

Office of Government Ethics

94 x 13 -- 06/27/94

Letter to a Designated Agency Ethics Official dated June 27, 1994

This responds to your May 4, 1994 letter in which you requested an informal advisory letter on issues relating to the applicability of 18 U.S.C. § 207(a)(2). As was noted in your letter, [your agency] is a U.S. Government agency that promotes U.S. investment and economic growth in developing countries. One of the programs [your agency] offers to U.S. companies and individuals is [a type of] insurance. Your questions are prompted by the imminent departure of [an official] who you stated, for purposes of this discussion, has official responsibility for all matters relating to [your agency's] insurance program. Specifically, you have requested informal advice on three issues concerning the application of 18 U.S.C. § 207(a)(2).

We note that you have described in some detail the administrative process with which a prospective [applicant] must comply in order to obtain insurance from [the agency]. In general, this process involves both the registration of [a] project and the subsequent submission of a formal application for insurance for that same project. Additionally, you have provided us with a copy of [the agency's] registration form which is used by your agency to register prospective projects and a copy of [the agency's] program handbook.

With regard to your specific questions:

Question 1:

You asked whether the submission of [the registration form] is a "particular matter" for purposes of the restrictions of 18 U.S.C. § 207(a)(2). Briefly stated, the fundamental issue here is whether a registration is a particular matter by itself or whether it is only the first part of a much larger particular matter.

The prohibition in 18 U.S.C. § 207(a)(2) applies to communications to or appearances before the Government on behalf of a private party in connection with a "particular matter" involving "a specific party or specific parties" in which the United States is a party or in which it has a direct and substantial interest. Therefore, the more focused question

is whether the [registration form] is or is a part of a particular matter involving specific parties. You concluded in your own analysis that [a registration form] is not a particular matter. We come to a different conclusion. We believe that [a registration form] is or is a part of a particular matter and that it involves a party -- the requestor.

5 C.F.R. § 2637.102(a)(7) defines the term "particular Government matter involving a specific party." Specifically, this section lists the types of Governmental matters that involve "particular matters." These matters include: a "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest."

The submission of [a registration form] is standing alone a "particular matter" involving a specific party or parties and may be a part of a larger particular matter. With respect to the categories of agency action identified above, the term "application" is defined in Black's Law Dictionary as "[t]he preliminary request, declaration, or statement made by a party applying for an insurance policy" ¹ The submission of [the agency's registration] form is a preliminary statement made by an [applicant] who is applying for [agency] insurance. This information provided during the registration process about a particular [project] is reviewed again after a formal application for insurance has been submitted. The registration form's instructions clearly indicate that this "form is to be used in registering proposed projects for [agency] insurance" in order to "ensure that the project remains eligible for [agency] insurance (emphasis added)."

Further, the submission of the [registration form] may also be considered to be an initial "determination" by the agency of an [applicant's] insurance eligibility or ineligibility. The plain meaning of the word "determination" is "[t]he act of making or arriving at a decision." ² It is clear from the information that you provided that the agency does make an initial decision early in the insurance application process on whether a particular [applicant's] project meets basic statutory eligibility criteria for obtaining insurance. If an [applicant] meets the eligibility criteria, his or her project is registered with [the agency]. Where an [applicant] does not meet the eligibility criteria, a letter is sent to the [applicant] notifying the [applicant] of the fact that the project is not eligible for insurance. In still other cases, an assigned insurance officer ³ may contact the [applicant] to obtain additional information. This new information is incorporated into the [applicant's registration] file and will be reviewed

later in the application process. We understand from your letter that only those projects which have been determined to meet the basic eligibility criteria will be considered by [the agency] after a formal application for insurance has been submitted.

Additionally, it appears to us that the submission of the form is part of a larger bifurcated process for applying for [agency] insurance. [Agency applicants] must register their projects before they formally apply for [agency] insurance to maintain their projects' eligibility status. The [registration] form warns potential [applicants] that if the [applicants] make commitments on a particular project without properly registering their projects with [the agency], the project would automatically become ineligible for [agency] insurance consideration. While we recognize that the [registration form] may serve other administrative purposes, such as providing a mechanism for [the agency] to screen out those projects which do not meet [agency] eligibility or other policy criteria, this does not change the fundamental nature of the registration as a preliminary requirement for applying for and maintaining eligibility for [agency] insurance for an identifiable project.

The submission of [a registration form] is a "particular matter involving a specific party." The [applicant] submitting the [registration form] is a party to the matter. A party is defined as "[a] person concerned or having or taking part in an affair, matter, transaction, or proceeding, considered individually."⁴ In the case at hand, the [registration form] is being submitted by the [applicant] to [the agency] to satisfy an [agency] requirement.

While you analyzed whether [the agency] was a party, that is only relevant in determining whether the "United States . . . is a party or has a substantial interest." [The agency] is not and need not be a party to trigger this provision because [the agency] does have a direct and substantial interest in the proper registration of projects. An [agency] insurance officer is assigned to review completed registration forms. This officer reviews the [registration form] to ensure that initial eligibility requirements have been met by the [applicant]. This review will result in a decision on whether the project merits further consideration by [the agency] and whether the [applicant] can proceed to the next step for applying for [agency] insurance. [The agency] does have a substantial interest in ensuring that only new projects that meet certain eligibility criteria are registered and subsequently considered for further [agency] insurance consideration. In conclusion, we are of the opinion that the submission of [a registration form] is a particular matter which does involve a party and that [the agency] does have a direct and substantial interest in the process of registering projects.

Question 2:

You asked whether a registered [project] is a matter which is "actually pending" before [the agency] between the time the [project] is registered and the receipt by [the agency] of a formal insurance application with respect to a particular project. You concluded that you did not believe that such a matter can be considered to be "actually pending" before [the agency] because there is nothing under consideration prior to the filing of an insurance application. Additionally, you stated that once the registration is granted, the registration process is complete and there is no longer a matter "pending" before the insurance officer.

As you know, 5 C.F.R. § 2637.202(c) defines the term "actually pending" to mean that "the matter was in fact referred to or under consideration by persons within the employee's area of responsibility." The restriction does not apply merely because the official's official responsibility includes responsibility for the same general types of matter so that theoretically a particular matter could have come under the official's supervisory authority.⁵ Further, as an additional aid in understanding the meaning of the term "actually pending," we note that Black's Law Dictionary defines the term "pending" to mean:

[b]egun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in the process of settlement or adjustment.

Awaiting an occurrence or conclusion of action, per continuance or indeterminacy.⁶

You claim that the registration of a project ends the matter of registration and that therefore nothing remains pending before [the agency]. The registration of a project is the first step of a two-tiered process for applying for insurance from [the agency]. The act of registration does not conclude an [applicant's] attempt to secure [agency] insurance but rather enables the [applicant] to submit a formal application concerning a particular and identifiable project that meets the initial eligibility requirements. As indicated on the registration form, the overall purpose for registering a project is to maintain its eligibility for [agency] insurance. The information which is submitted by individual [applicants] during the registration process⁷ is used by [agency] employees later in the application process to determine whether a project should be granted insurance.

You state that only a small fraction of [applicants] are granted

insurance and that some [applicants] may choose to delay further consideration of their application until a later date. A delay in the submission of a formal application to [the agency], after a project has been registered, does not change the underlying fact that the project is still "pending." This Office has maintained that a particular matter remains pending even though it is not at all times under "active" consideration.⁸ In the case at hand, it would appear to us that a registered project would remain "pending" within [the agency] until a specific action or event occurs which terminates this status. These actions or events would, for example, include: (1) the denial of insurance coverage for a particular project;⁹ (2) the expiration of any applicable registration period of a project and the failure of an [applicant] to seek an extension;¹⁰ or (3) the project becoming otherwise ineligible for insurance.¹¹ Additionally, we note there is no requirement in the statute that the matters have been pending under the employee's official responsibility for a certain length of time¹² only that they have been pending during the employee's last year of Government service.

In conclusion, it is our opinion that the submission of [a registration form] by an [applicant] does constitute part of a "particular matter" involving a specific party or parties that is considered to be "actually pending" before [the agency]. This matter will remain in the status of "actually pending" until either one or several actions on the part of the agency or by the [applicant] or other events occur with respect to the particular registered project which terminates that status.

Question 3:

Finally, you asked whether [the agency's] processing of [a registration form] is the "same particular matter" as the processing of an insurance application. You concluded that they were not the same matters because different issues are considered in each of these two processes. At the outset, we note the difficulty in discussing this issue in the abstract without the facts of an identifiable case. We can provide you with some general guidance on this issue. Therefore, we will answer the question of whether submitting [a registration form] for a project and subsequently applying for insurance for the project is the same particular matter. We believe that these are the same matters.¹³

As you know, 5 C.F.R. § 2637.201(c)(4) provides agency decisionmakers with several factors to consider in making a determination on whether one matter is the "same particular matter" as another related matter. These factors are: the extent to which the matters involve the same basic facts,

related issues, the same or related parties, the same confidential information, and the continuing existence of an important Federal interest.¹⁴

As you conceded in your letter, both the review of the [registration form] and the insurance application involve the same facts and parties. However, you contend that because these two stages in the application process involve different issues, they therefore should not be considered to be the same particular matters. While we agree that new issues may arise in the review of a formal application for insurance, this fact alone does not transform the matter into a new particular matter. It is clear from the facts that you have provided us that both the review of the initial registration and the formal application concern the same parties and the consideration of the same project. The primary purpose of both of these processes is to obtain insurance for an identifiable project. In *United States v. Santo Trafficante*, 328 F.2d 117, 119 (5th Cir. 1964), the court looked at the issue of whether or not a former Government attorney's involvement in a tax claim precluded his service, on behalf of the taxpayer, in subsequent litigation to collect the tax assessment. The court noted that the assessment of a tax and the collection of a tax were the same matters where they involved the same tax claim even though different issues would be considered in the later efforts by the Government to collect the tax. The court stated there that "the test was not . . . whether the attorney represented the adverse party . . . with respect to the specific issues in the pending litigation" (emphasis added), but rather whether he had participated in the tax claim.

Additionally, the fact that [the agency's] registration process involves preliminary issues of eligibility does not, in itself, transform the registration process into a separate matter from the submission of a formal application. A "particular matter" may extend to participation in preliminary matters subsequent to a matter reaching its final stage.¹⁵ In OGE Informal Advisory Letter 80 x 4, we stated that:

[m]uch of the work with respect to a particular matter is accomplished before the matter reaches its final stage. For example, an employee may personally participate in an investigation to determine whether the Government should file a formal action. Further, he might recommend, based upon his investigation, that the formal action be undertaken. If such an employee could at that point, before the actual filing of the action, leave the Government and contend that he was not barred by section 207 . . . the purpose of section 207 would be undermined. The same holds true for the preliminary steps leading to

a contract. Thus, if its purposes are to be served, section 207 must be read as including personal and substantial participation in the formative stages of particular matters.

Finally, your letter noted that related matters may, in some cases, become different particular matters. In general, new particular matters have been found where there are fundamental changes or differences between

related matters.¹⁶ In *Medico Industries*,¹⁷ the court did not find such a change where a contract modification essentially added only additional production units and substituted one contractor for another.¹⁸ Additionally, extensions, technical amendments, changes in the relative negotiating leverages of parties have not been found to be sufficient changes to transform a matter into a new particular matter.¹⁹ However, the facts here show that both the registration and application processes involve the review of the same project and parties. The fact that each process addresses different sets of issues does not change the underlying nature of the particular matter which is [the agency's] consideration of a specific project for insurance.

It is clear from the information that you have provided us and our review of the [registration] form and program handbook that the registration process is a fundamental part of [the agency's] application process. The same parties, facts, and confidential information are involved in both the registration of a project and in the subsequent submission and review of a formal application for insurance. Therefore, it is our opinion that the registration process and the subsequent consideration of an [applicant's] formal application may involve the same particular matters for purposes of the restrictions of 18 U.S.C. § 207(a)(2).

In conclusion, we understand that your request for advice was prompted by the imminent departure of [an agency official]. As was alluded to earlier, we again note that it is difficult for us to provide you with a more precise response without knowing the type of representational activities that the [official] is considering after his departure from [the agency]. As a general matter, it is important to remember that the individual projects are not under the [official's] official responsibility; it is rather the Government's review and granting of insurance. Therefore, while the [official] may be restricted from making representations back to the Government with respect to any specific insurance applications that were under his official responsibility, he could however make representations on aspects of the projects that do not themselves involve the insurance component of the project. Please contact

this Office if you would like to discuss any point in this letter. The Office of Government Ethics has not consulted with the Department of Justice with respect to any matter discussed in this letter.

Sincerely,

Stephen D. Potts
Director

1Black's Law Dictionary 99 (6th Ed. 1990).

2See Webster's II, New Riverside University Dictionary 369 (1988).

3The [registration form] advises [applicants] to contact the "Insurance Applications Officer" if he or she has any additional questions. We were not sure initially if this person is the same person who is identified as the "insurance officer" in your letter.

4Black's Law Dictionary 1122 (6th Ed. 1990).

5See example 1 to 5 C.F.R. § 2637.202(c).

6See Black's Law Dictionary 1021 (5th Ed. 1979). This definition is cited in OGE Informal Advisory Letter 85 x 6.

7This information may include discussions with the potential [applicant].

8See OGE Informal Advisory Letter 85 x 6.

9This is provided there is no process for appealing an adverse determination within [the agency].

10See OGE Informal Advisory Letter 85 x 6. In this letter, we stated that a claim would remain "pending" even though the agency had not received correspondence from the claimant company for a period of over three months provided that any pertinent statute of limitations period applicable to the claims process had not yet expired. Also, we understand that a registration with [the agency] is valid for two years and may be renewed in one year increments.

11We do not presume to know the exact situations where this may occur. However, we would expect that this may occur if, for example, the

particular [place] that the project was intended for is no longer considered to be an eligible [place] for purposes of obtaining [agency] insurance for a project in that [place].

12See also 5 C.F.R. § 2637.202(c).

13We note that [the agency's] program handbook states that [applicants] are required to register projects with [the agency] before the [project] has been [undertaken] or irrevocably committed. As a general matter, we therefore assume that an application for insurance will not be considered for a project that has not been registered, so that while [a registration form] can be freestanding, an application for insurance generally is not.

14For some additional discussion of these factors, see OGE Informal Advisory Letters 91 x 24, 90 x 7, and 86 x 13.

15See OGE Informal Advisory Letter 80 x 4.

16See CACI Inc.- Federal v. United States, 719 F.2d 1575 (1983) and OGE Informal Advisory Letter 90 x 7.

17See United States v. Medico Industries, Inc., 784 F.2d 840 (7th Cir. 1986).

18See also OGE Informal Advisory Letter 91 x 24.

19See OGE Informal Advisory Letter 90 x 7.