ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 88-1

STANDARDS OF CONDUCT FOR PRESIDENTIAL TRANSITION WORKERS

by

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I. INTRODUCTION

The transfer of power from one administration to another poses an enormous task. In the roughly ten weeks between the election and Inauguration Day, the President-elect's transition team must identify over a thousand people to fill high level positions, prepare a strategy for providing leadership during the crucial first months, and design a blueprint for taking over the day-to-day management of the federal government. Doing so requires comprehensive information on the organization and responsibilities of each agency and program, on their plans and concerns, on the resources available, on the legislative and regulatory initiatives that are being prepared, on the program's personnel, on grants and contracts that have been or are about to be awarded, and on the policy questions that will need to be decided.

Private citizens must necessarily be relied upon to accomplish this awesome responsibility. During the 1980-81 transition, for example, more than six hundred people had active assignments on transition teams, significant numbers of whom continued to be paid by their private employers. Indeed, many of them were chosen precisely because of their substantive knowledge of the agency's programs which was derived from jobs that brought them into contact with the agency.

The magnitude and importance of the tasks, and the short period available to complete them, necessitate that future Presidents-elect will continue to rely on an army of private citizens, some of whom may later be offered government appointments, but many of whom will return to the employment whence they came.

While the complexities of a Presidential transition place an enormous burden on the President-elect and his staff, the incumbent President and executive branch officials also face a difficult responsibility. They must typically deal with people from the transition organization who have widely different backgrounds, with a resulting array of sophistication and understanding of the subtlety of the issues facing the agency. Exacerbating this inherent problem, the history of transitions demonstrates that it is not always easy to determine just who actually speaks for the President-elect and who should be provided with information and access to personnel that are not normally publicly available. Yet, if an incumbent administration

hesitates in rendering assistance, transition officials may view such conduct as obstructionist, thereby straining relations and making it more difficult for the President-elect to gain control over the federal bureaucracy. Or, they may provide sensitive information to those who are not actually authorized by the President-elect's team but rather who are self-appointed helpers.

The prospect of large numbers of transition workers with sometimes ambiguous authority and with special access to government information, personnel, and facilities carries with it the inherent potential for conflicts of interest or the abuse of public trust. To be sure, the constant scrutiny by the press and the major embarrassment that would result if an abuse were to materialize provide a strong inducement to the transition team to ensure that none arises.

Nevertheless, the possibility for controversy over whether private sector people with exceptional avenues into agencies have onflicts of interest has arisen in an analogous setting. Shortly after taking office, President Reagan issued an Executive Order establishing the Executive Committee of the Private Sector Survey.[1] It was to conduct in-depth reviews of Executive Branch operations and advise the President and the heads of the federal agencies. Popularly known as the Grace Commission, after its chairman Peter Grace, the Commission itself consisted of approximately 150 senior corporate executives. It was funded by a private foundation created for the purpose. A series of "task forces" was charged with surveying the respective agencies, conducting the preliminary fact-gathering, and formulating the initial recommendations for the consideration of the Executive Committee. Each task force was chaired by a member of the Executive Committee and staffed with other volunteers. Together, nearly a thousand private citizens served.

This effort in many ways resembled a Presidential transition -- individuals who continued to be employed by private firms had extraordinary access to government agencies for a temporary period, made high-level recommendations concerning the agencies with which they were dealing, and returned to their own employers. The effort was controversial: charges were made that

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[1]Exec. Order 12,369, 47 Fed. Reg. 28899 (1982).

the task force members had conflicts of interest, and it was urged that they should be subject to the federal conflict of interest requirements.[2] While the federal conflict of interest requirements applied to the members of the Executive Committee itself, the task force members were exempt. Perhaps this experience alone indicates the wisdom of having some sort of baseline conflict of interest requirements and guidelines for agencies in dealing with similar efforts.

While no known serious problems have arisen during recent transitions, because the Presidential transition occupies a peculiar place in governmental organization, because the application of the federal conflict of interest provisions is not always clear,[3] and because of the inherent potential of at least the appearance of conflicts of interest, it is appropriate to develop standards of conduct for the transition effort to ensure an orderly transition that maintains the public's confidence.

Transition officials do not have the authority to make government decisions, and they have special access to agencies for a very brief time. It is therefore not essential that they be subjected to the full rigor of the conflict of interest rules that govern full-time employees. Moreover, imposing such requirements would likely inhibit the ability of the President-elect to secure the services of individuals he would like to enlist. The applicable conflict of interest requirements, especially those that apply to part-time or temporary employees, do provide a starting point that can provide the basis for those that might appropriately be imposed, however.

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[2]See, e.g., *National Anti-Hunger Coalition v. Executive Committee*, 557 F. Supp. 524 (D.D.C.), *aff'd* 711 F.2d 1071 (D.C. Cir. 1983); Cohen, *Reagan's Cost Control "Bloodhounds" Are Hounded by Charges of Conflicts*, National Journal (January 15, 1983) at 122.

[3]Even if the application of the federal conflict of interest provisions were abundantly clear in a given situation, as the Conference has noted before: "The problem of post-employment activities of former Federal employees is too complicated, and the distinctions between permissible and impermissible conduct too fine, for fair and effective enforcement by criminal sanctions in most cases." Recommendation 79-7, 1 CFR § 305.79-7. If that is true with respect to full-time employees, it is even more so with respect to members of the transition team.

II. A TRANSITION WORKER SHOULD NOT BE REGARDED AS A SPECIAL GOVERNMENT EMPLOYEE

The federal conflict of interest statutes[4] restrict certain activity of both current employees and those who have terminated their service.

Special Government Employees.

The statute divides employees of the government into two categories, employees and special government employees.[5] A "special government employee" ("SGE") is an employee[6] who serves on a temporary or intermittent basis.[7] The classification of special government employee was created in 1962 to establish a status of federal employee as to which some, but not all, of the conflict of interest requirements would apply, the theory being that the full scope of restrictions were unduly burdensome when applied to temporary or intermittent employees.[8]

Who is a Special Government Employee?

A determination that someone is an employee or special government employee imposes significant restrictions upon that person's activities. The question, therefore, is whether a member of the transition team could be held to be an SGE. If he is regarded as providing services to the government, which will be taken up later, the question then becomes whether he is an "employee" or an "independent contractor."

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[4]18 U.S.C. §§ 202-209.

[5]18 U.S.C. § 202(a).

[6]Note, importantly, that the first requirement of being an SGE is that the person must be an employee of the government and not occupy some other relationship, such as an independent contractor.

[7]The statute defines an SGE as an employee "who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, or temporary duties either on a full-time or intermittent basis. . . ."

[8]Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters before an Agency*, 1980 Duke L. J. 1,9 (1980); Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1123-7 (1963).

Someone who provides advice to the government -- typically called a "consultant" -- may serve the government as either an employee or as an independent contractor. The *Federal Personnel Manual* provides guidelines for determining whether an employee-employer relationship exists between a consultant and the government:[9]

> Ordinarily when an agency uses the advisory services of someone of consultant caliber, the agency creates an employee-employer relationship governed by this chapter. Pay for personal service usually indicates an employee-employer relationship, but the relationship also exists when service is unpaid. However, the facts in a situation govern whether the relationship exists . . . . Although not all the conditions usually associated with the relationship are present, an employee-employer relationship subject to this chapter usually exists when the person:
>
> 1) serves under the direction and supervision of a federal employee;
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> 2) works in space and with equipment provided by the government;
>
> 3) has access to agency records and files;
>
> 4) analyzes for solution specific agency problems and functions and presents recommendations or reports;
>
> 5) ordinarily serves on more than one occasion on the same project, and may serve periodically for some time;
>
> 6) works on dates or at hours set by or required to be reported to the agency.

The primary test for determining whether someone is an SGE or an independent contractor is the degree of operational control or supervision exercised by the Government official for whom the services are being rendered: independence is the key.[10]

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[9]Chapter 304, "Experts and Consultants".

[10]Davis, *Special Government Employees: Application of Conflict of Interest Laws and Regulations*, Office of Government Ethics Conference (1981) at L-2.

Application of the General Rules to the Transition.

Several of these criteria would point squarely to the transition team as being SGEs. Many of them will work in space and with equipment provided by the government. They certainly have access to agency records and files. They analyze agency problems and functions and present recommendations and reports, although they may not be involved in "specific" problems.

But, do they serve under the direction and supervision of a federal employee? Their loyalty, indeed their very reason for being, is to provide advice to the President-elect. They do not answer to a government employee or officer, let alone be supervised by one. Nor do they provide advice or services to the government as such. They provide it to the President-elect who occupies a singular status -- not quite private, but not yet part of the government. Thus, under generally applicable provisions, the transition team would not likely be regarded as SGEs.

Presidential Transition Act.

In addition, the matter has been addressed at least somewhat by statute. The Presidential Transition Act of 1963 provides:

> Notwithstanding any other law, persons receiving compensation as members of the office staffs under this subsection, other than those detailed from agencies, shall not be held or considered to be employees of the Federal Government . . . .[11]

To be sure, the transition team that goes out into the agencies may not be regarded as part of "the office staff," and the section only applies to those who are compensated under the Act. But, the intent behind the law appears to be that the President-elect is not part of the government itself but needs resources for "his preparation for the assumption of official duties,"[12] and that would certainly seem to be equally applicable to transition members who are not part of the office staff and who are not paid under the Transition Act. The thrust of the Act, therefore, accords with the

[11] § 3(a)(2), published at 3 U.S.C. § 102 n.
[12] § 3(a).

application of the general rule that the transition team should not be regarded as SGEs.[13]

III. THE FEDERAL CONFLICT OF INTEREST REQUIREMENTS

The federal conflict of interest statutes impose detailed and complex requirements on employees and former employees. They vary with respect to whether the person is a current or former employee, the extent to which the employee has or had authority over the issue in question, and whether the person is a regular or special government employee, and even in this case, the obligations vary. A relatively detailed review of the conflict of interest restrictions is contained in the Appendix. Inasmuch as these duties are not directly applicable to transition workers but do serve as an important analogy or starting point for recommended standards of conduct, they are described here in a general way.

General or Specific Issues.

On the whole, the conflict of interest statutes that restrict the activities of government employees and former employees vary with respect to whether the issues involved are general (called "particular matters" in the statutes)[14] or specific (called "particular matters involving a specific party or parties" in the statutes).[15] General issues cover all types of discrete agency decisions, no matter how broad the effect, including rulemaking and matters of policy. In contrast, specific issues are more limited: they concern a proceeding that affects the legal rights or status of identifiable

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[13]This analysis demonstrates a cautionary note, however. A transition team member who has direct contact with an agency, especially if that person expects to assume a senior position in the agency after the inauguration, may be tempted to undertake additional responsibilities beyond those required for the transition. It may be that by doing so he would then be regarded as an SGE with respect to those duties, and the conflict of interest restrictions would apply.

[14]See the discussion in the Appendix, text accompanying nn. 55,56, for an elaboration on the term "particular matter."

[15]See the discussion in the Appendix, text accompanying nn. 57, 58, for an elaboration on the term "particular matter involving a specific party or parties."

parties or a particular transaction between parties. Thus, for example, an employee's participating in the design of a program for training teenagers would be a general issue, but not a specific one. His participation in the decision as to whether or not to provide a particular applicant with funds would be a specific matter; it is also, of course, a general one.

Restrictions While an Employee or SGE.

Employees may not concurrently be paid by or represent others. An employee may not be paid by[16] nor represent anyone other than the government before a court or agency[17] concerning any general matter in which the government itself is interested. Thus, for example, any employee of the agency which is considering the training program above may not be paid by nor represent anyone with respect to that program.

SGEs may not be paid by or represent others as to specific matters. These restrictions apply to an SGE only with respect to specific matters in which the SGE has actually participated personally and substantially. But, if the SGE serves more than sixty days in a calendar year, the restrictions apply to all specific matters which are pending before his agency. An SGE who participated on an advisory committee with respect to the design of the program could represent an applicant for a grant under the program since he did not participate personally and substantially in the relevant specific decision. He could represent someone with respect to the program itself, as long as he did not have a financial conflict of interest, since the prohibition applies only to specific matters. If, however, the SGE worked more than sixty days during the year, he could not represent the party with respect to the application since it would be a specific matter pending in his agency. Note that under the first of these two sections, an SGE is prohibited altogether from being compensated by anyone other than the government for such matters, including counseling or advising clients in the privacy of his own office.

Financial conflict. An employee, including an SGE, is also prohibited from participating in any general matter in which he or a close relation has a financial interest. This restriction may be

[16]18 U.S.C. § 203.
[17]18 U.S.C. § 205.

waived, however, if the employee discloses the conflict in advance and receives a written determination that it is not so substantial as to be likely to influence his official duties.

Restrictions on Former Employees.

Employees, including SGEs, who leave government service are subject to three levels of restrictions on their activities.

Permanent ban on representation concerning specific matters in which employee participated. An employee, including an SGE, may **never** represent[18] anyone in an appearance before **any** agency or court with respect to any specific matter in which he participated[19] personally and substantially. Note that it is the contact with an agency or court that is prohibited here. This section does not restrict the former employee from counseling another party with respect to such an issue so long as he does not contact an agency or court with respect to trying to influence the decision, nor does it prohibit the former employee from representing someone in a general matter.

Two year ban on representation concerning specific matters under official responsibility. For a period of two years, a former employee may not represent anyone in an appearance before any agency or court with respect to any specific matter which was pending under his official responsibility within one year prior to his leaving. Under this section, for example, a former SGE who sat on an advisory committee that made recommendations for contracts to implement the teenage training program could not appear before an agency with respect to an application for a contract if the application had been submitted within one year before he left even if he had not acted on the matter himself. He

[18]"Represent" means "knowingly act[ing] as an agent or attorney for, or otherwise represent[ing a party], in any formal or informal appearance, or with the intent to influence, mak[ing] any oral or written communication on behalf of] a party before an agency or court. 18 U.S.C. § 207(a).

[19]For purposes of the conflict of interest statutes, "participate" includes "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." Thus, someone who analyzes a program and makes recommendations for new policies would be regarded as "participating" in the decision concerning those policies.

could counsel others concerning the application, and he could appear before his old agency with respect to matters not under his authority before he left. And, indeed, he could represent others on general matters under his authority; thus, he could represent the same applicant with respect to a proposed change in the general rules.

Two year ban on advising with respect to a specific issue in which senior official participated. In addition, senior agency officials are prohibited for two years after their departure from representing or advising others by personal presence before any agency or court with respect to any specific matter in which he participated personally and substantially. Under this section, the former high official may be physically present in the room but only as an observer. If he is present and provides advice concerning the matter, he has violated the duty. This restriction lasts for two years; the more general one above, however, continues to prohibit the official from ever representing anyone concerning such matters. What he gains after two years, is that he can sit in the hearing room and provide advice to a colleague.

One year ban on senior officials from contacting former agency. Senior agency officials, other than SGEs who serve less than sixty days, may not represent anyone in an appearance before their former agency with respect to any general matter which is pending before the agency. Under this section, the former executive is barred for one year from even contacting his former agency with respect to any matter, if the contact is intended to influence a decision. He may, however, represent someone with respect to such matters before other agencies or in court, and he may counsel clients concerning such matters so long as he does not contact his former agency.

Partners of Employees.

A partner of an employee,[20] including an SGE, is prohibited from acting as the agent or attorney for anyone before any agency or court in connection with any general matter in which the

[20]This restriction applies only to partners of current employees. It therefore does not bar the partners of a former SGE from representing another party in a matter in which the SGE participated while in government service.

employee participates or has participated personally and substantially.

IV. OTHER DUTIES OF SGEs

Additional requirements have been imposed on SGEs by an Executive Order initially issued by President Johnson to provide "Standards of Ethical Conduct for Government Officers and Employees."[21] Since many of its duties for SGEs are relevant to transition workers, the appropriate section is set out here:

> PART III - Standards of Ethical Conduct for Special Government Employees
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> Sec. 301. This part applies to all "special Government employees" as defined in Section 202 of Title 18 of the United States Code, who are employed in the Executive Branch.
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> Sec. 302. A consultant, adviser or other special Government employee must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or other persons, including particularly those with whom he has family, business, or financial ties.
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> Sec. 303. A consultant, adviser, or other special Government employee shall not use any inside information obtained as a result of his government service for private personal gain, either by direct action on his part or by counsel, recommendations or suggestions to others, including particularly those with whom he has family, business, or financial ties.
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> Sec. 304. An adviser, consultant or other special Government employee shall not use his

[21]Published at 18 U.S.C. § 201 n., 30 Fed. Reg. 6469 (May 8, 1965). It was subsequently amended in 1971 (36 Fed. Reg. 7831) and 1978 (44 Fed. Reg. 1055). Section 306 of the Order, which required financial disclosure, was repealed by Exec. Order 12,565, 51 Fed. Reg. 34437 (September 25, 1986); additional financial disclosure requirements were imposed by Part IV of that order.

> position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business, or financial ties.
>
> Sec. 305. An adviser, consultant, or other special Government employee shall not receive or solicit from persons having business with his agency anything of value as a gift, gratuity, loan or favor for himself or persons with whom he has family, business, or financial ties while employed by the government or in connection with his work with the government.

Like the statutory provisions, the Order would not likely apply directly to the transition team, but also like the statute itself, it provides an analogy for the types of requirements to which the team needs to be sensitive.

The Office of Government Ethics has issued general requirements for employee responsibilities and conduct.[22] They are to be implemented by regulations issued by the individual agencies. Two are particularly relevant to this inquiry, although by their terms neither is directly applicable to an SGE:

> **Use of Government property**[23]
>
> An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him.

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[22] 5 CFR Part 735.

[23] 5 CFR § 735.205.

Misuse of Information[24]

> For the purpose of furthering a private interest, an employee shall not ... directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public.

The Ethics in Government Act requires senior level SGEs and such others as the President may designate to file a financial disclosure report.[25] The reports include: income in the form of dividends, interest, rent, and capital gains; other income, including honoraria; gifts of food, lodging, transportation and entertainment; other gifts; assets and liabilities; transactions involving certain assets; certain positions held in any corporation, firm, or business; and any arrangements or agreements with a former or future employer, and the identification of certain major clients.[26] These reports are extensive and require sufficient detail that they are the subject of frequent complaints as to both the time required for their completion and their intrusiveness. Given the limited duration of the transition team and its lack of direct authority, like the conflict of interest provisions, it would not seem necessary or appropriate to impose the full rigors of the financial disclosure provisions on them. Rather, as the legislation currently pending in Congress would do, a more limited disclosure as to the identity of the individual's private employer, if any, and the sources, if any, of funds that are supporting him during the transition.

V. RECOMMENDATIONS

Using the conflict of interest restrictions imposed on special government employees as an analogy and taking into consideration the special circumstances of the Presidential transition, the Committee recommends the following Standards of Conduct for members of the Presidential transition team who have access to non-public information:

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[24] 5 CFR § 735.206.

[25] §§ 201(f)(3), 207(a). The reporting requirements are contained in 5 CFR § 734.

[26] ACUS, *Federal Administrative Procedure Sourcebook*, 409 (1985).

No. 1. *Disclosure of Information.*

> A special transition team member shall supply the agency with a statement as to his or her present employment and the sources of funding which support his or her transition activities.

This is the standard contained in the currently pending legislation. It is less intrusive than that required of an SGE, but it will provide the agency and the public with critically important information: who is the transition employee's private employer and who is financing his participation in the transition effort.

No. 2. *Misuse of Inside Information.*

> A special transition team member shall not use, directly or indirectly, or permit others to use, official non-public information to further a private interest.

This is the same standard applicable to SGEs.

No. 3. *Financial Self-Dealing.*

> A special transition team member shall not take any action on a particular matter involving the federal agency which could have a direct effect upon a financial interest of the transition team member, his or her spouse, a family member, or any individual with whom the transition team member has a business, professional or close personal relationship.

This is the same standard applicable to SGEs.

No. 4. *Concurrent Representation in Agency Proceedings.*

> During the transition period, a special transition team member shall not advise or represent, with or without compensation, anyone in any particular matter involving a federal agency to which he or she has had access to non-public information. This restriction does not extend to the special transition team member's firm or organization, but the team member should advise his or her firm or organization to establish procedures to assure that

the team member does not participate in any way in any such agency proceeding

This is more restrictive than that applicable to SGEs, but less restrictive as to partners.

An SGE is prohibited only from being compensated by or representing another party with respect to specific issues -- particular matters involving a specific party or parties -- in which he participates personally and substantially as a government employee or, if the SGE is employed for more than sixty days, with respect to any matter pending before the agency. The concern addressed by this standard is that a transition worker who has access to confidential information may be perceived as having significant influence on the decisions of the agency generally, purely as a result of the special access, and not just with respect to specific issues in which he participates. This restriction is therefore triggered by access to non-public information and would, in addition, prohibit the transition worker from advising or representing another party with respect to any particular matter involving the agency -- including matters of general policy or rules. Thus, for example, during the transition, a transition worker with access to non-public information could not advise a client concerning a rulemaking or other policy matters, even if the confidential information to which he had access did not pertain to the relevant program within the agency. An SGE could, however, advise or represent another party concerning general policy matters or (if he worked less than sixty days) specific matters which were outside the scope of his authority.

On the other hand, this standard provides that the restrictions are not to be imputed to the transition member's partners or organization, although they are to be requested to establish screening procedures. The partners of an SGE may not act as the agent or attorney for any party in any particular matter in which the SGE has participated personally and substantially. In this case, for example, if a partner in a law firm is serving as an SGE and in that capacity makes policy recommendations concerning a new rule, his partners may not represent anyone in the associated rulemaking proceeding. In this recommended standard, the partners would be permitted to do so. That is because the transition continues for such a short period, the transition worker will not have any decisional authority with respect to the matter, and the transition worker is otherwise barred from advising with

respect to the issue. It therefore appears that the risk of gaining undue influence is relatively slight, yet the potential cost of inhibiting qualified people from participating in the transition because their firm may be involved in some matter before the agency would likely be high.

No. 5. *Misuse of Government Property.*

(a) A special transition team member shall not use federal property, including equipment and supplies, other than for purposes directly related to transition activities.

(b) A special transition team member shall conserve and protect federal property entrusted to him or her.

This is the same standard applicable to SGEs.

No. 6. *Post-Transition Activities.*

After the transition, a former special transition team member shall not advise or represent, with or without compensation, any person before an agency in any particular matter as to which he or she obtained official information not then available to the public and not made public prior to the request for advice or representation.

This restriction is similar to the two year ban applicable to senior agency officials who participated personally and substantially in the decision, except that it applies to general matters and is not limited to specific ones. Because the transition worker would not have any decisional authority nor any lasting institutional presence, as does a former senior official, it does not seem necessary or appropriate to bar him from participating in matters after the transition simply because he may have made recommendations concerning them during his tenure. On the other hand, it would continue to be inappropriate to use confidential information garnered as a result of the transition, and hence this standard would bar the former transition worker from advising or representing any party before the agency, including issues of general policy so long as the information is not publicly available; once the public at large has the information, the restrictions are removed. There is no precise analog in the

conflict of interest statutes for this standard, although employees and SGEs are banned generally from using confidential information for personal ends; this is a specific application of that general requirement.

APPENDIX

ANALYSIS OF THE FEDERAL CONFLICT OF INTEREST REQUIREMENTS APPLICABLE TO FEDERAL EMPLOYEES AND SGEs

Restrictions on Concurrent Representation.

A federal employee is prohibited from receiving compensation except as provided by law for the proper discharge of his duties "in relation to any . . . particular matter in which the United States is a party or has a direct or substantial interest . . . ."[27] Moreover, a federal employee may not act as an agent or attorney for anyone before any agency or court "in connection with any . . . particular matter" in which the United States has a "direct and substantial interest."[28] A violation of these restrictions may result in a fine of not more than $10,000 or imprisonment for not more than two years, or both.

These requirements apply to a lesser degree to special government employees. They apply to an SGE "only in relation to a particular matter involving a specific party or parties[29] . . . in which he has at any time participated[30] personally and

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[27]18 U.S.C. § 203(a).

[28]18 U.S.C. § 205.

[29]For an analysis of the distinction between the terms "particular matter" and "particular matter involving a specific party or parties", see pages 21-22. Basically, "particular matter" includes rulemaking and general policy issues, no matter how general the effect. The term "particular matter involving a specific party or parties" typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties; it does not include rulemaking or the formulation of general policy.

[30]For purposes of the conflict of interest provisions, the term "participates" includes "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise."

substantially" as an SGE.[31] For example, an SGE who participates in the awarding of a federal contract to one competitor over another may not represent the losing contractor in an action against the United States for rescission of the award. On the other hand, if he participated in the design of the overall program that was to be implemented by a series of contracts, he may represent a firm with respect to obtaining a contract.

The full rigor of these restrictions apply, however, to an SGE who serves for more than sixty days out of a year regarding any matter pending before the agency which the SGE serves.[32] Thus, for example, an SGE who works 61 days in a calendar year may not be retained[33] to even make an inquiry concerning the status of a specific proceeding such as the award of a contract or permit. The SGE could, however, inquire about and encourage the shaping of a general policy or represent a party in a rulemaking proceeding.

Financial Conflicts.

An employee or SGE is prohibited from participating personally and substantially in any "particular matter" before an agency or court in which the employee to his knowledge has a

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[31]18 U.S.C. §§ 203(c)(1), 205.

[32]Id. Section 205 contains a waiver provision for an SGE who works for an outside organization under a contract with the United States. This provisions states, "nothing herein or in Section 203 prevents a special government employee from acting as agent or attorney for another person in the performance of work under a grant by, or in contract with or for the benefit of, the Unites States provided that the head of the department or agency concerned with the grant or contract shall certify in writing (to be published in the Federal Register) that the national interest so requires." 18 U.S.C. Section 205. This exception permits an SGE to assist a government contractor in the performance of a government contract. Other waiver provisions apply with respect to non-compensated representation in disciplinary proceedings. An employee may also represent his family except in matters in which he participated personally and substantially, provided the official responsible for his appointment to his position approves.

[33]If the SGE were paid for the services, he would violate § 203. Even if he were not paid but nonetheless acted as the agent or attorney for someone else, he would violate § 205, except for directly personal relationships.

financial interest.[34] The restriction applies equally to financial interests of the employee, "his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment.[35] Thus, without a waiver, an SGE may not make recommendations concerning general policy matters, such as a proposed rule, if that rule or policy would benefit his private employer. As a specific example, a feedlot operator may not make recommendations to the Food and Drug Administration concerning the desirability of the use of low levels of antibiotics in animal feeds, since presumably the policy, whether or not it were adopted, would affect his operating costs.[36]

This prohibition does not apply if the employee or SGE fully discloses to the proper government official the nature of his interest and receives "in advance a written determination that this interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or employee."[37] The government may also exempt by general rule certain types of financial interest which are remote or inconsequential.[38]

Payments from Other Sources.

Employees may not receive payment for their service as federal employees from any source other than the United States government.[39] The section does not apply to special government employees, however.[40]

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[34]18 U.S.C. § 208(a). The penalty for a violation is a fine of not more than $10,000 or not more than two years imprisonment, or both.

[35]Id.

[36]Office of Legal Counsel, *Memorandum Opinion for the Chief Counsel, Food and Drug Administration*, No. 78-37 (1978).

[37]18 U.S.C. § 208(b).

[38]Id.

[39]18 U.S.C. § 209.

[40]§ 209(c) provides:

> This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation,

Restrictions on Post Employment Activities.

Three levels of conflict of interest restrictions apply to government employees, including SGEs, who leave government service.[41]

Former government employees, including SGEs, are forever prohibited from acting as "agent or attorney or otherwise representing any person . . . in any . . . appearance before or, with the intent to influence, mak[ing] any oral or written communication" to any agency or court with respect to[42] any "particular matter involving a specific party or parties" in which they participated personally and substantially while in government service.[43] Thus, a former government employee, including an SGE, may never represent a party before any agency or court concerning a specific adjudicatory-type proceeding in which he participated, including through the rendering of advice or recommendations. He may counsel clients concerning such matters, however, so long as he does not communicate with a government decision maker. The ban does not reach providing advice on general policy matters or rules.

Former government employees, including SGEs, are also prohibited for two years from acting as the agent or attorney or otherwise representing any person in any appearance before or, with the intent to influence, communicating with any agency or court with respect to any "particular matter involving a specific party or parties" in which they participated personally and substantially and "which was actually pending under [their] official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility".[44] Thus, even

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whether or not he is a special Government employee. . . .

[41]18 U.S.C. § 207.

[42]The statutory phrase is "in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest". § 207(a)(2).

[43]§ 207(a).

[44]18 U.S.C. § 207(b)(3)(i).

if the SGE did not "participate personally and substantially" in making the decisions, he may not represent anyone else before any agency or court for two years on that matter if it was pending under his official responsibility within the year prior to his leaving. For example, if an SGE were hired to review applications for housing subsidies, for two years after leaving the government service, he could not represent anyone[45] who had an application pending, even if no decision were made on it during his tenure.

Other restrictions apply to employees on the Executive Schedule and those involving "significant decision-making or supervisory responsibility, as designated . . . by the Director of the Office of Government Ethics, in consultation with the department or agency concerned."[46] For two years, they may not represent, aid, counsel, advise, or assist in representing any other person by personal presence at any formal or informal appearance before an agency or court concerning any matter in which they participated personally and substantially.[47] In this case, high officials who participated personally and substantially in an adjudicatory-type proceeding[48] may not be physically present (other than as strict observers; they may not "advise" anyone with respect to the issue) before an agency or court concerning that matter for a period of two years. They may, however, provide advice and counsel on the matter in the privacy of their own offices.

Moreover, for one year after the termination of employment such a senior individual, except SGEs who serve less than sixty days in a calendar year, may not act as an agent or attorney nor otherwise represent anyone in any appearance before his agency[49]

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[45]Representation here means by appearance before the agency or communicating with it -- even if a different agency than the one for which he worked or in judicial review of an agency action. It does not mean that the former employee cannot counsel others as to such matters so long as he does not contact the government.

[46]18 U.S.C. § 207(d)(1)(C). The list is contained in 5 CFR § 737.33.

[47]18 U.S.C. § 207(b)(3)(ii).

[48]It seems easier, if perhaps a bit inaccurate, to use this term as opposed to "particular matter involving a specific party or parties."

[49]The Director of the Office of Government Ethics may limit these restrictions to permit a former senior official other than the agency heads or other specific officials to appear before a separate

in a "particular matter" in which the agency has a direct and substantial interest.[50] Under this provision, these officials may not, for one year, represent anyone on any issue which is pending in the agency by appearing before the agency nor may he otherwise contact his former agency with the intent of influencing the decision. He may, however, represent parties before other agencies or in court, and he may counsel clients concerning those issues so long as he does not contact his former agency.

Partners of Employees.

A partner of an employee, including an SGE, may not serve as the agent or attorney before any agency or court in any "particular matter" in which the employee participates or has participated personally and substantially.[51]

Ban on Appearances for Violations.

If the agency head finds, after notice and opportunity for hearing, that a former employee has violated these provisions, he may prohibit the former employee from making any appearance before the agency or submitting any oral or written

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division of the agency having separate and distinct subject matter jurisdiction if he determines that there exists no potential for undue influence or unfair advantage based on past government service. 18 U.S.C. §§ 207(d)(1)(C), (e). The regulations setting out the distinct sub-programs is contained in 5 CFR §§ 737.31, 32.

[50]18 U.S.C. § 207(c). The penalty for violating this Section is a $10,000 fine or imprisonment for not more than two years, or both.

This one year ban does not apply to former employees who are elected officials of a state or local government or an accredited degree granting institution of higher education, or a hospital or medical research organization. § 207(d) (2). An agency may also exempt a particular individual from the one year ban if the individual has outstanding qualifications in a technical discipline and the national interest would be served by his appearance. § 207 (f).

[51]18 U.S.C. § 207(g). Importantly, this restriction applies only to partners of current employees: "Neither the Act nor these regulations impute the restrictions on former employees to partners or associates of such employees." 5 CFR § 737.21(b).

communication to the agency on a pending matter for a period of up to five years.[52]

"Particular Matter" Versus "Particular Matter Involving a Specific Party or Parties".

The statutes distinguish between "particular matters" and "particular matters involving a specific party or parties." For example, §§ 203(a), 205, 207(b), 207(g) and 208 restrict participation in "particular matters" whereas §§ 203(c), 205 (as it applies to SGEs), 207(a), and 207(b) are limited to "particular matters involving a specific party or parties." The question therefore becomes, is there a difference and if so, what is it?[53]

As one of the members of the advisory panel appointed by President Kennedy to recommend changes in the federal conflict of interest laws explained:

> The significance of the phrase "involving a specific party or parties" must not be dismissed lightly or underestimated. [The statute] discriminates with great care in its use of this phrase. Wherever the phrase does appear in the new statute it will be found to reflect a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate.[54]

The first issue to be addressed, therefore, is what is a "particular matter." The Office of Legal Counsel found that the term applies "to any discrete or identifiable decision, recommendation, or other matter even though its outcome may

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[52]18 U.S.C. § 207(j).

[53]For example, one observer who was present at the creation of the current statute appears to think the language is a difference without meaning: "it seems doubtful that these discrepancies carry any substantive difference." Perkins, *supra* n. 8, at 1127. He points out that the phrase "involving a specific party or parties" was added by the Senate Judiciary Committee at the request of the Department of Justice. At n 51.

[54]B. Manning, *Federal Conflict of Interest Law* (1964) at 204.

The panel consisted of Judge Calvert Magruder of the First Circuit, Dean Jefferson Fordham of the University of Pennsylvania Law School, and Professor Bayless Manning. Morgan, supra, at 9.

have a rather broad impact."[55] The Director of Office of Government Ethics recently explained to Congress that OGE and the Department of Justice interpret the term "particular matter," without further qualification, as including "rulemaking and general policy matters, and extend[ing] to all discrete matters that are the subject of agency action, no matter how general the effect."[56]

On the other hand, the restrictive phrase "particular matter involving a specific party or parties" does not include "general rulemaking, the formulation of general policy or standards, or other similar matters."[57] Indeed, the regulations of the Office of Government Ethics define the highlighted term as meaning:

> Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. Therefore, a former Government employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding.[58]

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[55]OLC, *supra* n. 36.

[56]Testimony of Frank Q. Nebeker, Director, Office of Government Ethics, before the Senate Committee on Governmental Affairs on The Federal Advisory Committee Act, April 19, 1988 at 9.

[57]Memorandum of the Attorney General Regarding Conflict of Interest Provisions of Public Law 87-849, 18 U.S.C. § 201 n.

[58]5 CFR § 737.5(c).