

# Post-Government Employment --18 U.S.C. § §207(a)(1) and (a)(2)

## Elements of 18 U.S.C. § 207(a)(1) and § 207(a)(2)

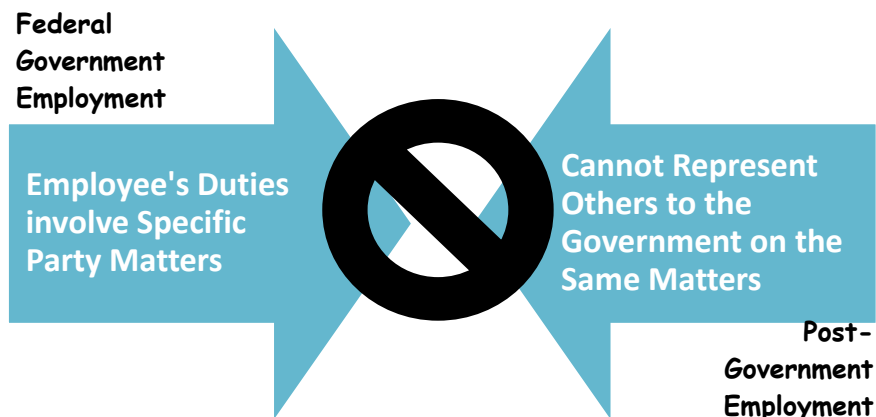
Permanent Ban (a)(1)	2-Year Ban (a)(2)
<i>(Former)</i> Employee Knowingly Make Communication or Appearance Intent to Influence To or Before an Employee of the US On Behalf of Any Other Person U.S. is a Party or Has a Direct and Substantial Interest Particular Matter Involving Specific Parties Same Particular Matter	
<b>PARTICIPATED PERSONALLY AND SUBSTANTIALLY</b>	<b>PENDING UNDER OFFICIAL RESPONSIBILITY DURING LAST YEAR OF GOVERNMENT SERVICE</b>

\* This is only a summary. When giving advice, always consult the complete set of laws, rules, and opinions that apply to the particular situation.

## Basic Prohibitions

None of the provisions of 18 U.S.C. § 207 bar any individual 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. None of the restrictions bar self-representation.

Section 207(a)(1) is a lifetime restriction and section 207 (a)(2) is a two-year restriction. Both commence when an employee leaves Government service. These provisions prevent Government employees from “switching sides” and representing another person or entity before the United States on the same matters they either worked on personally as a Government employee, or that were pending under their official responsibility.



## Implementing Regulation

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5 CFR Part 2641 -- Post-Employment Conflict of Interest Restrictions under 18 U.S.C. § 207

5 CFR § 2641.201—Permanent restriction under 18 U.S.C. § 207(a)(1)

5 CFR § 2641.202—Two-year restriction under 18 U.S.C. § 207(a)(2)

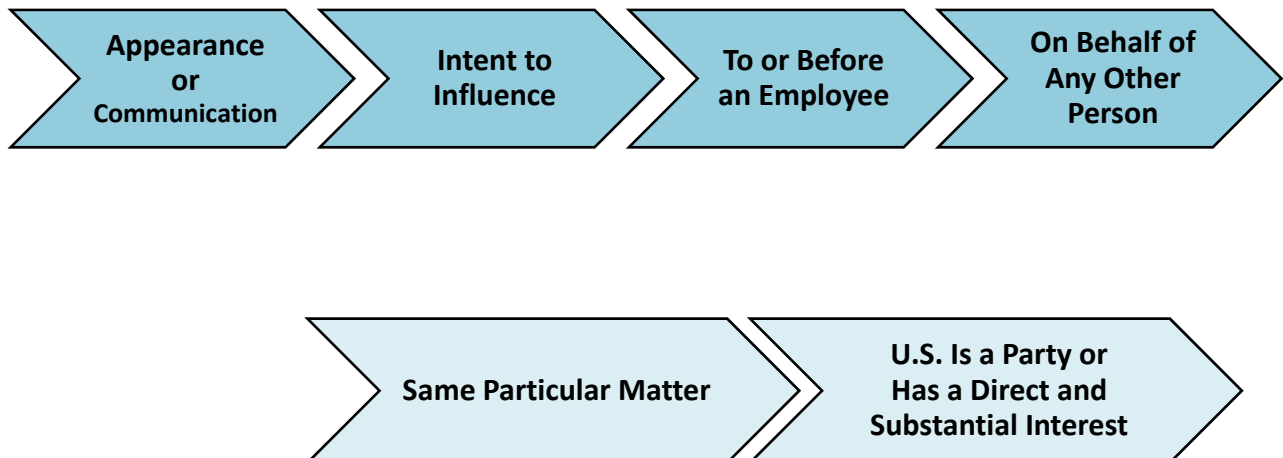
## The Process

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### 1. If, while in government service:



### 2. Then, after Government service the former employee may not make:



## Employee

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18 U.S.C. §§ 207(a)(1) and (a)(2) apply to all Executive branch employees *except* the President, Vice President, and enlisted military personnel, including: *See 5 CFR § 2641.104.*

This includes:

- Full-time “officers” and “employees” of the Executive branch, regardless of grade or rank (except as stated above)
- Part-time employees, including special government employees (SGEs), whether or not compensated; *See 18 U.S.C. § 202.*
- “Detailees” under the Intergovernmental Personnel Act; *See 5 U.S.C. §§ 3371-3376.*

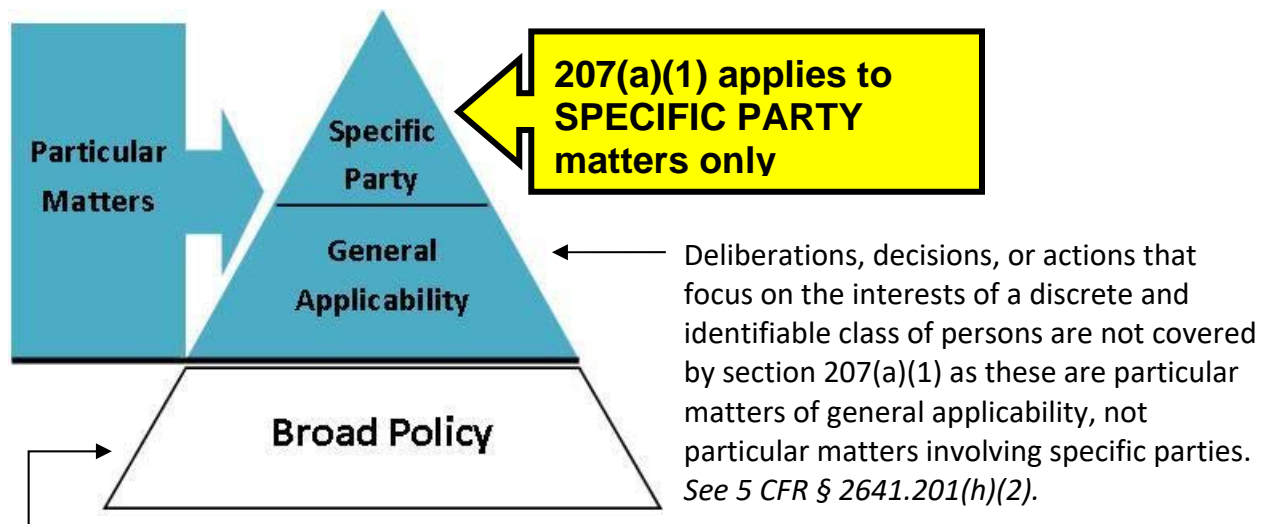
## Particular Matters

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*5 CFR § 2641.201(h)*

***A particular matter involving specific parties typically involves:***

- Specific proceedings affecting the legal rights of the parties; e.g., judicial proceedings or requests for a ruling or other determination, such as immigration or tax hearings
- Isolatable transaction or related set of transactions between identified parties; e.g., contracts, grants, licenses, product approvals, applications, enforcement actions, administrative adjudications, or court cases  
*See 5 CFR § 2641.201(h)(1).*



Broad policy matters (those deliberations, decisions, or actions that focus on the interests of a large and diverse group) are not particular matters at all, thus, not covered by section 207(a)(1).

For further elaboration, see OGE Advisory Memo 06 x 9 of October 4, 2006 titled, "*Particular Matter Involving Specific Parties*," "*Particular Matter*," and "*Matter*."

## Personal and Substantial Participation

5 CFR § 2641.201(i)

**TIP:** Remember that personal and substantial participation is a very low threshold.

Term	Definitions
Participate Personally 5 CFR §2641.201(i)(2)	<ul style="list-style-type: none"> <li>• Directly</li> <li>• Includes direct and active supervision of a subordinate’s participation in the matter</li> </ul>
Participate Substantially 5 CFR §2641.201(i)(3)	<ul style="list-style-type: none"> <li>• Involvement is of significance to the matter</li> <li>• May be substantial even though it does not determine the outcome of a particular matter</li> <li>• 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</li> <li>• Can include participation at all levels of the decision-making process, including making recommendations and giving advice; It also includes the direct and active supervision of a subordinate’s participation in the particular matter</li> </ul>
Personal and Substantial Participation 5 CFR §2641.201(i)(1)	<ul style="list-style-type: none"> <li>▪ Requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue</li> </ul>

## Pending Under Official Responsibility (*During last year of service*)

5 CFR § 2641.202(j)

Term	Definitions
Official Responsibility 5 CFR §2641.202(j)(1)	<ul style="list-style-type: none"> <li>• Direct administrative or operating authority to approve, disapprove, or otherwise direct Government action</li> <li>• Can be intermediate or final, exercisable alone or with others, either personally or through subordinates</li> <li>• <b>All</b> 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 someone who either participates in the matter or has been assigned to participate.</li> </ul>
Actually Pending 5 CFR §2641.202(j)(2)	<ul style="list-style-type: none"> <li>• Has been referred to the employee for assignment</li> <li>• Has been referred to, or is under consideration by, any person the employee supervises</li> <li>• A matter remains “pending” even when not under active consideration</li> <li>• There is no minimal time required for the matter to qualify as “pending”</li> </ul>
Disqualification 5 CFR §2641.202(j)(5)	<ul style="list-style-type: none"> <li>• Official responsibility for a matter is not eliminated through self-disqualification or avoidance of personal participation in the matter</li> </ul>

## Appearance or Communication

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5 CFR § 2641.201(d)

Appearance = physical presence See 5 CFR § 2641.201(d)(2).

- Formal or informal setting
- Participating in discussions
- Simply appearing in the room (even without participation)

Communication = imparting/transmitting information (facts, opinions, ideas, questions, direction, etc.) See 5 CFR § 2641.201(d)(1).

- Formal and informal
- Intent that information be attributed to former employee See Example 5 to (d)
- Orally - In writing - Electronically

Behind-the-scenes activity is permitted under sections 207(a)(1) and (a)(2) (e.g., advice or assistance) so long as it is not done through a third party with attribution intended. See 5 CFR § 2641.201(d)(3).

A former employee is prohibited from “**knowingly**” making prohibited contact.

- The question of knowledge comes up *after* an appearance or communication occurs. OGE deals with prospective advice so this element is not included in the analysis.
- Only the Department of Justice can decide whether to prosecute a former employee for knowingly making a communication or appearance that violated 18 U.S.C. § 207.

## Intent to Influence

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5 CFR § 2641.201(e)

Intent to influence is present when a former employee seeks:

- A Government ruling, benefit, approval, or other discretionary action OR
- To affect Government action where a real or potential dispute or controversy exists See 5 CFR § 2641.201(e)(1).

But not when purely:

- A social visit with former co-workers
- To convey or request purely factual information (no chance of controversy); e.g., status of the matter
- To request publicly available documents

All relevant circumstances must be considered for a given case. See 5 CFR 2641.201(e)(2).

Be cautious. A communication or appearance that begins without any intent to influence may become one with the intent to influence if an unforeseen dispute arises. See 5 CFR § 2641.201(e)(3).

Other specific activities that are not considered to have the intent to influence include:

- Preparing tax returns
- Signing assurances as Principal investigators for Federal research grants
- Filing certain Security and Exchange Commission forms
- Making a communication at the initiation of the Government concerning work performed/to be performed under a Government contract or grant during a routine Government site visit to non-Government premises *See 5 CFR §§ 2641.201(e)(2).*

*Mere physical presence intended to influence* = when a former employee makes an appearance but does not communicate in any way. Factors to consider include:

- The former employee has been given actual or apparent authority to make any decisions, commitments, or substantive arguments in the course of the appearance
- It is anticipated that others present at the meeting will make reference to the views or past or present work of the former employee
- Circumstances do not indicate that the former employee is present merely for informational purposes; e.g., merely to listen and record information for later use
- The former employee has entered a formal appearance in connection with a legal proceeding at which he is present
- The appearance is before former subordinates or others in the same chain of command as the former employee.

*See 5 CFR § 2641.201(e)(4).*

## **To or Before an Employee of the U.S.**

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*5 CFR §2641.201(f)*

An employee or officer of any:

- Department
- Agency
- Federal Court
- Court-martial

This includes to or before an employee who is detailed to any of the above. *See 5 CFR §2641.201(f).*

Some public commentary is okay, when *specific conditions* are met: *See 5 CFR §2641.201(f)(3).*

- Appearances or communications at public gatherings or conferences, seminars, etc.
- Broadcasts or publications of commentaries

Note, section 207(a)(1) does not prohibit communications or appearances before Members of Congress\* and legislative staff, or the District of Columbia, but be careful where Federal employees are also in attendance (in their official capacity).

\*Not all §207 prohibitions permit communications or appearances with Congress; i.e., §207(f) bars former senior employees from representing a foreign entity before Congress (as well as a department, agency, court, or court-martial) within one year of leaving their Federal Government positions.

## **On Behalf of Any Other Person**

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*5 CFR § 2641.104; 5 CFR § 2641.201(g)*

Any other person includes:

- Individual, corporation, company, association, firm, or partnership (commercial or non-profit)
- Any other organization, institution, or entity (commercial or non-profit)
- All Federal, state, local, and foreign governments

The term person also includes any officer, employee, or agent of any of the above. It does not include the former employee himself or a sole proprietorship owned by a former employee (so long as the former employee represents his own interests, not a third party's interests).

Considered on behalf of a third party when a former employee acts: *See 5 CFR § 2641.201(g)(1).*

- As agent or attorney, or
- With expressed or implied consent, and
- Subject to some degree of control or direction

Not considered on behalf of a third party merely because:

- In interest or support of another
- Because it results in a benefit to another

## **Same Particular Matter**

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*5 CFR § 2641.201(h)(5)*

The bars in 207(a)(1) and (a)(2) apply only to those same particular matters involving specific parties that the employee either worked on as a Government employee or that were pending under his official responsibility during his last year of service. Some factors to consider in making this determination are:

- Whether it involves the same basic facts
- Whether it involves the same or related parties
- Whether the issues are related
- The amount of time elapsed

*See 5 CFR § 2641.201(h)(5)(i).*

The particular matter must have involved a specific party or parties when the:

- Employee worked on it or had it pending under official responsibility while with the Government AND
- At the time the former employee makes a post employment appearance or communication

HOWEVER, the parties do not need to be identical at both times. *See 5 CFR § 2641.201(h)(3).*

Ordinarily, separate contracts and follow-on contracts are considered separate particular matters involving specific parties; however, if there is some indication that one contract directly contemplates the other contract or if there are other circumstances indicating that two contracts are really part of the same proceeding involving specific parties, then two contracts may be viewed as the same particular matter. Additionally, a Government procurement has specific parties identified to it when a bid or proposal is received in response to a solicitation, if not before. *See 5 CFR §2641.201(h)(5)(ii). See also OGE Opinions 02x5 and 05x6 for discussions of same particular matters involving specific parties.*

## **U.S. is a Party or Has a Direct and Substantial Interest**

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*5 CFR § 2641.201(j)*

The United States (“U.S.”) must be a party or have a direct and substantial interest at the time of the post-Government employment communication. For purposes of sections 207(a)(1) and (a)(2), U.S. encompasses the entire Federal Government, **all branches**, including Government corporations.

- The U.S. does not have to be a party to the matter; e.g., a false claims against the Government case that is being pursued by a whistleblower and not the Government.
- The matter does not have to be pending in a Federal forum for the U.S. to be a party or have a direct and substantial interest; e.g., a matter pending in a State court.
- HOWEVER, the U.S. does not necessarily have an interest in a matter simply because a Federal statute is at issue or the matter is pending in a Federal court.

When it is not clear whether the U.S. is a party to or has a direct and substantial interest in a particular matter, a determination is required. *See 5 CFR §§ 2641.201(j)(2)(i)-(ii) for the procedures required for this determination.*



## Exceptions and Waivers

5 CFR § 2641.301

If you conclude that the employee's proposed activities are prohibited by § 207, you need to determine whether an exception or waiver applies. An exception or waiver would permit the employee to undertake the activities notwithstanding the statutory restrictions. Not all exceptions apply to each § 207 prohibition.

Exception/Waiver	(a)(1)	(a)(2)	(c)
Acting for the US § 2641.301(a)	X	X	X
Acting for a State or Local Government as an Elected Official § 2641.301(b)	X	X	X
Acting for State or Local Gov't, Universities, Hospitals/Research Orgs. § 2641.301(c)			X
Special Knowledge § 2641.301(d)			X
Scientific or Technological Information § 2641.301(e)	X	X	X
Testimony § 2641.301(f)	X	X	X
Political Parties and Campaign Committees § 2641.301(g)			X
Acting for International Organizations § 2641.301(h)	X	X	X
OGE Waiver for 207(c) and (f) § 2641.301(j)			X