thank you good afternoon everyone and welcome to the ethics fundamental series I'm very pleased to be joined today by

0:09

Helen Eisner and Kim Sakura Panza from our General Counsel's office and they're gonna be talking about an issue that has

0:15

been described in the past is difficult nettlesome and other words that I can't

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really put out here on the public airwaves so what we're gonna do is I'm

0:26

going to turn it over to Kim and Helen in just a minute but I just wanted to remind everyone that if you miss this

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broadcast today or if you have some colleagues who you think would benefit from being able to listen to this

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broadcast remember that this video and other ones that we have are all archived on our Google+ page and on YouTube I

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also urge you to check out the ieg store for all kinds of useful job aids from both a GE and from the ethics community

0:52

and lastly I'd like to remind you that next Thursday at noon we're going to be doing our advanced practitioner and

0:59

we're going to be covering 205a with Rachel Dowell and Lee Francis from also

1:05

the general counsel's office so that's gonna be a really good presentation that I think that you should make an effort to join us online for and so with that

1:13

I'm gonna turn it over to Kim and to Helen thanks so much for being here guys well thank you Ryan and good afternoon

1:20

everyone and welcome to today's Institute for Ethics in Government fundamental series on making sense of

1:28

particular matters as Ryan said I'm Helen Eisner and I'm an assistant counsel here in the ethics law and

1:35

policy branch and policy branch we're

1:43

really excited to be here today we are excited to share some of our research into the particular matter concept and

1:49

hopefully shed some light on some of the issues that come up when you are struggling with a particular matter

1:57

determination so we have a PowerPoint that we're going to put up on the screen during the presentation that will allow

2:03

you to follow along at your office's while we go through so I think Ryan's

2:08

gonna put that up now and we'll get started great well as Ryan mentioned the concept

2:15

of particular matter is really a central one to our ethics rules and criminal conflict of interest laws but a whole

2:23

host of confusion comes along with these two simple words particular matter and

2:28

in this presentation we hope to break things down a bit and provide some basic

2:34

guidance for you as an ethics official on how to apply this concept on a daily

2:39

basis also before we start we we just wanted to draw your attention to one of our legal advisories which is oh six x

2:46

zero to nine and this is always a really helpful resource when confronting these issues and we encourage you to reference

2:54

back to this resource in the future so in terms of the presentation today the first thing that we're going to discuss

3:00

is just the particular matter concept in general and try to provide some information and context that will be

3:07

helpful to help try and understand what the term means as part of that

3:12

discussion we're going to discuss both sorts of particular matters we have particular

3:17

matters involving specific parties and particular matters of general applicability most of our time is going

3:24

to be spent talking about that latter concept particular matters of general applicability and the reason why is

3:31

because it's usually easy to spot particular matters that involve specific parties but can be much trickier when

3:38

you're trying to identify a particular matter of general applicability and of course we're going to talk about broad matters

3:45

as well because that's the broader universe of government activity which it's not narrow or focused enough to be

3:52

a particular matter and after we go through the basic concepts we're gonna have a discussion about various criminal

3:58

conflict of interest statutes and our standards of conduct provisions that use these terms and we're gonna provide some

4:04

examples of how the particular matter analysis has been done in some real cases so matters particular matters of

4:12

general applicability and particular matters involving specific parties you've all seen these terms but what do

4:19

they mean okay so first we're going to talk about some

4:24

basic nuts and bolts as you all know there are three categories of matters

4:30

that the criminal conflict-of-interest statutes and the standards of conduct contemplate that a federal employee

4:36

might be involved with they're displayed up on the screen in a bull's-eye we have matters particular matters of

4:42

general applicability in particular matters involving specific parties this bullseye that you see up on your screen

4:48

is going to be one that we'll have throughout the presentation to show the different categories when we move

4:54

through we're going to try and highlight the band we're talking about in blue so you can get a visual sense of where we

5:00

are first off we have matters that's the outer band we have highlighted and light blue here so what does this really mean

5:07

we have up on the screen really broad matters matters that focus on a large

5:12

and diverse group some examples from our regulations include deliberations of an

5:18

advisory panel on federal tax reform or regulations that change the method of calculating depreciation when we move in

5:27

on our inner circle we get to the particular matter category now if you

5:33

see here we've highlighted the two inner bands particular matters of general applicability and particular matters

5:38

involving specific parties our regulations say that a particular matter

5:44

is one that involves deliberation decision action that's focused on the

5:49

interest of specific persons or a discrete and identifiable class of persons now that definitions a little bit dense

5:56

but it's exactly why we have both of those bands highlighted right now it tells us a couple important things first

6:02

we know that a particular matter doesn't necessarily need to involve parties and also that it's not limited to

6:08

adversarial proceedings or formal relationships so that's why under this

6:13

umbrella we have our two buckets particular matters of general applicability and particular matters involving specific parties now first

6:21

we're going to look at particular matters of general applicability now interestingly or perhaps frustratingly

6:27

this term particular matter of general applicability does not itself appear in the criminal

6:33

conflict of interest laws it's a term that OGE created in our Galatians to define the other particular

6:41

matter category that's used in the statutory language now we acknowledge

6:46

that the term is a mouthful and somewhat confusing you don't normally have the word particular in general in the same

6:53

term of art and we certainly acknowledge that it's not necessarily intuitive or accessible for you as ethics officials

7:00

to use in counseling and advising employees but it's what we have and we're going to hopefully give you some

7:06

context to understand the concept a particular matter of general applicability typically involves

7:12

deliberations decisions or actions that focus on a particular industry or profession such as regulations programs

7:19

or standards and policy making as long as it's focused on a discrete and identifiable class what it really means

7:26

is what we have up there narrower matters that are focused on a discrete and identifiable class of persons some

7:33

examples from our regulations include regulations that establish safety standards

7:39

for trucks on interstate highways or determinations our legislation focused

7:44

on the compensation and the working conditions of a class of Assistant United States Attorney's next in the

7:52

band we have the Center's concept particular matters involving specific parties a particular matter involving

8:00

specific parties typically includes specific proceedings that affect the

8:06

legal rights of some parties so think about something like a judicial proceeding a hearing or an enforcement

8:12

action the particular matter involving specific parties also can include

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isolate able transactions or a related set of transactions that include

8:24

identified parties so here you think about something like contract license grants product approvals or applications

8:32

what does this really mean we have up on the screen a very limited group of

8:37

identified parties is involved in the matter some examples also taken from our

8:43

regulations the FTC review of a proposed merger between two companies or an FDA

8:50

approval of a certain drug Bunny's application so before we move on

8:55

to our next session I wanted to just chat briefly about the circular graphic

9:01

that we've been using many of you are probably familiar with the inverted

9:06

triangle diagram that og has used in its training materials and the new graphic

9:13

that we're using today the bullseye communicates the same information one

9:18

advantage of this graphic and the reason why we're using it today is that it visually shows you how a larger category

9:24

also includes smaller categories so for example what does this mean if you have

9:29

a regulation that prohibits an employee's involvement with any matter the broadest category so that might be

9:37

some of the 207 restrictions on senior employees that means that that employee

9:42

cannot work on a matter or any of the Interior bands of the circle particular

9:49

matters of general applicability in particular matters involving specific parties it subsumes the whole group now

9:56

by contrast if you have a law or regulation that uses the term particular matter that means that you're covering

10:02

the two smaller circles that you see circled up here in red particular matters of general applicability and

10:07

particular matters involving specific parties so both the circle in the Triangle are this the same information

10:14

and please use whichever visual representation you think is more helpful

10:20

so we'll get more into the specifics about these terms in just a minute but it's really important to stress the

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reason we care about these terms and the distinctions between them and that's because they determine the scope of the

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relevant prohibitions and exemptions so this sowhat's slide as roy lichtenstein

10:40

put it is it's here to show you that the type of matter really determines your

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employees potential liabilities so when an employee comes to you you always have to think about what type of matter is

10:52

involved and the type of matter is really important as far as what activities the employee can participate

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and in order to serve your agency's mission so this so what it is really

11:04

critical as far as understanding the type of matter so the key threshold question for

11:10

any ethics analysis as always what type of matter is involved so on that note

11:17

let's break it down so it's clear in what circumstances the criminal statutes

11:23

and our rules under the standards of conduct appear and we're going to go

11:28

through and list where matters particular matters of general applicability and particular matters

11:35

involving specific parties appear both in the criminal statutes criminal conflict-of-interest statutes and in the

11:42

standards of conduct and we're combining that here just as an illustration not in

11:49

any way to you know combine or equate the criminal conflict of interest statutes and our standards of conduct as

11:56

for far as potential liability but let's start with matter and just you know go

12:01

through where this appears so and again before I start just so you can follow

12:08

along with me we're referring to the areas in the bullseye so you can see as

12:13

we're talking about matters particular matters of general applicability and particular matters involving specific parties what areas are covered by the

12:22

parts of the bullseye that we've highlighted in blue so again starting

12:27

with matters matters are the outer band of the bullseye but when a matter is

12:32

involved it triggers the entire bullseye so again the area triggered when we

12:38

shaitaan' is the area that we've shaded in blue which encompasses both matters particular matters of general

12:44

applicability and particular matters involving specific parties so where does matter appear matter terminology is

12:51

found in 207 C and D which are the restrictions for senior and very senior

12:56

employees from coming back and working on matters and also in the teaching speaking and writing limitations under

13:03

the standards of conduct in 807 now moving on to particular matter as you

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can see on the screen now particular matter encompasses particular matters of general applicability and particular

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matters involving specific parties so again this is the two inner circles

13:22

of our bullseye and particular matter terminology is found at 203 205 208 and

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502 a 2 and also under subpart F now

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moving on to particular matters involving specific parties and where that can be found and again this is our

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narrowest category and it just covers the very center of the bullseye and this

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can be found under 207 a 205 C and 203 C

13:53

which are the sge restrictions for special government employees also for under the standards of conduct at 502

14:01

503 and it's also seen in various 208 regulatory exemptions so a little bit

14:09

later in the presentation we'll talk more about how the analysis has been done in some specific contexts

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but let's understand a little bit about you know kind of why this is important and why the term exists and it's really

14:22

not just an exercise in semantics to figure out whether something fits in one

14:28

category or the next if ethics officials and employees fail to understand and appreciate the

14:34

distinction between the different categories this can lead to inadvertent violations of the law applying the

14:42

categories incorrectly can leave employees in hot water for example 208

14:49

generally refers to particular matters so it applies to the broader range of

14:54

activities or a broader range of activities than party matters but if an

15:00

employee is advised incorrectly that section 208 applies only to particular

15:05

matters that focus on a specific party or company and the ploidy thinks that he

15:11

can he or she can only avoid participating in things like enforcement

15:16

actions or contracts and you know the employee thinks that they that's the kind of limited category of activities

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they have to avoid then the employee may inadvertently violate the law by

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participating in other particular matters like rule making that might affect a specific person or

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company as part of a class so again just going back to our so what point that I

15:41

mentioned earlier the point is that this matters for your analysis identifying the type of matter determines the

15:48

employees participation and it really serves the goals of your agency to be

15:53

able to determine the matter and determine what the employee can participate in so now moving on let's

16:00

look specifically at the particular matter category so why do we even have this

16:06

concept of particular matter well understanding this category is really important because the upper and lower

16:13

boundaries of government activities that affect a discrete and identifiable class

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or party can move an employee in one direction or the other direction towards

16:24

a specific party matter or the broader matter category so let's understand why

16:31

this middle get ground category exists and the differences between specific party matters and broader matters so

16:39

originally the criminal statutes were largely focused on claims before the

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government this category of particular matter was created to broaden the scope

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of the criminal statutes by making them applicable to all the activities of

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modern government not just claims at the same time it was recognized

17:01

we couldn't hamper modern government by prohibiting involvement in broad general

17:06

areas of activity so some people criticize this middle area particularly

17:13

when it comes to section two eight which is our criminal conflict of interest prohibition prohibition and some people

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suggest that the restriction should only apply to particular matters involving

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specific parties and we're talking again about 208 and when we're talking about

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the post employment restrictions under 207 this is a prohibition that does in fact only apply to particular matters

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involving specific parties but from our perspective an employee's participation

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in a matter in which she has a financial interest usually would raise real

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conflicts of interests but still we also think this middle category is important

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the category of particular matters involving certain particular matters of

18:01

general applicability and it's this kind of participation in a broader universe

18:06

of matters that can really still sometimes pose a significant conflict of interest okay so what is a particular

18:16

matter of general applicability as we know it's the highlighted you know

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second circle of our bull's eye and one of the components of the particular matter designation OGE defines what a

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particular matter of general applicability is in its regulations at 5 CFR 2640 . 102 m and there we say that a

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particular matter of general applicability means a particular matter that is focused on a discrete and

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identifiable class of persons but does not involve specific parties so breaking

18:53

it down what are the components of this definition first component is we have a

18:58

discrete and identifiable class now what does that mean that's a group of persons

19:03

who have a shared characteristic or trait that makes them distinguishable from the general population so some

19:11

examples that we've given have been veterans meat packers the mining industry now the second component of the

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definition is also equally important and it's that the matter is focused that

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means that it's directed to the class that we've talked about or that it will have a distinct impact on the class not

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just as a member of the general public or as part of the entire business community so that's the definition of

19:38

the components but what are some examples regulation drafting is usually a quintessential example that often

19:45

comes up when trying to give an illustration of a particular matter of general applicability and the reason why

19:52

is because in many cases regulations are focused on a discrete and identifiable class of persons for example

20:00

about a regulation that implements portions of a health care bill that regulates the prices charged for

20:06

prescription drugs oh gee ease regulations tell us that this is a rule making example that qualifies as a

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particular matter of general applicability there the discrete and identifiable class is

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pharmaceutical companies the ones that determine the prices of the drugs and you can say that the regulation is

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focused on the interest and activities of these companies in a way that's narrower than the general public or the

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entire business community so you can see how that example meets the two prongs of the components up on the screen now by

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contrast let's say we have a broader regulation that isn't directed to a

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small group but instead to the interest of a large and diverse group of people that is not going to be a particular

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matter piggybacking on the example above OGE has said that a legislative proposal for

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broad health care reform is not a particular matter because it's not focused on the interest of specific

21:04

persons or discrete an identifiable class instead you see that a broad

21:09

healthcare reform is targeted towards and intended to affect every single person in the United States so how do

21:18

you decide when you have a class of affected people and whether they're so large that they're no longer discrete

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and identifiable class that is the million-dollar question and it's one that several panelists including oh geez

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general counsel grappled with at the recent government ethics summit not to

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disappoint anyone but I don't think that there is a definitive answer to this question and this the reason why is

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because in all cases it's ultimately a judgment call that you as ethics officials must make that being said

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there are a couple of points that we think are helpful to keep in mind as you grapple with these issues on a daily

21:59

basis first keep in mind what Helen mentioned earlier about the historical

22:05

background about where the particular matter term comes from we want ethics rules to apply to more than narrow claim

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but we have the word particular to modify matter to make clear that the

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restrictions on federal employees don't apply to general areas of activity instead we have restrictions related to

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particular matters which encompass party matters and those that are focused on the interest of a discrete and

22:35

identifiable class now there's an unpublished OLC opinion from August of 1990 that we think has

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some really informative language that reminds us of you know this this word particular is a really important one and

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it's there for a reason and the way this opinion did it is it reminded us that if

22:55

we define the term particular matter really broadly that means that just

23:01

about any activity no matter how general could be prohibited and the opinion was nice because it gave some admittedly

23:09

pretty absurd examples that show the implications of if you were to take too broad of a view of a particular matter

23:15

so one example is that it said that if the president asked the Secretary of Defense who owned one share of a stock

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in a single United States company whether he thought the United States should get tough on Iraq the secretary

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arguably couldn't respond without a potential violation of section 208 the criminal conflict of interest laws

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similarly a secretary of treasury in all likelihood couldn't participate in discussions about the size of the

23:43

federal budget deficit again a very broad discussion with without committing

23:49

a potential 208 violation that would be the consequence of taking an unnecessarily broad view of a particular

23:55

matter so if we apply that logic to the to healthcare examples above if you looked

24:02

at health care legislation broad comprehensive health care legislation and said that was a particular matter

24:07

that essentially would destroy the meaning of the word particular and be

24:12

completely against the concept that we don't want to restrict federal employees from general areas of activity but the

24:20

pharmaceutical pricing regulation looks a little bit differently and why is that because when we look at the regulations

24:27

about pharmaceutical prices and what prices can be charged that is not a

24:33

general area like comprehensive healthcare legislation instead it's targeted it's focused and it's focused

24:39

on the pharmaceutical industry and pharmaceutical companies so one other point to keep in mind when you consider

24:45

whether something is a particular matter if you have something that's a group or

24:51

a class that looks a lot like the general public you're probably not going to find that group to be a discrete and

24:58

identifiable class so for example if we had a class that consisted of all

25:03

business enterprises in the United States that wouldn't be a discrete and identifiable class because it's a hugely

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broad and diverse group and this is probably also the case if you have a regulation that affected all businesses

25:18

that employed more than ten people because again that is a large and diverse class but what if we had

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something narrower say a class consisting of all business enterprises that sell pet accessories like these

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adorable pooches you see up on your screen that would be a discrete and identifiable class because that group is

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narrow and it shares certain defined characteristics pet accessories admittedly is a pretty silly example and

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probably is not one that comes up in your daily practice but we wanted to

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give you this somewhat memorable example to illustrate how you can look at a certain industry or subset of businesses

25:59

as a discrete and identifiable class and the regulations that OGE have that

26:06

they're chock-full of other examples where we talk about how specific professions or groups constitute a

26:13

discrete and identifiable class and some of those less colorful examples are the

26:19

meat packing industry prescription drug or pharmaceutical companies domestic

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companies that sell portable computers the mining industry organizations producing science education programs for

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elementary school children so those are other examples that illustrate how we

26:37

look at a defined group in that way now there's often a line drawing

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exercise that is involved in making these distinctions you have some flexibility to make these determinations

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and it's just important to keep in mind the critical question of whether you have a discrete and identifiable class

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that shares certain defined characteristics so what would be some

27:01

other examples of a particular matter of general applicability I would say one

27:06

would be if Department of Agriculture employee is working on a proposal to purchase grain from domestic farmers to

27:14

help support grain prices that project a proposal to purchase grain from domestic

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farmers would seem to be a particular matter because grain farmers are discrete and

27:25

identifiable class and the project focuses on that particular industry

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let's consider another hypothetical situation what if you have an employee

27:36

at the postal rate Commission and she is asked to participate in a working group

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that's considering raising the postal rate for first-class stamps now we say

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that this arguably would not be a particular matter because the issue that the working group is focused on is directed at a large and

27:54

diverse group of people the general public that uses first-class stamps is a very broad group so there you don't have

28:02

a discrete and identifiable class that's the focus of the activity and therefore wouldn't find that that activity would

28:09

be a particular matter so to help you as you're approaching these often

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complicated questions we've put together a road map for analysis for identifying

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particular matters of general applicability so let's first look at a few key questions that might help you

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when you're trying to determine whether a given matter is a particular matter of general applicability so first you

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should ask yourself how broad or narrow is the focus of the matter consider

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whether the matter is directed to a group of individuals or entities next

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it's important to think about whether the class that the matter focuses on is discrete and identifiable

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from the general population now remember a class is not discrete and identifiable

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simply because it is the focus of the matter there must be an independent reason the

29:05

class is discrete and identifiable and such as you know the class encompasses a particular industry profession or

29:11

economic sector another question to ask yourself does the matter have a distinct

29:17

impact on a class that is separate from the impact of a matter on the general population the discrete and identifiable

29:24

class that is the focus of a particular matter generally is impacted in a way

29:30

that is distinct from the impact on the general population now remember a matter

29:36

may still be a particular matter even if it has an impact beyond the class with

29:41

which it is concerned for example regulations establishing safety standards for the trucking industry

29:47

would be a particular matter because they relate to a particular distinct

29:53

group even though broader public safety concerns likely motivated the rules and

30:01

as we know from our our lovely bull's eye which were gonna we're going to keep

30:07

throwing at you so get used to this bull's eye particular matters of general applicability are the middle band of

30:14

types of matters that a federal employee might encounter but we also have the

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broader more general matters and the subset of particular matters which is

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particulars involving specific parties so let's also take a look at these two categories as as far as how to approach

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and identify them for particular matters involving specific parties as we talked

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about before this is the narrowest of the terms and as we mentioned when this

30:46

terms appears and we'll talk about this a little bit later as far as how it's been applied in the past but it's

30:52

important to keep in mind what that when this term is used in the criminal conflict of interest statutes or the

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standards of conduct it is because of a deliberate decision to impose a more

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limited band and to narrow the circumstances circumstances in which the band is to

31:10

operate so for this reason we have said that a particular matter involving

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specific parties typically involves a specific proceeding affecting the legal rights of the parties or an isolated

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transaction or related set of transactions between identified parties now as we talked about before general

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examples of this are contracts grants licenses product approval applications

31:37

but generally speaking rulemaking and legislation are not covered by this

31:42

category unless in the unique circumstance that they are narrowly focused unidentified parties such as for

31:50

example a private relief bill now moving

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onto matters as we've stated before we think you should really start to think

32:00

of this as really broad matters no no matters you can't say that they're

32:07

focused on a particular group or class or that they're directed to the interests of a large and diverse group

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of persons so they have an impact on the general population this is the really

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broad group of matters and we give you various examples of this earlier that we

32:27

discussed and these matters that would not constitute a particular matter so

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what does it all really mean let's see how a particular matter terminology has

32:39

been applied and I want to spend some time focusing even more on some good examples a particular matter terminology

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as interpreted by OLC opinions and OGE advisories and these are really our best

32:52

guideposts when it comes to understanding these terms so I'm going to discuss some specific examples for

32:58

how particular matter terminology has been applied in the context of 18 USC

33:03

208 our partiality provision under the standards of conduct 502 18 USC 205

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dealing with representational activity and 18 USC 207 our post employment

33:16

restriction so let's start with a with 208 but

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before I jump fully into the 208 world I want to point out an example that we

33:28

often bounce around here at OGE and this is the classic aspirin example

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now this is something that appeared in a somewhat muddled fashion in a 1978 OLC

33:43

opinion but can really help explain the application of particular matter terminology in the two-week context and

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also demonstrate some common pitfalls so let's take a regulation concerning the

33:56

production standards for aspirin how do we think about this under 208 so looking

34:02

at our screen immediate reaction my employee just goes to CVS and buys

34:07

aspirin when he has a headache there's no way this is a particular matter to him now it's certainly true that the

34:15

financial impact on the employee is very likely determinative as part of the analysis but a point I really want to

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emphasize is don't just jump to direct and predictable what we're talking about

34:27

here is whether there's a particular matter in the first place a matter isn't

34:34

a particular matter to the employee it is either a particular matter or not independent of the employee with all due

34:42

respect to our poor employee with this headache and perhaps even some ethics officials who themselves have a headache

34:48

trying to understand particular matter terminology the particular matter analysis stands alone and what I mean by

34:56

that is there's a tendency to jump to direct and predictable but to eat is

35:01

critically a two prong analysis is it a particular matter a matter is particular

35:10

independent of the employee once you have the answer to that question of whether it's a particular matter then of

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course it's important to conduct the rest of the analysis to figure out if there is a 208 issue so if you first

35:25

find a particular matter you then also determine if there is a direct and predictable effect on the employee is

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fine interests so first is our aspirin regulation a particular matter of

35:37

general applicability yes there is a focus on a discrete and identifiable class of aspirin producers of course

35:46

this is not the end of the 208 analysis it may and here it will likely fail the

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second prong of direct and predictable effect on a financial interests meaning

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that the employee employee can likely participate but the point I want to make

36:03

is not to conflate the two parts of analysis whether there's a particular matter and whether the identified

36:10

particular matter has a direct and predictable effect on the employees financial interest are

36:16

separate considerations now changing the hypothetical again to demonstrate that

36:23

particular omit matter identification is at least mechanically a completely independent independent

36:30

part of the to weight analysis let's again go back to our poor employee with

36:37

the headache but this time he owns a hundred thousand dollars in bear stock however his job involves working on

36:45

health care legislation not on the aspirin we discussed before starting

36:50

with prong one is it a particular matter of general applicability for 208

36:56

purposes as we've said health care legislation does not focus on a discrete

37:02

and identifiable class so there is no to a weight problem and he can go ahead and

37:09

participate in the work on the legislation even if he owns the Bayer stock and even in this case where the

37:17

direct and predictable element seems stronger this raises an important point

37:22

you can see how health care legislation would have many component parts some of

37:28

which may directly impact aspirin manufacturers it is generally not

37:34

required to break down broad matters into smaller components that may be considered particular matters when doing

37:41

an analysis to see if something involves a particular matter and as we said in one

37:46

of our legal advisories Oh 5 X 1 where we address deliberations of the

37:51

president's advisory panel on federal tax reform we explained that broad

37:57

public policy matters should not usually be carved up into successively finer and

38:03

more focused parts and the advisory we say it would not be logical to conclude

38:08

that an employee could participate in considering the overall legislative

38:14

proposal but not its constituent parts I'm going to talk about another 208

38:21

example which again we have up on the screen we have our bullseye showing that

38:28

208 covers particular matters meaning both particular matters of general applicability as well as particular

38:34

matters involving specific parties so we have those two inner bands highlighted in blue so the first example that I

38:41

wanted to talk about was one that was discussed in a 1993 unpublished OLC

38:48

opinion that addressed the activities of something called the Federal Open Market Committee now that's a committee that

38:55

regulates interest rate sensitive securities mainly by manipulating the

39:00

amount of reserves that are available to banks and to thrift institutions the

39:06

question that that opinion looked at was were the activities of the committee particular matters of general

39:12

applicability now the opinion went through and as part of its analysis it

39:18

compared this situation of the Federal Open Market Committee to an earlier LC

39:24

decision where they considered whether recommendations of the President's Council of Economic Advisers constituted

39:31

particular matters in the earlier decision OLC concluded that the activities of the president's council

39:38

were matters not particular matters because they were addressed to general

39:43

policies for economic growth and stability now the Federal Open Market Committee situation was different in no

39:51

Elsie's opinion the reason why is because the Federal Open Market committee's policies were directed to a

39:57

particular aspect of economic policy and a particular segment of the economy banks and thrifts therefore LLC

40:06

concluded that the decisions that the committee made related to a particular

40:11

and discreet group the banking industry now that was the case even though the

40:17

work of the committee could potentially have various effects on the economy as a whole now I want to take a second to

40:24

explicitly acknowledge something earlier when I talked about the OLC s analysis trying to figure out if this committee

40:30

work involved a particular matter I jumped around and compared it to a

40:35

situation where the OLC determined that something was a matter now neither I nor

40:42

the OLC do this sort of jumping around just to confuse and frustrate you the

40:47

reason why we compare and contrast against examples that might be in a different category is because we think

40:55

that it's helpful when you're trying to figure out which which bucket something some activity falls in it's helpful to

41:02

compare and contrast not only against other examples that you have in the same

41:08

category so here comparing against other particular matters of general applicability examples but also there

41:16

are examples in the bordering categories because that helps you figure out how you can properly classify your case what

41:23

your situation is closest to going back to the the Federal Open Market Committee

41:29

case it raises two other important points that I just wanted to highlight again now first as we talked about

41:37

earlier just because something might have an impact outside of the discrete

41:42

and identifiable class that makes it a particular matter that doesn't mean that

41:48

were taken out of particular matter of general applicability territory so here

41:54

like I said OLC said the committee's decisions might have effects on the economy but because the committee's

42:01

decisions were focused specifically on banks and thrifts we had a discrete and identifiable class and therefore apart

42:08

Euler matter the example is also a nice reminder about how we can think about

42:14

the particular matter concept we often think about a class as an industry group or certain professionals such as truck

42:21

drivers or helens aspirin producers but professionals aren't the only types of

42:26

groups that that we might be able to identify as we talked about earlier in the roadmap the task is to figure out

42:33

whether the focus of the activities is on a group that's discrete and identifiable from the general population

42:38

and here OLC concluded that banks and thrifts work discrete and identifiable so let's

42:45

take on another 208 related OLC opinion that i think is a good point of contrast

42:51

to this Federal Open Market Committee example in an August 1990 opinion a well

42:58

seek question whether deliberations regarding a response to Iraq's invasion of Kuwait were particular matters so

43:06

let's think about this compared to the banks and thrifts situation we need to figure out are the deliberations focused

43:12

on a discrete and identifiable group well the deliberations have a distinct impact on discrete and identifiable

43:19

class I will see concluded that the deliberations would affect virtually

43:26

every economic sector and individual and that the effect would not be distinctive

43:32

on any individual or group or a sector so what we're talking about in this

43:37

Kuwait situation is a decision that focused really on the entire population and the entire economy so what are we

43:45

what are we looking at we're looking at a situation that falls outside 2:08 category or at 2:08 territory in our

43:53

bull's eye now in contrast in this opinion OLC said if the discussion was

43:59

on whether to seize a particular oil field or tanker then the actions would

44:04

in fact focus on specific individuals or entities or on a discrete and identifiable class and that would bring

44:11

us back into the blue shaded area of the circle because we would be in the inner two rings now this is important because

44:19

as we talked about earlier if 208 covered broad deliberations it could really the entire

44:26

government no one would be able to work on foreign policy strategy because almost everyone would surely have some

44:33

sort of financial interest tied to that strategy now 208 as as Helen talked

44:40

about earlier was really meant to reach true conflict of interest concerns so we

44:46

recognize that the concerns aren't limited just to cases or controversies or party matters but we have a limiting

44:53

limiting effect by using particular to create a practical standard to really

44:59

find activities that pose a potential conflict before we move on to another

45:05

another area I wanted to leave a few final 208 thoughts first even if you

45:12

look at a class let's say you look at a class and determine that it's discrete and identifiable as Helen said remember

45:18

this is just the first part of the analysis as discussed above particular

45:23

matter is the first part of the discussion and it doesn't mean that an

45:29

employee cannot work on a matter if you find that there's a particular matter once you've determined that something is

45:36

a particular matter you then proceed with the analysis to see if there is a direct and predictable

45:42

effect on the employees financial interest such that he or she should not work on that activity if you have

45:49

something that has an effect on a large number of groups it's going to be pretty likely that you will not satisfy the

45:56

direct and predictable analysis and this is something that a GE acknowledges

46:01

explicitly in our 208 regulation in 26

46:06

40 . 103 we say that a particular matter that has an effect on a financial

46:12

interest only as a consequence of its effect on the general economy does not

46:17

have a direct effect within the meaning of this part so so what does that mean

46:23

let's look at our open market at Federal Open Market Committee example again we've said that that's a particular

46:28

matter but do we have a 208 disqualification it depends if you apply the director predictable

46:35

test it seems that someone working on the committee couldn't own interest rate-sensitive securities because

46:41

decisions of the committee have a direct and predictable effect on those interests but if you had a person that

46:49

had other financial interest that were only potentially affected as a result of

46:54

the impact of the committee's decisions on the economy as a whole that person

46:59

would not be disqualified from participating under 208 our point here

47:05

today isn't to get into direct and predictable but to emphasize that particular matter and direct and

47:11

predictable work in tandem and just because the particular matter standard is met doesn't mean that you're going to

47:19

have a 208 violation it just means that you've met the first threshold step and

47:24

that you need to proceed with your analysis the second point that I wanted to touch on is that the relationship

47:33

with the standards of conduct provision 5 CFR part 26 35 502 that's the

47:39

impartiality provision now that provisions narrower and that it only covers specific party matters and that's

47:45

one area of the bullseye the center circle so if we go back to our aspirin example a regulation affecting aspirin

47:51

as we discussed falls into the particular matter of general applicability category so it wouldn't

47:57

directly fall into 502 because it's not a particular matter involving specific parties but if we had a situation where

48:06

our employee with the headache was engaged in a product review specific to

48:11

Bayer then that would be a particular matter involving specific parties it

48:17

would be in this center part of the circle and trigger both 502 and 208 I

48:22

just mentioned this because it shows that 502 is narrower by design in terms of the reach of the prohibition and the

48:28

types of covered relationships so I also just want to jump in and provide a few

48:33

more examples that discuss 18 USC 205 and 207 and just help cover all our

48:39

bases as far as how particular matter terminology has been applied um so let's quickly look at 18 USC 205

48:48

the prohibition against acting as agent or attorney the statute applies to covered matters which encompasses both

48:55

particular matters of general applicability and particular matters involving specific parties so again

49:02

those two inner rings of the circle and this is the same area of activity covered under 208 in 1984 OLC published

49:12

an opinion that many of you may be familiar with and the question arose whether a federal employee could

49:18

represent the National Association of Assistant United States Attorney's before the Department of Justice on

49:25

personnel matters OLC reasoned the discussion of personnel matters

49:30

affecting a usa's was a particular matter of general applicability au

49:36

essays were considered a discrete and identifiable class by virtue of their

49:42

employing agency their profession and their position this meant that current

49:47

federal employees could not represent the National Association of assistant US

49:53

attorneys before the Department of Justice without violating 205 it's also

49:59

a great example of the scope of 205 looking again at our bullseye 205 does

50:05

not just cover specific parties map party matters it was meant to cover the wider area of particular matters of

50:12

general applicability and particular matters involving specific parties clearly the personal personnel matters

50:18

at issue would have had a distinct impact and were focused on a USA's a

50:24

population discrete and identifiable from the general population and the

50:30

current employee could not represent the Association now with the scope of 205 in

50:36

mind and contrasting 2a5 with 18 USC 207

50:42

this is really kind of a good opportunity to look at these two statutes and emphasize why it's

50:48

important to identify the right particular matter terminology the type

50:53

of communications affecting the a USA's fell in the particular matter of general applicability category for

50:59

our 205 analysis but particular matter of general applicability is a category

51:05

that broader middle ring that is not covered under 18 USC 207 a this only

51:13

applies to party matters the center of the bullseye so as we've already

51:18

mentioned there is a reason for this narrowing for example we don't want an individual who worked at the IRS as a

51:25

tax attorney to be prevented from ever working on tax policy on his departure

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207 a therefore impacts a narrower class of government activities because of this

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identifying and drawing lines for 207 can be very important for example if the

51:44

AUSA is we just discussed left their government positions they would be able

51:50

to represent the Association regarding the same personnel grievances they were prevented from working on well employed

51:57

for the government those personnel issues were categorized as particular matters of general applicability the

52:04

middle category but fall outside the narrowest category of particular matters

52:09

involving specific parties to provide one final and helpful I think example

52:15

and specifically shed light on 207 a the post employment restrictions let's talk

52:21

about OGE legal advisory 80 X 10 in that advisory we discuss a former attorney at

52:28

the Department of Justice who was asked to advise a state attorney general's

52:33

office on efforts to comply with federal guidelines regarding desegregation of state colleges and universities now at

52:41

the Department of Justice he had worked on the development of court-ordered criteria by which six states were to

52:47

develop plans to desegregate their higher education systems later on he

52:52

worked on the development of general criteria to be used as investigatory guidelines in states that formerly had

53:00

dual systems of public higher education the first set of criteria involving the

53:06

six specific states were deemed to be a particular matter involving specific parties and and just to mention

53:12

none of these six states or the state were then former employee wanted to advise and provide guidance so any

53:20

leader work related to this criteria regarding the six specific states but

53:26

fall into 207 a territory meaning he could not work on it however there were

53:34

no 207 problems related to the former employees work advising a state on the

53:40

second set of more general criteria the general guidelines were not specific

53:45

party matters they did not apply to specific identified States and the

53:50

employee could work on these general criteria without violating 207 the post

53:56

employment restriction again this case shows how identifying the right category

54:02

determines whether the criminal statutes apply recognizing the difference between particular matters of general

54:07

applicability particular matters involving specific parties and matters is just incredibly important to giving

54:15

accurate ethics advice now that we've discussed the different categories one

54:20

final subject we wanted to touch on briefly is transitions and how you determine how a government wina

54:27

government activity transitions from one category to the next we acknowledge that

54:32

the boundaries are fluid and fuzzy between the categories and it can be

54:38

frustrating to try and figure out where a specific project lies particularly because work in the government isn't

54:44

static you need to do a case-by-case analysis to figure these things out and

54:50

just in terms of some general guidance if you're trying to figure out if a broad matter has become a particular

54:57

matter you would look at whether the deliberations have turned to specific

55:04

actions that focus on certain people or a discrete and identifiable class of

55:09

people the example we talked about earlier about healthcare is a good one a

55:14

legislative plan for broad healthcare reform is not a particular matter but a particular matter would arise if the

55:21

agency later issue implementing regulations on pharmaceutical prices if you're trying

55:27

to figure out when a particular matter becomes one involving specific parties the general rule is that specific

55:33

parties are first identified when the government first receives an expression of interest from a perspective party

55:39

like a contractor or a grantee this isn't always timing-dependent and OGE

55:45

has various legal advisories that discuss the nuances of when a particular

55:50

matter involving specific parties arises ultimately there are no hard and fast

55:55

rules when you look at the boundaries in our bull's eye but hopefully this context helps you see how something can

56:02

transition from a matter into the net expand a particular matter of general

56:07

applicability and finally potentially to a particular matter involving specific parties the center part of our bills I

56:15

so that concludes today's fundamentals presentation we really hope we've helped

56:22

make sense of particular matters and you know our your og desk officers are

56:28

always available to answer any questions that may come up so thank you so much for joining us here today thank you and

56:37

I'd also like to just remind everyone that next month or I'm sorry not next month next week we're going to be doing

56:44

our advanced practitioner it's going to be mmm excuse me we're gonna be covering 205a we're gonna have two members of our

56:51

general counsel's office here to do that with us and we look forward to seeing you there so with that I'm Ryan Siegrist and we'll

56:58

see you next week