important to remember that each time "particular matter" is used in section 207(a), it is modified by the additional "specific party" language.¹

In addition to section 207(a), similar language is used in 18 U.S.C. §§ 205(c) and 203(c). These provisions describe the limited restrictions on representational activities applicable to special Government employees (SGEs) during their periods of Government service.²

¹ For a full discussion of the post-employment restrictions, see OGE DAEOgram DO-04-023A, at http://www.usoge.gov/pages/daeograms/dgr_files/2004/do04023a.pdf.

² These restrictions on SGEs are discussed in more detail in OGE DAEOgram DO-00-0003A, at http://www.usoge.gov/pages/daeograms/dgr_files/2000/do00003a.pdf.

As explained below, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); see OGE Informal Advisory Letter 00 x 12. Moreover, OGE has issued certain regulatory exemptions, under section 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Likewise, the distinction between particular matters involving specific parties and broader types of particular matters (i.e., those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under section 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g).

Finally, OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain SGEs. 5 C.F.R. § 2635.807(a)(2)(i)(4).

2. What the Phrase Means

When this language is used, it reflects "a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate." Bayless Manning, Federal Conflict of Interest Law 204 (1964). Therefore, OGE has emphasized that the term "typically involves a specific

proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties." 5 C.F.R. § 2640.102(1).³ Examples of particular matters involving specific parties include contracts, grants, licenses, product approval applications, investigations, and litigation. It is important to remember that the phrase does not cover particular matters of general applicability, such as rulemaking, legislation, or policy-making of general applicability.⁴

Ethics officials sometimes must decide when a particular matter first involves a specific party. Many Government matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve

³ This definition, found in OGE's regulations implementing 18 U.S.C. § 208, differs slightly from the definition found in the regulations implementing a now-superseded version of 18 U.S.C. § 207, although this is more a point of clarification than substance. Specifically, the old section 207 regulations referred to "identifiable" parties, 5 C.F.R. § 2637.201(c)(1), whereas the more recent section 208 rule refers to "identified" parties. As explained in the preamble to OGE's proposed new section 207 rule: "The use of 'identified,' rather than 'identifiable,' is intended to distinguish more clearly between particular matters involving specific parties and mere 'particular matters,' which are described elsewhere as including matters of general applicability that focus 'on the interests of a discrete and identifiable class of persons' but do not involve specific parties. [citations omitted] The use of the term 'identified,' however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as where an agent represents an unnamed principal." 68 Federal Register 7844, 7853-54 (February 18, 2003).

⁴ Usually, rulemaking and legislation are not covered, unless they focus narrowly on identified parties. See OGE Informal Advisory Opinions 96 x 7 ("rare" example of rulemaking that involved specific parties); 83 x 7 (private relief legislation may involve specific parties).

specific parties. The Government sometimes identifies a specific party even at a preliminary or informal stage in the development of a matter. E.g., OGE Informal Advisory Letters 99 x 23; 99 x 21; 90 x 3.

In matters involving contracts, grants and other agreements between the Government and outside parties, the general rule is that specific parties are first identified when the Government first receives an expression of interest from a prospective contractor, grantee or other party. As OGE explained recently in Informal Advisory Letter 05 x 6, the Government sometimes may receive expressions of interest from prospective bidders or applicants in advance of a published solicitation or request for proposals. In some cases, such matters may involve specific parties even before the Government receives an expression of interest, if there are sufficient indications that the Government actually has identified a party. See OGE Informal Advisory Letter 96 x 21.

Particular Matter

Despite the similarity of the phrases "particular matter" and "particular matter involving specific parties," it is necessary to distinguish them. That is because "particular matter" covers a broader range of Government activities than "particular matter involving specific parties." Failure to appreciate this distinction can lead to inadvertent violations of law. For example, the financial conflict of interest statute, 18 U.S.C. § 208, generally refers to particular matters, without the specific party limitation. If an employee is advised incorrectly that section 208 applies only to particular matters that focus on a specific person or company, such as an enforcement action or a contract, then the employee may conclude it is permissible to participate in other particular matters, even though the law prohibits such participation.

1. Where the Phrase Appears

In addition to 18 U.S.C. § 208, several other statutes and regulations use the term "particular matter."⁵ The representational restrictions applicable to current employees (other than SGEs), under 18 U.S.C. §§ 203 and 205, apply to particular matters.⁶ As mentioned above, section 207 also contains a definition of "particular matter."⁷ However, where the phrase is used in the post-employment prohibitions in

⁵ The relevant language in 18 U.S.C. § 208(a) is "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (emphasis added).

⁶ The prohibition in 18 U.S.C. § 205(a)(2) actually uses the phrase "covered matter," but that term is in turn defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter," 18 U.S.C. § 205(h)(emphasis added).

⁷ The definition in 18 U.S.C. § 207(i)(3) provides: "the term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." This language differs slightly from other references to "particular matter" in sections 203, 205 and 208, in part because the list of matters is not followed by the residual phrase "or other particular matter." However, OGE does not believe that the absence of such a general catch-all phrase means that the list of enumerated matters exhausts the meaning of "particular matter" under section 207(i)(3). The list is preceded by the word "includes," which is generally a term of enlargement rather than limitation and indicates that matters other than those enumerated are covered. See Norman J. Singer, 2A Sutherland on Statutory Construction 231-232 (2000).

section 207(a)(1) and (a)(2), it is modified by the "specific parties" limitation.⁸

The phrase "particular matter" is used pervasively in OGE's regulations. Of course, the term appears throughout 5 C.F.R. part 2640, the primary OGE rule interpreting and implementing 18 U.S.C. § 208. Similarly, it is used in 5 C.F.R. § 2635.402, which is the provision in the Standards of Conduct that generally deals with section 208. The phrase also is used throughout subpart F of the Standards of Conduct, which contains the rules governing recusal from particular matters affecting the financial interest of a person with whom an employee is seeking non-Federal employment. 5 C.F.R. §§ 2635.601-2635.606. Moreover, the phrase appears in the "catch-all" provision of OGE's impartiality rule, 5 C.F.R. § 2635.502(a)(2). See also 5 C.F.R. 2635.501(a).⁹ Various other regulations refer to "particular matter" for miscellaneous purposes. E.g., 5 C.F.R. § 2635.805(a)(restriction on expert witness activities of SGEs); 5 C.F.R. § 2634.802(a)(1)(written recusals pursuant to ethics agreements).

2. What the Phrase Means

Although different conflict of interest statutes use slightly different wording, such as different lists of examples of particular matters, the same standards apply for determining what is a particular matter under each of the relevant statutes

⁸ At one time, the post-employment "cooling-off" restriction for senior employees in 18 U.S.C. § 207(c) applied to particular matters, but the language was amended (and broadened) in 1989 when Congress removed the adjective "particular" that had modified "matter." See 17 Op. O.L.C. 37, 41-42 (1993).

⁹ Generally, section 2635.502 focuses on particular matters involving specific parties, as noted above. However, section 2635.502(a)(2) provides a mechanism for employees to determine whether they should recuse from other "particular matters" that are not described elsewhere in the rule. In appropriate cases, therefore, an agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee's impartiality reasonably may be questioned under the circumstances.

and regulations. See 18 Op. O.L.C. 212, 217-20 (1994). Particular matter means any matter that involves "deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1)(emphasis added). It is clear, then, that particular matter may include matters that do not involve parties and is not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000).

Essentially, the term covers two categories of matters: (1) those that involve specific parties (described more fully above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as "particular matter of general applicability." 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Examples provided in OGE rules include a regulation applicable only to meat packing companies or a regulation prescribing safety standards for trucks on interstate highways. 5 C.F.R. §§ 2640.103(a)(1)(example 3); 2635.402(b)(3)(example 2). Other examples may be found in various opinions of OGE and the Office of Legal Counsel, Department of Justice. E.g., OGE Informal Advisory Letter 00 x 4 (recommendations concerning specific limits on commercial use of a particular facility); 18 Op. O.L.C. at 220 (determinations or legislation focused on the compensation and work conditions of the class of Assistant United States Attorneys).

Certain OGE rules recognize that particular matters of general applicability sometimes may raise fewer conflict of interest concerns than particular matters involving specific

parties.¹⁰ Therefore, while both categories are included in the term "particular matter," it is often necessary to distinguish between these two kinds of particular matters. Of course, in many instances, the relevant prohibitions apply equally to both kinds of particular matters. This is the case, for example, in any application of 18 U.S.C. § 208 where there is no applicable exemption or waiver that distinguishes the two.

It is important to emphasize that the term "particular matter" is not so broad as to include every matter involving Government action. Particular matter does not cover the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2640.103(a)(1). For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform. 5 C.F.R. § 2640.103(a)(1)(example 4), (example 8). See also OGE Informal Advisory Letter 05 x 1 (report of panel on tax reform addressing broad range of tax policy issues). Although such actions are too broadly focused to be particular matters, they still are deemed "matters" for purposes of the restrictions described below that use that term.

¹⁰ As noted above, OGE's impartiality rule generally focuses on particular matters involving specific parties. See OGE Informal Advisory Letter 93 x 25 (rulemaking "would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a)"). Furthermore, as also discussed above, several of the regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2) treat particular matters of general applicability differently than those involving specific parties. The preamble to the original proposed regulatory exemptions in 5 C.F.R. part 2640 explains: "The regulation generally contains more expansive exemptions for participation in 'matters of general applicability not involving specific parties' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters." 60 Federal Register 47207, 47210 (September 11, 1995). Of course, Congress itself has limited certain conflict of interest restrictions to the core area of particular matters that involve specific parties. E.g., 18 U.S.C. § 207(a)(1), (a)(2).

A question that sometimes arises is when a matter first becomes a "particular matter." Some matters begin as broad policy deliberations and actions pertaining to diverse interests, but, later, more focused actions may follow. Usually, a particular matter arises when the deliberations turn to specific actions that focus on a certain person or a discrete and identifiable class of persons. For example, although a legislative plan for broad health care reform would not be a particular matter, a particular matter would arise if an agency later issued implementing regulations focused narrowly on the prices that pharmaceutical companies could charge for prescription drugs. 5 C.F.R. § 2640.102(a)(1)(example 8). Similarly, the formulation and implementation of the United States response to the military invasion of an ally would not be a particular matter, but a particular matter would arise once discussions turned to whether to close a particular oil pumping station or pipeline operated by a company in the area where hostilities are taking place. 5 C.F.R. § 2640.102(a)(1)(example 7).

Matter

The broadest of the three terms is "matter." However, this term is used less frequently than the other two in the various ethics statutes and regulations to describe the kinds of Government actions to which restrictions apply.

1. Where the Phrase Appears

The most important use of this term is in the one-year post-employment restrictions applicable to "senior employees" and "very senior employees." 18 U.S.C. § 207(c), (d). In this context, "matter" is used to describe the kind of Government actions that former senior and very senior employees are prohibited from influencing through contacts with employees of their former agencies (as well as contacts with Executive Schedule officials at other agencies, in the case of very senior employees). The unmodified term "matter" did not appear in these provisions until 1989, when section 207(c) was amended to replace "particular matter" with "matter" and section 207(d) was first enacted. Pub. L. No. 101-194, § 101(a), November 30, 1989. OGE also occasionally uses the term "matter" in ethics regulations, for example, in the description of teaching,

speaking and writing that relates to an employee's official duties. 5 C.F.R. § 2635.807(a)(2)(E)(1).

2. What the Phrase Means

It is clear that "matter" is broader than "particular matter." See 17 Op. O.L.C. at 41-42. Indeed, the term is virtually all-encompassing with respect to the work of the Government.¹¹ Unlike "particular matter," the term "matter" covers even the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. Of course, the term also includes any particular matter or particular matter involving specific parties.

Nevertheless, it is still necessary to understand the context in which the term "matter" is used, as the context itself will provide some limits. In 18 U.S.C. § 207(c) and (d), the post-employment restrictions apply only to matters "on which [the former employee] seeks official action." Therefore, the only matters covered will be those in which the former employee is seeking to induce a current employee to make a decision or otherwise act in an official capacity.

¹¹ A now-repealed statute, 18 U.S.C. § 281 (the predecessor of 18 U.S.C. § 203), used the phrase "any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter" (emphasis added). One commentator noted that the term "matter" in section 281 was "so open-ended" that it raised questions as to what limits there might be on the scope. Manning, at 50-51. Manning postulated that some limits might be inferred from the character of the matters listed before the phrase "or other matter." Id. at 51. Whatever the force of this reasoning with respect to former section 281, the same could not be said with respect to 18 U.S.C. § 207(c) or (d), as neither of these current provisions contains an exemplary list of covered matters.