Federal conflict-of-interest laws as applied to government service by partners and employees of accounting firms; Partners and employees of accounting firms

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Federal Conflict-of-Interest Laws
As Applied to Government Service by

PARTNERS
AND EMPLOYEES
OF ACCOUNTING FIRMS

by
Roswell B. Perkins
and
Richard D. Bohm

AICPA
American Institute of
Certified Public Accountants
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Debevoise, Plimpton, Lyons & Gates

American Institute of Certified Public Accountants
Foreword

If you are a certified public accountant planning to enter a federal public service post, you will find this summation of conflict-of-interest laws useful.

The booklet, published by AICPA, summarizes laws and regulations that apply to partners and employees of accounting firms. It was designed to provide overall guidance on federal laws as they pertain to professionals entering public service. With regard to detailed questions relating to individual circumstances, CPAs and their firms are advised to consult with legal counsel.

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Introduction

The material that follows is designed as a guide for CPA practitioners entering federal service. In addition to this book and other written guidance, assistance is available from the staffs of the Office of Government Ethics and the designated ethics officials of the federal departments or agencies in which the service will be rendered, and their help should be sought without hesitation.

This book does not address public service at the state and local government levels, since the statutes, ordinances, and regulations for each state and municipality differ and must be examined separately.

The federal service conflict-of-interest problems may differ somewhat for personnel from large accounting firms or from small ones; however, the principles are the same.

The federal conflict-of-interest statutes are part of the criminal statutes included in the United States Code. These statutes and their general subject matter follow:

<table>
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<tr>
<th>Statute</th>
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<tr>
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<td>No supplementation of government salary</td>
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The regulations of the Office of Government Ethics and regulations promulgated by individual departments and agencies must also be considered in connection with particular conflict-of-interest issues.

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1 5 C.F.R. pts. 734, 735, and 737.
Chapter 1

Arrangements for Entering Full-Time Government Service

1.1 Preemployment Procedures

Before entering federal government service, a partner or employee of an accounting firm should review any potential conflict-of-interest problems with a partner of the firm who has responsibility for such matters and with counsel or special counsel for the firm. The partner or employee should then submit the details of all proposed economic arrangements with the accounting firm, including any arrangements concerning return to the firm, to the official within the prospective department or agency who has been designated to deal with conflict-of-interest matters. This official may or may not be the general counsel of the department or agency.1 Most of this information would appear on the financial disclosure report referred to in chapter 5 of this book. A draft of the report could be submitted to such general counsel. The prospective employee should obtain a letter from such general counsel that (a) approves all the proposed economic arrangements between the individual and his firm (as well as other personal financial interests of the individual) and (b) sets forth a practical program for disqualification of the individual, after he becomes a government employee, from dealing with matters in which he or his firm has a financial interest.

Some aspects of the proposed disqualification arrangements may need to be dealt with through a written determination, such as a ruling or exemptive order, signed by the government official responsible for the appointment. See section 2.1.2.

1.2 Resignation or Leave of Absence

Except for employees of an accounting firm who expect to serve in the special program known as the President's Executive Exchange

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1 For simplicity, we shall hereinafter use the term "general counsel" to mean the designated agency ethics official. Each department and agency has been required to designate such an official.
Program, partners and employees of accounting firms who become full-time government employees should resign from their firms rather than accept leave-of-absence status. Resignation is consistent with the essential economic break that must be made regarding current profit-sharing or receipt of salary. Moreover, resignation demonstrates a definitive act of legal separation from the firm.

Employees of an accounting firm who become "exchange executives" under the President's Executive Exchange Program are not required to resign and may request leave-of-absence status under the regulations governing that program.2

The partner or employee benefit plans of some accounting firms may provide for the continued participation of former partners or employees "on leave of absence." Firms having such plans may wish to amend them to permit continued participation for a limited time (perhaps four years) for partners and employees who have resigned to enter public service.

1.3 Prohibition on Supplementation of Government Salary

One section of the conflict-of-interest laws (18 U.S.C. § 209) prohibits any form of supplementation of the government salary of a government employee. Thus, a former partner of an accounting firm who has entered federal service may not share in the income of the firm earned after the commencement of his government service since receipt of such partnership income would constitute a form of supplementation of government salary. Likewise, there should be no overlap of firm and government salaries for an employee of an accounting firm who leaves for federal service.3

The partnership agreements of some firms provide that a partner's share of firm income for a portion of a fiscal year will be prorated (on the basis of months, weeks, or days), using an estimate of the full fiscal year income. Any rational and reasonable basis for making the estimate of predeparture firm income would appear to be acceptable under the conflict-of-interest laws.

2 In the event that a partner of an accounting firm should become an exchange executive, resignation is recommended over leave of absence. Under 18 U.S.C. § 207(g) certain prohibitions extend to the partners of an individual in government service. It would be desirable to avoid these restrictions altogether, even though their impact would be limited.

3 18 U.S.C. § 209 does not preclude payment for accrued vacation that has been earned under an established formula but has not been taken by the employee at the time his government service begins.
1.4 Relocation Expenses

Until recently, one could reasonably expect that moving expenses may legally be paid by an individual’s former firm. However, a recent amendment to 18 U.S.C. § 209 and the legislative history of that amendment make it clear that reimbursement of moving expenses for individuals entering government service is generally prohibited; that is, such reimbursement is considered a supplementation of government salary. The recent statutory amendment created an exception to the prohibition for participants in an exchange or fellowship program in an executive agency.

When the exception is applicable (principally, in the case of White House Fellows and exchange executives under the President’s Executive Exchange Program), the expenses that may be reimbursed by the firm are limited to those that (a) are directly related to the relocation, (b) are incurred before government service commences, and (c) do not result in the realization of gain or profit to the reimbursed party. A letter that was made part of the legislative history of the recent amendment to 18 U.S.C. § 209 describes the scope of permissible reimbursements:

While specific payments would of course be subject to approving opinions by counsel for host departments and/or the Department of Justice, the intent of the drafters is that such payments might include reimbursement of broker’s fees and other costs of selling or renting a home in the city of private employment and buying or renting a home in the Washington area; moving expenses for household goods; travel expenses for the participant and his family to Washington; house-hunting trips; and temporary housing; provided that such expenses were directly related to the move, and were incurred prior to the first day of government service. Expenses not directly related to the move, or incurred after the beginning date of government service, or payments which resulted in a gain or profit, are not intended to be covered by the legislation. Such payments might include moving allowances in lieu of reimbursement of actual expenses; use of corporate real or personal property at less than fair market rental; or expenses incurred for storage of personal property not moved; management fees for rental property; personal living

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4 However, 18 U.S.C. § 209 does not apply to a “special government employee” (see section 4.1) or to an officer or employee of the government serving without compensation. 18 U.S.C. § 209(c). Therefore, “special government employees” and government employees serving without compensation may have their travel or moving expenses reimbursed by their firms.

5 The exception created by the statutory amendment is set forth in 18 U.S.C. § 209(e).
expenses; and personal trips from Washington to the participant’s former home during the program year.\footnote{Letter, dated December 20, 1979, from Lee M. Cassidy, executive director of the President’s Commission on Executive Exchange, to Senator Joseph R. Biden, Jr. \footnote{Letter, dated December 20, 1979, from Larry A. Hammond, deputy assistant attorney general, Office of Legal Counsel, to Senator Joseph R. Biden, Jr.}}

If the partner or employee entering government service is not leaving to become a participant in an exchange or fellowship program in an executive agency, there is little that his firm legally can do to share the financial burden of relocation. Relocation benefits such as the following (which are often made available by accounting firms when partners or employees move from one city to another) would seem to be barred along with moving expenses: \(a\) a lump-sum “resettlement allowance,” \(b\) payment for living expenses in temporary quarters, and \(c\) reimbursement for the initiation fee of a social club in the place to which the individual is moving.

A special situation which, if presented, should be discussed with general counsel of the prospective department or agency is the purchase of a home at fair market value by a relocation management company regularly retained by the accounting firm. It seems that 18 U.S.C. § 209 should not be construed to preclude the purchase of a home at fair market value, even though the buyer is a company under contract with the firm the individual is leaving.

The details of any form of proposed reimbursement associated with the move should be described in the initial submission (referred to in section 1.1) to the general counsel of the department or agency the resigning partner or employee proposes to serve, and written approval of the proposed reimbursement should be sought.\footnote{Letter, dated November 1978, from Larry A. Hammond, acting assistant attorney general, Office of Legal Counsel, to Mr. Landis Jones, director of the President’s Commission on White House Fellowships. There seems to be no legal basis for making a distinction between an individual who is returning from government service as a White House Fellow and one who is returning from government service who was not serving in that program.}

\section*{1.5 Other Financial Arrangements}

\subsection*{1.5.1 Group insurance plans}

Coverage under group insurance plans—life, medical expense, long-term disability, accidental death and dismemberment, and so forth—
may be continued during the period of government service. The applicable statute, 18 U.S.C. § 209(b), expressly sanctions a government employee’s continued participation in a bona fide “group life, health or accident insurance . . . plan maintained by a former employer.”

1.5.2 Profit-sharing plans

Continued participation by a government employee in a bona fide profit-sharing plan maintained by a former employer is also expressly sanctioned by 18 U.S.C. § 209(b). This would not permit the former partner or employee to receive credits based on income of the accounting firm earned for services rendered after the commencement of the government service, but would permit an individual’s account in a profit-sharing plan to continue to be invested under the auspices of the plan. Moreover, if the plan provides that credits for “longevity” under the plan may include periods of temporary absence from the firm (including periods of government service), the grant of such credits would not appear to violate 18 U.S.C. § 209.

Profit-sharing plans maintained by some firms require the distribution, upon resignation, of the partner’s or employee’s interest in the plan. If this is the case, the federal conflict-of-interest laws would permit payment to be made either in a lump sum, in periodic installments or through an arrangement such as the purchase of an annuity from a life insurance company.

The details of all forms of continued participation in a profit-sharing plan should be described in the initial submission referred to in section 1.1 to the general counsel of the department or agency in which the individual proposes to serve.

1.5.3 Retirement plans

There is no conflict-of-interest problem created by the right to receive retirement income in the future or by the actual receipt of fixed amount retirement income while in government service, subject, however, to observance of the disqualification provisions of 18 U.S.C. § 208. (See sections 2.1 through 2.5.) Retirement benefits may be paid out in a lump sum or in periodic installments.

The retirement benefits must be fixed in amount and attributable to prior service with the firm. The provisions of 18 U.S.C. § 209(b),

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8 Although 18 U.S.C. § 209 refers to a plan maintained by a former employer, it seems clear that Congress did not intend to discriminate against partners and the partnership form of business.

9 Id.

10 If the plan singled out government service as the only situation in which temporary absence carried with it the right to a continuation of longevity credits, the Office of Legal Counsel of the Justice Department would probably take the view that the credits are not permissible.
which permit continued participation in a bona fide retirement plan, do not appear to have been intended to permit continuation of retirement plan benefits when the former firm has discretion to discontinue them. A private entity should not have the power to cut off a stream of income to a government employee. Therefore, the retirement plan should not permit the former firm to discontinue retirement plan benefits.

If retirement benefits are, or will be, payable to the individual during or following his government service, the government employee should disqualify himself from matters in which his former firm has a financial interest. See section 2.3.

1.5.4 Other termination payments; severance pay
A partner who resigns to enter government service may receive the payment of his share of the paid-in capital of the firm, accrued profits in special accounts or, where the firm's partnership agreement so provides, the difference between past profits determined on a cash basis and on an accrual basis according to any schedule of payments established before he commences government service. The amounts of all payments to be made to the resigned partner must be fixed at the effective resignation date, but the actual payments may be made in installments.

A severance pay program that is "across-the-board" in the sense that it applies to departures for any purpose is clearly permissible. The program must provide that the amount of the payment is fixed before departure. More limited severance pay programs, such as ones that provide for payments in the case of departures into any endeavor other than professional accounting or departures into nonprofit or public service of any type, are probably also permissible, but clearance with the general counsel of the department or agency would be required. The severance payment may not be one triggered solely by federal government service. The severance payment must clearly be related to past service for the accounting firm.

1.6 Public Disclosure of Financial Interests
In general, individuals who enter government service must file a prescribed financial disclosure report within thirty days after commencing government service. A presidential appointee requiring Senate confirmation must file a report within five days of the president's submission of his name to the Senate. The financial disclosure requirements of the conflict-of-interest laws, which require extensive public disclosure of financial interests, are discussed in chapter 5.
1.7 Senate Confirmation Process

Presidential appointees requiring Senate confirmation must submit to a confirmation hearing before the Senate committee having jurisdiction over the department or agency in which the appointee will serve. Possible conflicts of interest are virtually always a matter of discussion, both informally (with the committee staff or chairman, or both) in advance of the hearing and formally in the open committee hearings themselves. Presidential appointees should be fully prepared for these discussions with the help of prior briefings by the general counsels of the departments or agencies they expect to serve and, depending on the circumstances, by a representative of the counsel to the president. All possible conflict-of-interest issues should be considered and resolved in advance.

In addition to the financial disclosure report (referred to in section 1.6), a memorandum should set forth (a) any financial relationships with the former firm the appointee proposes to retain and (b) the proposed program for disqualification of the prospective government employee from dealing with matters in which the firm has a financial interest.¹¹

Before open committee hearings commence, the full approval of the chairman and of the senior minority member of the Senate committee should be obtained regarding the proposed resolution of all conflict-of-interest questions.

¹¹ The appointee must also inform the Senate committee considering his nomination of any intention to establish a qualified trust at the time his financial report is filed. See section 5.4, herein.
Chapter 2

Limitations on an Individual’s and His Former Firm’s Activities During Full-Time Government Service

2.1 Disqualification Requirement

2.1.1 The principle of 18 U.S.C. § 208

A government employee is prohibited by 18 U.S.C. § 208 from participating in government decision-making relative to a particular matter in which either (a) the employee himself has a financial interest, (b) his spouse or minor child has a financial interest, or (c) a person or organization with whom he is negotiating, or with whom he has any arrangement concerning prospective employment, has a financial interest.

If such a financial interest exists, 18 U.S.C. § 208 prohibits a government employee from participating personally and substantially in government decision-making processes relating to the “particular matter.” The statute may be violated even though the government employee is not the official responsible for the decision: The statute includes participation through “recommendation, the rendering of advice, investigation, or otherwise.”

The decision-making processes covered by the statute may take many different forms and may relate to any kind of action, such as contract awards, payment of claims made against the government, decisions regarding issuance of regulations affecting a particular company or a specified class of companies, rate-making, and even, perhaps, the drafting of specifications for bids. A decision within the scope of the statute may be negative, such as a disapproval of a contract award or a license application, as well as affirmative.

The technique for disqualification can readily be worked out within the department or agency in which the partner or employee will serve. The key factor is the alertness of the government employee in recognizing situations wherein he, his spouse, minor child, or former
firm has a financial interest. Once the need for disqualification has been identified, a procedure for removing the government employee from the decision-making process is not difficult.

2.1.2 The exemptive power created by 18 U.S.C. § 208(b)

Basically, 18 U.S.C. § 208(b) authorizes a determination about the inapplicability of 18 U.S.C. § 208 in two situations:

a. A determination directed to the particular situation and individual. When the government employee, in advance of any participation, advises the official responsible for his appointment of the nature of a particular matter and his financial interest in it, he may receive in advance, if the facts justify it, “a written determination made by such [appointing] official that the 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. . . .”

b. Exemption directed to a class of situations. When there is a category of financial interests that appears to be “too remote or too inconsequential to affect the integrity of Government officers’ or employees’ services,” the department or agency may grant an exemption by a general rule or regulation published in the Federal Register.¹

The exemptive power granted in 18 U.S.C. § 208(b) should provide sufficient flexibility to enable a former partner or employee to avoid the necessity of disqualification as long as his personal financial interests or the financial interests of his former firm are so peripheral and minor that a conflict of interest is not at issue.

2.2 The Concept of “Particular Matter”

The prohibition contained in 18 U.S.C. § 208 only applies to participation in the government decision-making processes relative to “particular matters.” The scope of the term “particular matter” in the context of 18 U.S.C. § 208 has not been defined by courts or agencies. However, the regulations implementing the postemployment provisions of the conflict-of-interest laws discuss the scope of the term “particular matter” in the context of 18 U.S.C. § 207. These regula-

¹ An example of the use of this exemptive power is the exemption granted for investments held in the portfolio of a mutual fund in which the government employee has invested, provided that the portfolio investment does not represent more than one percent of the amount of the reported assets of the mutual fund. See, e.g., 28 C.F.R. § 45.735-5(b).
tions provide, in essence, that a “particular matter” covers any matter except “broad technical areas and policy areas and conceptual work done before a program has become particularized into one or more specific projects.” The Office of Legal Counsel of the Justice Department tends to view rule-making and regulation-issuing as normally involving a “particular matter” under 18 U.S.C. § 208. Indeed, the Office of Legal Counsel may subscribe to a test of whether the outcome of a matter, of any type, “will have a direct and predictable effect upon the financial interests covered by this section.” Accordingly, if there is any doubt whether matters in which a government official is involved include a “particular matter,” an interpretation should be requested from the general counsel of the department or agency involved.

An example of a matter that presumably would not be considered a “particular matter” under 18 U.S.C. § 208 is an issue arising in the development of broad tax policy affecting virtually all businesses in the country, such as a recommendation to Congress that the investment credit be retained or eliminated.

2.3 Disqualification When the Accounting Firm Has a Financial Interest

An individual would be considered to have a financial interest in his former firm if he has financial ties in the form of present or future retirement benefits. Even though the amount of the benefits may be fixed, the individual has reason to be concerned with his former firm’s ability to make future payments to him or future contributions to a retirement plan. Thus, unless there are no financial ties whatsoever, the individual should, irrespective of any intent to rejoin his former firm, disqualify himself when the firm’s financial interests could be affected by government decision-making.

In addition, if the individual has any understanding with his former firm regarding reemployment or readmission as a partner fol-

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2 5 C.F.R. § 737.11(d). This definition of “particular matter” defines a term used in 18 U.S.C. § 207(c) that is identical to the term used in 18 U.S.C. § 208. The term “particular matter” is to be distinguished from a different term that appears in 18 U.S.C. § 207(a) and (b), namely, “particular matter involving a specific party or parties.” The definition of the latter term, set forth in 5 C.F.R. § 737.5(c)(1), provides that “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. Rule-making, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter.”

3 See Federal Personnel Manual, chap. 735, App. C, p. 3. The text is dealing with “special government employees,” but there is no reason for making a distinction between regular and special employees for this purpose.
lowing completion of government service, 18 U.S.C. § 208 requires that the individual disqualify himself from matters in which the firm has a financial interest. Even a tacit understanding would probably require disqualification. Moreover, even if there is no understanding but negotiations for readmission or reemployment have commenced, the statute is applicable and disqualification is essential.

An accounting firm has a direct financial interest, quite obviously, in any proposal it makes for a contract or other arrangement to provide any services to the government, such as auditing or consulting services. The accounting firm would have such an interest whether it is bidding alone or as a member of a team. A government employee whose work is likely to involve reviewing contract proposals from accounting firms should establish very clear written ground rules that any matters that involve proposals submitted by his former firm should be diverted to others for consideration.

The individual in government service probably should also disqualify himself whenever his former accounting firm appears on behalf of a client before the particular governmental department or agency. This ground rule was laid down by several lawyers entering government service, and the principle is sound for accountants as well.4 If the principle becomes impractical in a particular situation, special exemptive action may be needed. (See section 2.1.2.)

2.4 Disqualification When Clients of the Accounting Firm Have a Financial Interest

The subject of clients of accounting firms and law firms has not been a matter of much attention in the conflict-of-interest literature. It is arguable that benefit to clients of the firm from government action, such as the award of a government contract, would not normally be of any material financial benefit to the firm. More specifically, the regular accounting fees charged by the firm to a client would not, in all likelihood, be materially increased merely by reason of the client’s increased business derived from a government contract. Accordingly, in the usual case the firm might well be able to sustain the legal position that it has no “financial interest,” within the meaning of 18 U.S.C. § 208, in the award of a contract to its client.

4 See, e.g., hearings on the nomination of two lawyers (Roberta S. Karmel, Esq., and Stephen J. Friedman, Esq.) before the Senate Committee on Banking, Housing, and Urban Affairs (Sept. 16, 1977, and April 1, 1980). The appointees stated that they would disqualify themselves from certain types of matters where either their former law firms represented any party before the SEC or where they had any connection or gained significant knowledge of the matter while at their former law firms.
Irrespective of the strict legal issue presented by 18 U.S.C. § 208 when the financial interest in governmental action is essentially only the client's interest, a serious question of appearances may be involved whenever a government employee's particular act would benefit a client of a firm to which he expects to return. The concern about unfavorable appearances has been codified by section 203 of Executive Order 11222 (May 8, 1965) as well as in the regulations of most departments and agencies. Section 203 of Executive Order 11222 states that government employees may not have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees. . . . [Emphasis added.]

When a client stands to gain from government action, it may appear to the average person that the accounting firm (or law or engineering firm) serving the client is also likely to benefit. The possibility of benefit to the accounting firm may in fact exist if the accounting firm is relatively small and the particular client accounts for a substantial portion of the annual fees of the firm.

The most satisfactory solution to the "client" problem would be to seek, at the time of commencing government service, a written determination from the general counsel of the department or agency involved regarding the required scope of disqualification, if any, from dealing with clients of the accounting firm. For presidential appointees requiring Senate confirmation, the proposed ground rules for disqualification should be presented to the confirming committee so that they will have been at least implicitly approved if the appointee is confirmed. Ideally, the agreed-upon ground rules should be made a part of the written record of the confirmation hearing.

One possible approach would be to identify the accounting firm's most important clients at the date of commencing government service

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5 This view was confirmed in various conversations with key individuals involved in the administration of federal conflict-of-interest laws.


7 The notion that an indirect and even contingent financial interest may be enough to create a conflict of interest in the eyes of a court was dramatically illustrated by the Supreme Court decision in the so-called "Dixon-Yates" case. U.S. v. Mississippi Valley Generating Co., 364 U.S. 520 (1961). The facts were that an officer of an investment banking firm served as a consultant to the government in connection with the financing of a prospective electric power project. If the government decided to rely on private utilities to build the project, the same investment banking firm might foreseeably have been retained by the private utilities as their financial agent in obtaining the necessary financing for the project. The Supreme Court found that the predecessor statute to section 208 (the wording differed from that of section 208) had been violated by the consultant's acting for the government while having a potential financial interest in the result. Accordingly, the Court voided the government's contract with the private utility.
(such as those whose fees exceed 5 percent of the firm's income in the most recent fiscal year) and apply the disqualification principle only to those clients. If a 5 percent dividing line were used, it would presumably result in there being no disqualification requirement for client matters in the case of the largest accounting firms. Although a list of clients contributing more than a stated percentage of fee income will not remain static for any accounting firm, it would be inconsistent with the severance of ties with the firm if a former partner or employee were kept informed of the identity of large clients. Moreover, if the government employee simply is not aware of a new client (or of the fact that an old client has grown in importance), there will obviously be no risk of the exercise of biased judgment. It is pertinent to note that there can be no violation of 18 U.S.C. § 208 unless the government employee has knowledge of his or his firm's financial interest.

Needless to say, a government official can disqualify himself from acting in a particular situation if he feels "uncomfortable" with the appearances. Thus, in a particular case a former accounting firm partner or employee could disqualify himself whenever his personal relationship to a former client, no matter how small, is one that suggests disqualification is appropriate.

2.5 Disqualification When Other Financial Interests of the Individual or His Spouse or Minor Child Are Involved

The disqualification principle applies to the government employee's financial interests in securities or other property that he, his spouse, or minor children own (either directly or as a beneficiary of a trust). Any portfolio of securities (other than securities with a market value of less than one thousand dollars in the case of any single issuer) owned by the government employee or his family must be disclosed in his financial disclosure report (see section 5.3.3), and disqualification from dealing with the corporate issuers of these securities would, in general, be appropriate. The government employee should address an inquiry to the general counsel of the department or agency in which he will be or is serving regarding whether to disclose a list of securities or other financial interests valued at less than one thousand dollars and whether disqualification is required in the case of these smaller holdings.

In certain situations, the creation of a qualified diversified trust may be a helpful device to permit greater freedom of operation by the individual while in government service. The efficacy of qualified diversified trusts to make disqualification unnecessary under 18 U.S.C. § 208 is discussed in section 5.4.

In the case of a former partner or employee who continues, as
permitted by 18 U.S.C. § 209(b), as a member of a profit-sharing plan that holds securities in a portfolio, the government employee should seek a ruling, either in the form of an opinion of the general counsel of his department or agency or a determination by the official responsible for his appointment, regarding the applicability of 18 U.S.C. § 208 to the issuers of the securities held in the profit-sharing plan portfolio.

2.6 Limitations on a Firm’s Activities During Government Service of a Former Partner or Employee: The Principle

In general, a former partner’s or employee’s government service would not preclude an accounting firm from taking any action it would ordinarily take absent the government service. The key and essential element is strict adherence by the former partner or employee to the disqualification requirements described in this chapter.

2.7 Contract Proposals by the Firm

The accounting firm should not (subject to the qualification noted below) feel inhibited in making contract proposals to the department or agency in which a former partner or employee is serving. As noted in section 2.6, the essential element is the government employee’s strict adherence to the disqualification procedure established within the department or agency.

The accounting firm itself has an interest in being certain that the former partner or employee removes himself, affirmatively, definitively, and with a written record of the fact, from any aspect of the decision-making process in relation to the contract proposal. It may be appropriate for the firm to alert the general counsel of the former partner’s or employee’s department or agency if and when a contract proposal will be made that might come to the attention of the former partner or employee, in order to help assure the necessary disqualification.

In very rare situations, an accounting firm might decide that the appearances of submitting a contract proposal would be adverse and would prefer not to do so, for example, if the contract proposal were squarely within the area of personal responsibility of the former partner or employee or if the former partner or employee had been involved in shaping the specifications for the contract proposal.
Chapter 3
Post-Government-Employment Restrictions

The statutory restrictions relating to postemployment activities are set forth in 18 U.S.C. § 207.¹ These restrictions fall into four categories, discussed in sections 3.1 through 3.4, below. The limitations on the firm to which the government employee returns are discussed in section 3.5.

The new Office of Government Ethics (OGE) has issued a comprehensive set of regulations (OGE regulations) that interpret and supplement the postemployment provisions of the conflict-of-interest laws.²

3.1 Permanent Ban: Matters in Which There Was Personal and Substantial Participation

3.1.1 Scope of the prohibition

A returning partner or employee may not, at any time after his government employment, "switch sides" and knowingly act as agent or attorney for or otherwise represent his firm or one of its clients in "any formal or informal appearance before, or, with the intent to influence," make "any oral or written communication on behalf of" the firm or any of its clients in connection with any "particular matter involving a specific party or parties . . . in which the United States . . . is a party or has a direct and substantial interest, and in which he participated personally and substantially as an officer or employee" of the government.³

The foregoing restriction has no stated duration and, hence, applies during the lifetime of the former government employee. How-

¹ 18 U.S.C. § 207 was revised substantially by the Ethics in Government Act of 1978 (hereinafter referred to as the "1978 act").
² The OGE regulations are set forth in 5 C.F.R. pt. 737.
ever, as a practical matter, any “particular matter involving a specific party” is likely to become a closed issue very quickly.

### 3.1.2 “Behind-the-scenes” assistance

The statute limits the representational prohibition to situations that constitute a “formal or informal appearance before” the government. This limitation, together with the confirming OGE regulation, makes it reasonably clear that purely “behind-the-scenes” activity within the firm is permissible so far as section 207(a) is concerned, even though it involves a switch of sides on a particular matter.

Nevertheless, for reason of appearances, the former government employee should not work on a matter within the firm when his government participation was personal and substantial. Moreover, the firm should seek written approval from the general counsel of the department or agency involved before assisting a client in connection with such a matter. If a former government employee becomes a partner or employee at a firm while a particular case on which he worked as a government employee is in progress, the procedures for isolating him from the matter within the firm should be approved by the appropriate general counsel.

### 3.1.3 Scope of the expression “particular matter involving a specific party or parties”

The OGE regulations provide that a “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.” The OGE regulations further provide that “rule-making, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter.” A former government employee may represent another person in connection with a particular matter involving a specific party, even if rules or policies he, as a government employee, had a role in establishing are involved in the proceeding, since his prior participation did not involve a “particular matter involving a specific party or parties.”

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4 An appearance occurs when an individual is physically present before a department, agency, court, or government employee in either a formal or informal setting or conveys material to a department, agency, court, or government employee in connection with a formal proceeding or application. 5 C.F.R. § 737.5(a)(3).
5 5 C.F.R. § 737.5(b)(6).
6 5 C.F.R. § 737.5(c)(1).
7 Id.
8 The OGE regulations confirm that the requirement of a “particular matter involving a specific party or parties” applies both at the time that the government employee participates in his official capacity and at the time in question after government service. 5 C.F.R. § 737.5(c)(4).
3.2 Two-Year Ban: Matters Actually Pending Under Official Responsibility

3.2.1 Scope of the prohibition—18 U.S.C. § 207(b)(i)

For a period of two years following termination of his government employment, a returning partner or employee may not knowingly represent anyone other than the federal government in connection with any “particular matter involving a specific party . . . which was actually pending under his official responsibility as an officer or employee [of the government] within a period of one year prior to the termination of such responsibility.” 9

This prohibition is broader than the prohibition discussed in section 3.1 above, in only one respect: The ban applies regardless of the former government employee’s personal involvement in the matter while it was before his department or agency, so long as the matter was “actually pending” under his official responsibility.10 “Actually pending” means that the matter was in fact referred to, or under consideration by, persons within the employee’s area of responsibility, not that it merely could have been.11

3.2.2 “Behind-the-scenes” activity

As in the case of section 207(a), section 207(b)(i) permits “behind-the-scenes” activity by the former government employee. In considering the advisability of permitting such activity within the firm, the problem of appearances is much reduced if the former government employee did not participate personally and substantially in the particular matter while a government employee. Depending on all of the circumstances, it may be reasonable to permit a partner or employee to give “behind-the-scenes” advice about matters that were only under his official responsibility and in which he did not participate personally and substantially.

If the written approval of the general counsel of the department or agency involved is obtained, the problem of appearances is virtually eliminated.

3.2.3 Measurement of two-year restriction period

Although the statute itself could be interpreted differently, the OGE regulations expressly state that

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9 18 U.S.C. § 207(b)(i).
10 Ordinarily, the scope of an employee’s “official responsibility” is determined by those areas assigned by statute, regulation, executive order, job description, or delegation of authority. 5 C.F.R. § 737.7(b)(2).
11 5 C.F.R. § 737.7(c).
The statutory two-year period is measured from the date when the employee’s responsibility in a particular area ends, not from the termination of Government service.\textsuperscript{12}

In an example, the OGE regulations illustrate the rule as follows:

An employee transfers from a position in A Agency to a position in B Agency, and she leaves B Agency for private employment 9 months later. In 15 months she will be free of restriction [with respect to] matters which were pending under her responsibility in A Agency in the year before her transfer.\textsuperscript{13}

\section*{3.3 Two-Year Ban: Assisting in Matters in Which a Senior Employee Participated Personally and Substantially}

The 1978 act created two new postemployment prohibitions applicable only to former senior government officials. One relates to “behind-the-scenes” assistance, and the second, discussed in section 3.4, imposes a one-year “cooling-off” period on appearances before the former senior government official’s former department or agency.

\subsection*{3.3.1 Senior employees}

The 1978 act prescribes the categories of former senior officials who are covered by the new restrictions as

\begin{itemize}
  \item[a.] Officials listed in sections 5311 through 5317 of 5 U.S.C., consisting of the so-called “executive schedule,” who fall into five higher salary categories.
  \item[b.] Officials in positions that the director of OGE determines “involve significant decision-making or supervisory responsibility,” and whose rates of pay are at least those applicable to grade GS-17.\textsuperscript{14}
\end{itemize}

The persons covered include secretaries of departments; heads of agencies; deputy, under, and assistant secretaries; associate administrators, and others paid under the executive schedule.

Adopting the terminology of the OGE regulations, this book refers to the persons in the categories described above as “senior employees,” although the 1978 act itself does not use this term.

\subsection*{3.3.2 Scope of the prohibition—18 U.S.C. § 207(b)(ii)}

As a result of a 1979 amendment to the 1978 act, section 207(b)(ii) is essentially a prohibition against representational activity and is, as a

\textsuperscript{12} 5 C.F.R. § 737.7(e).
\textsuperscript{13} 5 C.F.R. § 737.7(e), example 2.
\textsuperscript{14} Military personnel covered by the new restrictions are omitted from the categories described. See 5 C.F.R. § 737.33 for a list of positions that have been designated as “senior employee” positions for purposes of the two new restrictions.
practical matter, no more restrictive in its effect than section 207(a), discussed above (section 3.1). In fact, it is less restrictive in that it is only a two-year prohibition. Like section 207(a), section 207(b)(ii) applies only to particular matters in which an individual participated personally and substantially as a government employee.

When Congress first enacted section 207(b) in 1978, the new section encompassed forms of assistance other than representational activity, that is, situations where the former government employee "aids, counsels, advises, consults, or assists in representing any other person . . . concerning any formal or informal appearance before" a department, agency, court, and so forth. This was intended as a ban on "behind-the-scenes" assistance. However, in the very next year the words "by personal presence at" were substituted for the word "concerning" in the foregoing language. The House Judiciary Committee report in 1979 commented as follows:

S.869 would clarify the language of subsection (b) of Section 207 to make it clear that the bar on aiding and assisting applies only to an individual's participation by his physical presence at a formal or informal appearance.15

The OGE regulations give examples confirming the permissibility of "behind-the-scenes" assistance when the former employee avoids any personal presence before government personnel.16 It is virtually impossible to conceive of a situation wherein the combination of assistance plus personal presence before a government agency does not constitute representational activity. Thus, rather than adding a new prohibition, in its final version section 207(b)(ii) appears to be merely another statement of the prohibition against representational activity.

As indicated above under section 3.1.2, the apparent statutory latitude to provide "behind-the-scenes" assistance should not (because of appearances) be used to render aid in a matter in which the former government employee participated personally and substantially as a government employee.

3.4 One-Year Ban: Agency-Wide Ban for Former Senior Employees

3.4.1 Scope of the prohibition—18 U.S.C. § 207(c)

In 1978 section 207(c) was added to 18 U.S.C. as a response to so-called "revolving door" concerns. Under section 207(c), for a

16 See n. 4 (chapter 3), herein.
period of one year after terminating government employment, no for­mer senior employee may reappear before his former department or agency in a representational capacity. More specifically, a returned partner or employee may not knowingly act as agent or attorney for, or otherwise represent, the firm or any of its clients in any formal or informal appearance before, or with an intent to influence, make any written or oral communication on behalf of the firm or any of its clients to, his former department or agency or any of its officers or employees in connection with any particular matter pending before the department or agency or in which it has a direct and substantial interest.17

This prohibition applies regardless of whether the former senior employee had participated in, or had any responsibility whatsoever for, the particular matter. It includes matters that are pending elsewhere and not before the department or agency itself, provided that the former senior employee’s department or agency has a direct and substantial interest in them. A radical departure from prior statutory concepts is the fact that the prohibition includes matters that first arise after the employee leaves government service.

The particular matters covered by section 207(c) need not be ones “involving a specific party or parties,” and thus are not limited to disputed proceedings or contracts in which a party has been identified. Moreover, the language of section 207(c) specifically encompasses rule-making, unlike sections 207(a) and (b). Therefore, such matters as the proposed adoption of a regulation or interpretive ruling, or an agency’s determination to undertake a particular project or to open such a project to competitive bidding, are covered. Not covered are broad technical areas and policy issues and conceptual work done before a program has become particularized into one or more specific projects.18

3.4.2 “Behind-the-scenes” activity

The prohibition of section 207(c) does not reach “behind-the-scenes” assistance.19 Thus, subject to the reservations based on appearances noted in the following sentence, the former senior employee may counsel and advise regarding matters related to his former department or agency during his first year back with the firm. However, as discussed in sections 3.1.2 and 3.2.2, he should not give “behind-the-scenes” assistance regarding (a) particular matters in which he participated

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17 18 U.S.C. § 207(c).
18 5 C.F.R. § 737.11(d).
personally and substantially while in government and (b) perhaps, depending on the circumstances, particular matters that were actually pending under his official responsibility while in government.

3.4.3 Determinations to subdivide a department or agency for purposes of section 207(c)

The 1978 act provides two bases for action by the director of the OGE to limit the application of the one-year "cooling-off" prohibition of 18 U.S.C. § 207(c) to less than an entire department or agency. First, section 207(e) provides that the director of the OGE may, by rule, designate as "separate" a statutory agency or bureau that exercises functions distinct and separate from the remaining functions of the parent department or agency of which it is a part. Second, under the provisions of section 207(d)(1)(C), the director may, after determining that there exists no potential for use of undue influence or unfair advantage based on past government service, restrict the application of section 207(c) to permit a former employee (other than one who served in an executive level position) to "make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction. . . ." 20

If an agency or bureau is designated as "separate" under either section 207(e) or section 207(d)(1)(C), then certain former senior employees of that agency or bureau are not subject to the restrictions of section 207(c) with respect to the remaining agencies or bureaus of the parent agency or department. 21

In accordance with the provisions of sections 207(e) and 207(d)(1)(C), the director of the OGE has designated certain agencies and

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20 18 U.S.C. § 207(d)(1)(C). The requirement of "separate and distinct subject matter jurisdiction" may be met if the substantive areas of coverage are different or the regional areas of coverage are different. 5 C.F.R. § 737.13(d)(2)(iv). The authority granted by section 207(e) is applicable only to a separate statutory agency or bureau, that is, one created by statute or the functions of which are expressly referred to by statute in such a way that it appears that Congress intended that its functions were to be separable. 5 C.F.R. § 737.13(b)(1). The determination made pursuant to section 207(d)(1)(C) is intended to provide similar recognition of separability when the subordinate agency or bureau has been administratively created. 5 C.F.R. § 737.13(b)(2). A determination under section 207(d)(1)(C) is available only for those agencies or bureaus that would, but for the lack of a statutory basis, qualify for separate agency treatment under section 207(e).

21 The limitations on the exemptions are that (a) a determination under section 207(e) does not exempt from the restrictions of section 207(c) former heads of the separate statutory bureaus or agencies, or former officers and employees of the department or agency whose official responsibility included supervision of such separate agencies or bureaus and (b) a determination under section 207(d)(1)(C) does not, unlike section 207(e), exempt persons in positions at the executive level or serving at uniformed service grade levels of 0 through 9 or above.
bureaus as "separate" from the remaining agencies and bureaus of their parent agency. These designations are set forth in 5 C.F.R. §§ 737.31 and 737.32, respectively.

3.5 Applicability of Post-Government-Employment Prohibitions to Firm

The post-government-employment restrictions set forth in 18 U.S.C. § 207 would not preclude the former government employee's firm from undertaking client representation in a matter that the former government employee is precluded from undertaking. However, the appearances of the firm's doing what the individual may not might be adverse. Accordingly, in any particular situation in which the firm wishes to undertake work on behalf of a client, which the former government employee as an individual could not undertake, a ruling should be obtained from the general counsel of the department or agency involved to the effect that there is no objection to the firm's proposed role.

3.6 Sharing in Certain Fees Following Government Employment

3.6.1 The basic prohibition—18 U.S.C. § 203

One section of the conflict-of-interest laws, 18 U.S.C. § 203, is essentially a prohibition against a government employee's receipt of compensation from a private source for working on a "particular matter" in which the government has an interest and which is before any department or agency. The statute has three features that give it an extraordinary reach:

a. The prohibition against receiving compensation applies regardless of whether the government employee himself or another person renders the services that give rise to the compensation.

b. The prohibition applies even though the work that gave rise to the compensation involved a department or agency with which the government employee has or had no relationship whatsoever.

c. The prohibition against receiving compensation is construed as applicable regardless of whether the compensation is received by the government employee during or after his government employment, so long as the services that gave rise to the compensation were rendered while the recipient was a government employee.

The result of the foregoing is that under a highly technical reading of section 203, a partner of an accounting firm may not share in fees received by the firm after his return to the firm which are attri-
butable to work done by the firm on any governmental proceedings during his government tenure. This reading has been uniformly enforced by the Office of Legal Counsel of the Justice Department with respect to lawyers who leave federal service to become partners of law firms and would undoubtedly be applied by that office in the case of accountants.

Space does not permit a full analysis of why this technical reading would seem to be in error (except possibly in the case of an accounting firm with a very substantial portion of its income consisting of fees for government-related matters). Suffice it to say that, in the normal situation, the work for which the returned partner is actually being compensated is his work done for the firm after his return. If partnership distributions were made on the basis of fees accrued during a current period, the returned partner's entire income would be attributable to work performed following his return. It is simply because distributions are made on the basis of fees collected in cash that the argument can be made that some of his income is from work performed while the returned partner was still in government service.

In any event, assuming for present purposes that a favorable ruling from the general counsel of the department or agency involved cannot be obtained consistent with the view expressed above, the problem posed by 18 U.S.C. § 203 can be resolved by an appropriate downward adjustment in the income of the returned partner for the first year or two after his return to the firm. This adjustment would be designed to reflect the returned partner's share of fees received (after his return to the firm) for work done by the firm on particular governmental matters while he was in government service. The adjustment would undoubtedly be small for two reasons:

a. Most firms bill promptly for their services on all matters, including governmental proceedings, and are normally paid reasonably promptly. As a practical matter, fees for work done by the firm in the final days of a returning partner's government service will probably have been collected within the first six months following his return to the firm.

b. The great bulk of an accounting firm's work, such as performing the regular annual audit of a corporation and preparing its tax returns, would not, in all likelihood, be subject to the prohibition. Accordingly, it would seem that only a small percentage of the

22 Clearly the annual audit work is nongovernmental in the case of any corporation other than a government-owned corporation. Tax return preparation is mere compliance with law, and a governmental proceeding would not commence until an event occurred, such as a notice of tax audit or the receipt of a list of exceptions to the return.
income of most firms in any one year would be subject to the prohibition of 18 U.S.C. § 203.

A precise mathematical administration of the "income adjustment" approach to the prohibition of 18 U.S.C. § 203, in the case of a returning partner to a large firm, would obviously be impossible. A crude adjustment, based on estimates, would have to be developed.

3.7 Financial Disclosure Report Upon Termination of Government Service

A prescribed financial disclosure report must be filed within thirty days after termination of government employment for the period from the end of the calendar year with respect to which a report was last filed to the date on which the individual terminated such employment. As described in section 5.3, the government employee must disclose on this report detailed information with respect to his financial interests.
Chapter 4
Members of Advisory Commissions and Consultants

This chapter deals with the subject of partners and employees who become members of advisory commissions or committees appointed within the structure of the federal government or who become consultants to federal departments or agencies. The pertinent common characteristic of this type of government employment is that it is part-time or intermittent. No resignation from the firm is required.

4.1 Definition of “Special Government Employee”

The federal statutes were amended in 1962 to make important distinctions between (a) full-time government employees and (b) part-time or intermittent government employees, who are defined in the statutes as “special government employees.” The definition of a “special government employee” is a person appointed “to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five days, temporary duties either on a full-time or intermittent basis. . . .”

Thus, the key distinction between a special and a regular government employee is whether the post involves more than 130 days of government service within any period of 365 days.

The 130-day test is applied on the basis of the contemplated number of working days in the 365-day period following the appointment. The Civil Service Commission (now called the Office of Personnel Management) has prescribed that

at the time of his original appointment and at the time of each appointment thereafter, the agency should make its best estimate of the number of days during the following 365 days on which it will require the services of the appointee.

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2 Federal Personnel Manual, chap. 735, App. C, pp. 1 and 2. There are special provisions in the regulations to deal with situations where an appointment thought to
The regulations also contain the following rules regarding calculation of days of service:

A part of a day should be counted as a full day for purposes of the estimate, and a Saturday, Sunday or holiday on which duty is to be performed should be counted equally with a regular work day.3

Should a partner or employee of an accounting firm be called on by a federal department or agency to present his views as a member of an industry group the partner or employee would not, generally speaking, be considered a “special government employee.” However, consultation at meetings of industry groups may ripen into consulting as a government employee, and these “borderline” situations should be carefully reviewed. An opinion may be sought from the general counsel of the department or agency involved if it is not clear whether a particular proposed undertaking to advise or consult would result in special government employee status.

4.2 Evaluating Client Matters That Could Create a Conflict of Interest

When a partner or employee proposes to take on an advisory or consulting post in the federal government, his firm should determine whether any current client matters are closely related to the proposed assignment. Potential conflicts of interest must be resolved with the department or agency the partner or employee proposes to serve. Also, if the scope of the advisory or consulting job subsequently changes, a further check should be made regarding whether the new scope of the advisory or consulting duties creates a conflict of interest.

4.3 Partner’s Share of Income, Employee’s Salary, and Fringe Benefits

4.3.1 Income and salary

As noted above, partners or employees who become “special government employees” need not resign from their firms. Full participation in partnership income and continuation of the full employee salary is not barred during employment as a “special government employee.” The statute that precludes supplementation of the salary of a government

involve only 130 days or less turns out to require more than 130 days of service during a 365-day period. However, in the usual case of a consultant or advisory committee member, the service is for less than 130 days, and therefore, the special problem referred to in the preceding sentence will not be discussed herein.

employee, 18 U.S.C. § 209, contains a complete and unqualified exemption in subsection (c) for a “special government employee” and for the firm paying his salary or other income.

4.3.2 Group life, medical, and other insurance
Coverage under a firm’s group life insurance, medical expense insurance, and other insurance plans may continue in effect for a “special government employee.” The plans themselves create no problem since employment as a “special government employee” constitutes neither a termination of employment nor a leave of absence.

4.3.3 Profit-sharing plans
Individuals who become “special government employees” suffer no loss of rights under either partners’ or employees’ profit-sharing plans.

4.4 Disqualification From Matters That Could Affect the Firm, Clients of the Firm, or Other Personal Financial Interests

4.4.1 General
The principles discussed in sections 2.3, 2.4, and 2.5 (relating to disqualification from particular matters in which the firm or its clients have a financial interest, or the individual himself, his spouse, or minor child has a financial interest through investments or otherwise) are fully applicable to “special government employees.”

As discussed in section 2.2, 18 U.S.C. § 208 applies only when the government employee is involved in a “particular matter.” Many advisory commissions and committees deal only with broad policy issues in a given area of government activity and not with “particular matters.” Accordingly, it may be possible to obtain an advance determination that the members of the advisory commission or committee to which a partner or employee will be appointed need not be concerned with disqualification.

Such a determination, if made on the basis of an advisory committee’s original charter or the original job assignment of a consultant, should not be taken as conclusive, since the work of an advisory

4 See discussion under section 2.2, herein.
5 In the case of one advisory committee, for example, the general counsel of the former Department of Health, Education, and Welfare gave a written opinion, dated May 31, 1974, to the effect that the existence of financial interests on the part of clients of committee members was irrelevant. The opinion stated: “. . . the prohibition contained in 18 U.S.C. § 208 contemplates specific and particular matters, and not the broad policy matters addressed in your [the committee’s] charter. . . .”
committee or a consultant could change and take on an orientation not originally envisaged (that is, one directed to “particular matters”).

4.4.2 Portfolio of profit-sharing trust

The continuation of an individual’s interest in a profit-sharing plan raises the question of disqualification from participation in any matter involving a company whose securities are part of the profit-sharing plan trust portfolio (see final paragraph of section 2.5).

The prospective adviser or consultant should seek a formal “written determination” from the appointing authority, pursuant to 18 U.S.C. § 208(b)(1), to the effect that the partner’s or employee’s interest in any particular matter that may come before the department or agency involving the companies whose securities are part of the trust will be “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.”

4.5 Activity by the “Special Government Employee” in His Capacity as Partner or Employee of a Firm and by the Firm Itself During the Period of Government Employment

Section 4.4 deals with disqualification in connection with the governmental activity of the adviser or consultant. There are, in addition, certain statutory restrictions applicable to the nongovernment activity of a “special government employee” and to the activities of the firm itself during the term of government employment.

The scope of the statutory prohibitions (18 U.S.C. §§ 203 and 205) against the “special government employee” acting in his private capacity and against the firm itself is determined by the character and intensity of the governmental service being performed by the adviser or consultant. When such governmental services are rendered on no more than sixty days during the immediately preceding period of 365 consecutive days, the scope of the prohibition is very limited: The firm (and, a fortiori, the “special government employee” himself) may not work on behalf of a client in relation to a particular matter involving a specific party or parties if a partner or employee of the firm has been or is involved, personally and substantially, in the same particular matter as a government adviser or consultant.6

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6 This conclusion is based on the proposition that the compensation paid by the client could be said to be shared in by the partner or employee who is also the governmental adviser or consultant, thereby creating a violation of 18 U.S.C. § 203. It is also based on the propositions that, even in the absence of compensation, (a)
It should be easy to comply with this prohibition through an internal procedure designed to determine whether the anticipated scope of the proposed activities of a government adviser or consultant are closely related to any matters the firm is handling. If the scope of the work of the adviser or consultant, acting in his governmental capacity, changes from that originally described, a further check should be made within the firm regarding possible conflicts. Since the consultant or adviser is still an active partner or employee of the firm, there is an added responsibility on the part of the firm, as well as the individual, for monitoring conflict-of-interest matters in relation to his government service.

A major enlargement of the scope of the ban against an individual's or firm's representational activity occurs once an adviser or consultant has passed the sixty-day mark (that is, sixty days of government work within the preceding consecutive 365 days). Indeed, the enlargement of the representational prohibition is such that advisory committee assignments and consultancies should be avoided if they will involve more than sixty days work during the year.7

4.6 Post-Government-Employment Restrictions

A special government employee should establish a termination of services date so that the postemployment restrictions may be properly measured. In most cases the appointing documents will contain a specific termination date, although it may be postponed. A special government employee whose appointment is for a long or indefinite period would be well advised to submit a written resignation as soon as he thinks there may be a substantial hiatus in his services.

The section of the statutes applicable to the postemployment period, 18 U.S.C. § 207, makes no distinction between regular gov-

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18 U.S.C. § 205 bars the adviser or consultant from acting as “agent” for a client in relation to the particular matter before a department or agency and (b) 18 U.S.C. § 207(g) bars the partners of an adviser or consultant from acting as “agent” for a client in relation to the particular matter.

7 One of the problems is that a “special government employee” who has worked more than sixty days out of the last 365 becomes subject to a “department-wide ban”; i.e., he may not receive any share in compensation for services provided by himself or another person (i.e., by his firm), in relation to “a particular matter involving a specific party or parties... which is pending in the department or agency of the Government in which he is serving...” [18 U.S.C. § 203 (Emphasis added)]. The practical effect of this broad prohibition is to preclude the firm from working on particular contracts and proceedings pending anywhere within a government department or agency if a firm partner (and, perhaps, a firm employee) is currently on an advisory or consulting assignment for that department or agency and has worked for the government for more than sixty days out of the last 365 days.
government employees and "special government employees," except that 18 U.S.C. § 207(c) (one-year department-wide ban) does not apply to a "special government employee" who serves for fewer than sixty days in a calendar year. (See section 3.4.) A distinction between regular and "special" government employees was not necessary, since the postemployment restrictions are narrowly cut, except for 18 U.S.C. § 207 (c), and fit the conflict-of-interest situations for both classes of former employees.

The discussions in sections 3.1, 3.2, and 3.3 are fully applicable to former "special government employees." The comments in section 3.5 regarding firm activity that the former government employee could not himself undertake are also applicable.8

As in the case of the ban for a person who is at the time serving as a "special government employee" (see discussion in section 4.5), the postemployment provisions will have relatively little impact, since (a) the advice of consultants and advisory committees will usually relate to a class of cases rather than to a "particular matter involving a specific party or parties," and (b) in the case of the broader two-year ban described in section 3.2, most advisers and consultants are not given the kind of operating responsibility that is contemplated by the term "official responsibility."

4.7 Contract Proposals by the Firm

The principles discussed in section 2.7 with respect to a firm's contract proposals are applicable when a partner or employee serves as an adviser or consultant. However, the likelihood of any problem is even more remote than in the case of a former partner or employee serving as a full-time government employee.

8 In the case of a partner who has been a "special government employee," the problem of sharing in compensation, which is discussed in section 3.6, theoretically would apply to fee income earned from work done on governmental proceedings pending in the department or agency in which he served, for that portion of the work done by the firm between the date he had first served more than sixty days out of the preceding 365 and the date he ceased to be an adviser or consultant. However, this theoretical problem is resolved if there are no such sixty-day advisers or consultants.
Chapter 5

Public Disclosure of Financial Interests

5.1 Introduction

Title II of the 1978 act established public financial disclosure requirements that obligate certain current or prospective federal government officers or employees to disclose their personal financial interests and thereby demonstrate that they are able to carry out their duties without any conflict of interest relating to the financial interests.1 Prior to the effective date of the public financial disclosure provisions of the 1978 act, the reporting of financial interests had been on a confidential basis and had been made to either the Civil Service Commission or to designated officials within the government employee's agency.

The executive personnel financial disclosure requirements are set forth in 5 U.S.C. App. § 201 et seq. The OGE has issued a comprehensive set of regulations ("OGE financial disclosure regulations"), which interpret and supplement the financial disclosure provisions of the 1978 act.2

5.2 Persons Required to File Reports

The 1978 act requires reporting by, among others, all presidential appointees, those in the senior executive service, those in confidential or policy-making positions (Schedule C), and civil service employees at the grade of GS-16 and above, including comparable officers in the uniformed and foreign services.3 Reports must be filed annually by

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1 The 1978 act established financial disclosure requirements for all three branches of the federal government. This book only discusses disclosure by employees and officers of the executive branch.

2 The OGE financial disclosure regulations are set forth in 5 C.F.R. pt. 734.

3 The 1978 act supersedes any general requirements relating to individuals covered by the 1978 act under any other provision of law or regulation with respect to the reporting of financial information required for purposes of preventing conflicts of interest, except the requirements of 5 U.S.C. § 7342 (relating to the Foreign Gifts Act). 5 C.F.R. § 734.104(b). Personnel below the grade of GS-16 remain
incumbent government employees, within thirty days after entering government service by new government employees, and within five days of the transmittal by the president to the Senate of a nominee to a government position requiring the advice and consent of the Senate. A person who terminates government service must file a report within thirty days of such termination. Each of the persons required to file financial disclosure reports under the 1978 act is hereinafter referred to as a “reporting individual.” Only persons who have performed or are expected to perform the duties of their office for more than sixty days in a calendar year are required to file reports.4

5.3 Contents of Reports

Each reporting individual must file a report on a form prescribed by the OGE.5 A reporting individual must report his income, assets held as investments, and certain other items, as described below. Items for personal use, such as a residence or jewelry not for sale, need not be reported. The following information must be disclosed on the form.6

5.3.1 Income

Each item of income exceeding $100 derived from dividends, interest, rent, and capital gains from any source must be reported. Each

subject to the financial reporting requirements contained in 5 C.F.R. pt. 735, subpt. D. These reports remain confidential and are not available for public inspection. 5 C.F.R. § 734.104(a)(7). The OGE financial disclosure regulations provide that each agency may, subject to the approval of the OGE, issue regulations implementing the OGE financial disclosure regulations (i.e., 5 C.F.R. pt. 734), provided that the agency regulations are consistent with the OGE financial disclosure regulations and impose no additional reporting requirements on individuals subject to the 1978 act. 5 C.F.R. § 734.103.

4 If the person does in fact perform his duties for more than sixty days, he must file a report within fifteen days after the sixty-first day. In unusual circumstances, the director of the OGE may waive any reporting requirement otherwise applicable for an individual who is reasonably expected to perform, or has performed, the duties of his office for less than 130 days in a calendar year, but only if the director determines that (a) such individual is a “special government employee” (as defined in 18 U.S.C. § 202) who performs temporary duties either on a full-time or intermittent basis, (b) such individual is able to provide services specially needed by the government, (c) it is unlikely that the individual’s outside employment or financial interests will create a conflict of interest, and (d) public financial disclosure by such individual is not necessary in the circumstances. 5 C.F.R. § 734.205.

5 Certain federal employees and officers who are not covered by the 1978 act are required to file confidential financial disclosure reports.

6 Reports filed by incumbents and terminating employees contain more information than reports filed by new entrants and nominees. New entrants and nominees need not report the information specified in subsections 5.3.2 (relating to gifts and reimbursements) and 5.3.4 (relating to purchases, sales, and exchanges of certain property). Information in the additional categories will have to be disclosed once the new entrant or nominee becomes an incumbent.
item of income may be reported by categories of value ranging from "not more than $1,000" to "greater than $100,000." The reporting individual must disclose the source, type, amount, and value of any other forms of income exceeding $100 received during the last calendar year (or, if it is a first report, during the period commencing on January 1 of the preceding calendar year and ending on the date on which such report is filed), including income from employment other than that with the government, pensions, a partner's net distributive share of partnership income from a commercial venture, and honorariums.

5.3.2 Gifts and reimbursements
Gifts of food, lodging, transportation and entertainment must be reported if such gifts from any individual other than a relative total $250 or more in a calendar year. A reporting individual need not, however, report any gifts of food, lodging, or entertainment received as the "personal hospitality of any individual."  

The reporting individual must report all other gifts that total $100 or more from any individual other than a relative. For purposes of aggregation, the reporting individual need not count gifts valued at thirty-five dollars or less.

The identity of the source, a brief description, and the value of any reimbursements (not otherwise considered gifts under the 1978 act) received from any source during the preceding calendar year and that total $250 or more in value must also be reported.

A reporting individual need not report gifts and reimbursements received when he was not an officer or employee of the federal government.

5.3.3 Interests in property
The reporting individual must provide a brief description of any interest in property held by him during the preceding calendar year in a trade or business, or for investment or the production of income, having a fair market value in excess of $1,000. Each item of real

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7 This financial information must be reported only if the reporting individual is either an incumbent or an individual filing a report upon termination of his government service.

8 "Personal hospitality of any individual" is defined as "hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or the family of such individual or on property or facilities owned by that individual or the family of such individual" [5 C.F.R. § 734.105(i)].

9 For new entrants and nominees, all such interests in property must be reported for the period that begins on January 1 of the preceding calendar year and ends less than thirty-one days before the date on which such report is filed.
and personal property must be disclosed separately (the securities of any single issuer are treated as a separate item of property), and each item may be reported within broad categories of value ranging from "not more than $5,000" to "greater than $250,000." Savings accounts and certificates of deposit aggregating $5,000 or less need not be reported.

5.3.4 Purchases, sales, and exchanges of property

A reporting individual must provide a brief description of each purchase, sale, or exchange of real property (other than a personal residence), stocks, bonds, commodity futures, or other securities during the preceding calendar year if the fair market value of any such purchase or the gain realized on any such sale or exchange exceeds $1,000.10

5.3.5 Liabilities

A reporting individual must also provide a brief description of the total liabilities to any creditor, other than a relative, to whom at any time during the preceding calendar year over $10,000 was owed.11 The greatest amount owed to any creditor during that period must be reported. The liabilities may be reported by categories of value ranging from "not more than $5,000" to "greater than $250,000." A mortgage on a personal residence and loans secured by a personal automobile, household furniture, or an appliance not exceeding the purchase price of the item by which the loan is secured need not be reported, nor any revolving charge account with an outstanding liability below $10,000 as of the close of the preceding calendar year.

5.3.6 Other positions

The reporting individual must identify all positions held (except for positions held without compensation in any religious, social, fraternal, or political entity) on or before the date of filing during the current calendar year (and, for the first report, during the two-year period preceding such calendar year) as an officer, director, trustee, partner, proprietor, representative, executor, employee, or consultant of any entity. In addition, the reporting individual must identify and provide a brief description of the nature of the duties performed or services rendered with respect to each source of compensation that

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10 This information must be reported only if the reporting individual is either an incumbent or an individual filing a report upon termination of his government service.

11 New entrants and nominees must report all such liabilities during the period beginning January 1 of the preceding calendar year and ending less than thirty-one days before the date the report is filed.
exceeded $5,000 in either of the two calendar years prior to the year he first files a report.

5.3.7 Future employment; leaves of absence
The reporting individual must report any arrangement regarding future employment, as well as any arrangements regarding leaves of absence for government service and continuation of payments and benefits by previous employers.

5.3.8 Financial interests of spouse and dependent children
The 1978 act also requires the reporting individual to report the financial interests of his spouse and dependent children. The spouse's source of income exceeding $1,000 received from any person must be reported, but only the nature of the business need be reported if the spouse is self-employed in a business or profession. Gifts, to a spouse or dependent child, and reimbursements, to a spouse, must be reported if they are received by the spouse or dependent by reason of their relationship to the reporting individual.

The reporting individual must also report interests in property, transactions with property, and liabilities of his spouse and dependent children, unless he certifies that he has no knowledge of the financial interest, that it is not derived from his assets or income, and that he does not derive any economic benefit from it.

No report of the spouse's financial interests is required if the spouse is living apart from the reporting individual with an intent to end the marriage or to effect a permanent separation. Alimony and other payments relating to a divorce also need not be reported.

5.4 Trusts
As a general rule, reporting individuals must report information about trust holdings and income from any trust or financial arrangement from which income is received or with respect to which a beneficial interest in principal or income is held by the reporting individual, his spouse, or any dependent child. A reporting individual need not, however, report the holdings of or the source of income from any "qualified trust" (as defined in subpart D of the OGE financial disclosure regulations).\(^\text{12}\)

\(^{12}\) The holdings of a qualified trust are not confidential in one important respect. The assets initially and subsequently transferred to the qualified trust by any interested party must be reported and be subject to public disclosure. In addition, in the case of a qualified blind trust, the reporting individual must report the aggregate amount of the trust's income, by category, attributable to the beneficial interest of the reporting individual, his spouse, or a dependent child. In the case of a qualified diversified trust, only amounts actually received from such a trust by a reporting person, his spouse, or a dependent child must be disclosed.
The underlying theory of qualified trusts is that if a government official does not know the identity of his financial interests (a "blind trust") or, in some cases, if the assets of a trust consist of a well-diversified portfolio of readily marketable securities (a "diversified trust"), the government employee should be able to function without regard to the securities in the qualified trust.\(^\text{13}\)

If the financial disclosure report discloses a conflict of interest or the reporting individual recognizes before he files his report that his financial interests may create a conflict of interest or the appearance of one, he may be able to remove the conflict by the establishment of a qualified diversified trust.\(^\text{14}\) The specific requirements for the creation of a qualified trust and the filing requirements for it are subjects that require more discussion than can be presented here.\(^\text{15}\)

However, a few comments are in order regarding the relationship of a qualified trust to 18 U.S.C. § 208, which requires disqualification by government employees from participation in matters in which they have personal financial interests, and the efficacy of such a trust to alleviate conflict-of-interest problems.

In the case of a qualified blind trust, an asset placed in trust by an interested party is considered a financial interest of the government official for the purposes of 18 U.S.C. § 208 and any other federal conflict-of-interest statute until the party is notified by the trustee that the asset has been disposed of or has a value of less than $1,000.\(^\text{16}\) Thus, a trust is considered blind only with respect to assets subsequently purchased by the trustee.

In the case of a qualified diversified trust, however, the trust’s holdings are not deemed financial interests of the government official for purposes of 18 U.S.C. § 208 or any other federal conflict-of-interest law.\(^\text{17}\) Accordingly, disqualification becomes unnecessary with respect to the issuers of the securities held in the trust.

\(^{13}\) The OGE will furnish, upon request, copies of models of both blind and diversified trusts.

\(^{14}\) A qualified diversified trust will be approved by the director of the OGE only in the case of a trust created for the benefit of a person appointed to his office by the president, by and with the consent of the Senate, or the spouse or dependent child of such a person.

\(^{15}\) The reporting individual must file with the director of the OGE the executed trust instrument and a list of the transferred assets. Within thirty days of transferring an asset other than cash to the trust, the reporting individual must file a report with the director briefly describing each such asset. (The prior written approval of any additions to the trust portfolio by interested parties must be secured by the director of the OGE.) The reporting individual must also file a report within thirty days of the dissolution of a qualified trust listing all assets of the trust at the time of dissolution. All documents filed with the director of the OGE are subject to the public disclosure requirements described in section 5.5, herein.


5.5 Public Access to Reports

The reporting individual must file the financial disclosure report with the designated agency ethics official. The agency will add to that report the official description of the government office or position held or to be held by the reporting individual involved. Within fifteen days after any report is received by the agency, each agency must permit inspection of the report or furnish a copy of it to any person who makes a written request for it.\(^{18}\)

Filed reports are available to the public for six years after their receipt,\(^{19}\) after which they are destroyed unless needed in an ongoing investigation. The reports of unconfirmed appointees, however, are destroyed one year after the individual is no longer under Senate consideration.

Reports may not be obtained or used for unlawful purposes, for any commercial purpose (other than the news or communications media for dissemination to the general public), for establishing credit, or for solicitations.

5.6 Review of Reports

Reports must be reviewed by an appropriate official in the reporting individual’s agency within sixty days after the date of filing. The reviewing official reviews each report to determine that the form has been properly completed and that the report discloses no conflict of interest. If the reviewing official concludes that the reporting individual has complied with applicable laws and that no conflict of interest exists, he must sign and date the report.

In the event that the reporting individual is not in compliance with applicable law, the reviewing official may request additional information. If, after notice and an offer to respond, the reviewing official determines that the report discloses a conflict of interest, the official must notify the reporting individual of steps that must be taken to resolve it. Remedial steps may include, if appropriate, divestiture of the conflicting interests, restitution, establishment of a qualified

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\(^{18}\) The written application must state (a) the requesting person’s name, occupation, and address, (b) the name and address of any other person or organization on whose behalf the inspection or copy is requested, and (c) that such person is aware of the prohibitions on obtaining or using the report, as set forth in the 1978 act and described in the last paragraph of section 5.5 herein. All such applications are made available to the public throughout the period during which the report itself is made available to the public. 5 C.F.R. § 734.603(c).

\(^{19}\) The 1978 act does not require public availability of a report filed by any individual in the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any individual engaged in intelligence activities in any agency of the United States, if the president finds that public disclosure of the report would compromise the U.S. national interest. 5 C.F.R. § 734.603(b).
trust, request for an exemption under 18 U.S.C. § 208(b)\textsuperscript{20}, or voluntary request by the individual for transfer, reassignment, limitation of duties, or resignation.

5.7 Limitation on Outside Earned Income

Any reporting individual who occupies a full-time presidential appointment (requiring Senate confirmation) in the executive branch and who is compensated at a rate of pay that equals or exceeds the lowest rate of pay specified for GS-16 may not have in any calendar year outside earned income attributable to that year in excess of 15 percent of such compensation.\textsuperscript{21} The term outside earned income means wages, salaries, commissions, professional fees and other compensation received for personal services actually rendered, other than to the federal government. Income received by an inactive partner or income from investments with respect to which the personal services of the reporting individual are not a material factor is not deemed outside earned income for purposes of this provision. This provision does not cover amounts received during a period in which the reporting individual was not employed by the federal government for personal services actually rendered during such a period.

\textsuperscript{20} See section 2.1.2, herein.

\textsuperscript{21} 5 U.S.C. App. § 210. The provisions of this section do not preclude limitations on outside employment which may be imposed with respect to employees of a particular agency. For example, the Department of Justice does not allow its employees to practice law outside the department, regardless of the amount of the employee’s outside compensation.
Conclusion

The very length of the foregoing explanation may suggest to its readers that the conflict-of-interest laws create an impenetrable thicket. Any such impression would be erroneous. The restrictions established by the statutes and the regulations are sufficiently limited in scope and sufficiently clear in their application as to make compliance neither burdensome nor uncertain.

The greatest element of protection for individuals entering government service lies in the availability of clearance procedures. Following official approval of his financial disclosure report, an individual entering government service can feel comfortable that he will not be charged with any impropriety based on his personal financial interests, including his financial arrangements with his former firm. While functioning in office, the government official can readily avoid conflict-of-interest situations by disqualifying himself whenever he perceives that a personal financial interest or a financial interest of his former firm may be involved. After leaving government employment, he can follow certain of the ground rules discussed in this book in order to assure compliance with the conflict-of-interest statutes.

In summary, non-career service by accountants in the federal government is entirely feasible within the framework of the existing conflict-of-interest statutes and regulations.
APPENDIX

TEXT OF PERTINENT SECTIONS OF THE FEDERAL CONFLICT OF INTEREST STATUTES
(All Sections are Contained in Title 18 of the United States Code)

§ 202. Definitions

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, 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, temporary duties either on a full-time or intermittent basis, a part-time United States Commissioner or a part-time United States magistrate. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or em-
ployee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms "officer or employee" and "special Government employee" as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

(b) For the purposes of sections 205 and 207 of this title, the term "official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

§ 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—
(1) at a time when he is a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia, Delegate Elect from the District of Columbia, Resident Commissioner, or Resident Commissioner Elect; or

(2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission, or

(b) Whoever, knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives, promises, or offers any compensation for any such services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Delegate, Commissioner, officer, or employee--

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

(c) A special Government employee shall be subject to subsection (a) only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally
and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: Provided, That clause (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

§ 205. Activities of officers and employees in claims against and other matters affecting the Government

Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties—

(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and sub-
substantial interest—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

A special Government employee shall be subject to the preceding paragraphs only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: Provided, That clause (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

Nothing herein prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

Nothing herein or in section 203 prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other person-
al fiduciary except in those matters in which he has participated personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which are the subject of his official responsibility, provided that the Government official responsible for appointment to his position approves.

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 a contract with or for the benefit of, the United States provided that the head of the department or agency concerned with the grant or contract shall certify in writing that the national interest so requires.

Such certification shall be published in the Federal Register.

Nothing herein prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

§ 207. Disqualification of former officers and employees; disqualification of partners of current officers and employees

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except
the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to--

(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) 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, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; or

(b) Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any
other person (except the United States) by personal presence at any formal or informal appearance before—

(1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) 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, and

(3) as to (i), which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee; or

(c) Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—
(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(d) (1) Subsection (c) of this section shall apply to a person employed—

(A) at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;

(B) on active duty as a commissioned officer of a uniformed service assigned to pay grade of O-9 or above as described in section 201 of title 37, United States Code; or

(C) in a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the Director of the Office of Government Ethics, in consultation with the department or agency concerned. Only positions which are not covered by subparagraphs (A) and (B) above, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS-17 of the General Schedule prescribed by section 5332 of title 5, United States Code, shall be within the scope of this subsection.
States Code, or positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978, or positions of active duty commissioned officers of the uniformed services assigned to pay 0-7 or 0-8, as described in section 201 of title 37, United States Code, may be designated. As to persons in positions designated under this subparagraph, the Director may limit the restrictions of subsection (c) to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction, upon a determination by the Director that there exists no potential for use of undue influence or unfair advantage based on past government service. On an annual basis, the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his responsibilities under this paragraph.

(2) The prohibition of subsection (c) shall not apply to appearances, communications, or representation by a former officer or employee, who is--

(A) an elected official of a State or local
(B) whose principal occupation or employment is with (i) an agency or instrumentality of a State or local government, (ii) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or (iii) a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization.

(e) For the purposes of subsection (c), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau.

(f) The prohibitions of subsections (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics...
Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

(g) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, 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 in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which such officer or employee or special Government employee participates or has participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility, shall be fined not more than $5,000, or imprisoned for not more than one year, or both.

(h) Nothing in this section shall prevent a former
officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

(i) The prohibition contained in subsection (c) shall not apply to appearances or communications by a former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; nor shall the prohibition of that subsection prevent a former officer or employee from making or providing a statement, which is based on the former officer's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses.

(j) If the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that such former officer or employee violated subsection (a), (b), or (c) of this section, such department or agency head may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, such department or agency on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall by subject to review in an appropriate United States district court. No later than six months after the effective date of this Act, departments and agencies shall, in consultation with the Director of the
Office of Government Ethics, establish procedures to carry out this subsection.

§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or of the District of Columbia, including a special Government employee, participates personally and substantially, as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, 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, has a financial interest—

Shall be fined not more than $10,000, or imprisoned not more than two years, or both

(b) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, contro-
versy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the 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, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (j) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services. In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment.

§ 209. Salary of Government officials and Employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee
under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of the Government Employees Training Act (Public Law 85-507, 72 Stat. 327; 5 U.S.C. 2301-2319, July 7, 1958).

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency; Provided, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days.