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U.S. Environmental Protection Agency Guidance on Ethics and Conflicts of Interest

U. S. ENVIRONMENTAL PROTECTION AGENCY

GUIDANCE ON ETHICS AND CONFLICTS OF INTEREST

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FOREWORD

In the fall of 1982 a pamphlet entitled "Guidance on Ethics and Conflict of Interest" was distributed to Assistant Administrators, Office Directors, Staff Office Directors and Regional Administrators. These officials serve as "Deputy Counselors" under EPA regulations at 40 C.F.R. Part 3. In the spring of 1983, that pamphlet was distributed to all EPA managers and supervisors.

The pamphlet summarized the conflict-of-interest statutes at 18 U.S.C. §201 et seq. and the EPA standards of conduct at 40 C.F.R. Part 3, and provided examples of how these rules are applied.

This pamphlet is a revision of the earlier version and is intended for distribution to all employees. It is essentially an expansion of the material in the original pamphlet.

We welcome any comments or suggestions.

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INTRODUCTION

EPA employees are subject to a number of statutes and regulations which establish high standards of ethical conduct in carrying out their duties and responsibilities. The public is entitled to have complete confidence that official decisions are free from considerations of self-interest or favoritism. Each employee must help to earn and must honor that trust by his or her own integrity and conduct in all official actions.

The conflict of interest statutes at 18 U.S.C. §§202-209 are criminal provisions which prohibit acts affecting a personal financial interest, representation of outside parties in government matters, supplementation of government salary from outside sources and certain representational activities after departure from government service. In addition, provisions of the Ethics in Govenment Act of 1978 at 5 U.S.C. Appendix I require certain officials to file public financial disclosure reports. Other statutes deal with such matters as political activity. gifts to superiors, use of government vehicles, etc.

EPA regulations at 40 C.F.R. Part 3 set forth additional restrictions and requirements concerning actions which create a reasonable appearance of impropriety, outside employment, travel reimbursements, publishing activities and confidential financial reports under Executive Order 11222 of May 8, 1965. The regulations also establish a system for counseling employees concerning the statutes and regulations, approval of outside employment and collection and review of financial interest statements.

The Deputy General Counsel is the Designated Agency Ethics Official who is responsible for overall management of the EPA ethics program. He is assisted by an Alternate Agency Ethics Official and by the Deputy Counselors. The Deputy Counselors (Assistant Administrators, Staff Office Directors, Regional Administrators and Office Directors fn/) are responsible for advising employees in their organizations concerning the ethics rules, coordinating their advice with the Designated Agency Ethics Official and reviewing requests for approval of outside employment. They are also responsible for collecting, reviewing and maintaining confidential statements of employment and financial interest. The Deputy Counselors are required to direct employees to file such financial interest statements if their duties and responsibilities are likely to involve matters affecting the financial interests of those outside the government.

This pamphlet summarizes and explains the basic conflict of interest laws and EPA regulations. It is important to read it carefully, together with the regulations at 40 C.F.R. Part 3, and to consult with the appropriate Deputy Counselor or with the Designated Agency Ethics Official whenever questions arise.

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fn/ Laboratory Directors are also being considered for designation as Deputy Counselors.

GUIDANCE ON ETHICS AND
CONFLICT OF INTEREST

I. Financial Interests

The basic conflict-of-interest statute which governs employees' conduct in the course of their EPA duties is 18 U.S.C. §208(a), which provides that:

> 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, 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.

This provision applies to rulemaking and policy matters as well as adjudications, grants and contracts. fn/ The size of the financial interest is irrelevant, as is the employee's level of responsibility. The restriction applies not only to the corporation in which the employee owns stock but also to the corporation's parent and subsidiary companies. Moreover, it does not matter that the organization in which the employee or the employee's immediate family has a financial interest is a non-profit or public interest group, since such groups nonetheless have financial interests which the employee's decisions or advice may affect.

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fn/ There is a distinction between rulemaking matters which distinctively affect a particular firm or industry and matters which affect industry generally. Only the former types of rulemaking are covered by 18 U.S.C. §208. However, employees should consult with the Designated Agency Ethics Official if they believe that this distinction applies to them.

Examples

1. An employee owns 10 shares of common stock in a smelting company which will be required to install additional pollution control equipment if a proposed new source performance standard is promulgated. The employee's EPA duties ordinarily include reviewing drafts of regulations and making comments.

The employee may not participate in developing this regulation, since he has a financial interest in a company that would be affected by the performance of his duties.

2. Same as above, except that the financial interest is part of a trust bequeathed by the employee's deceased parents for the benefit of his minor children.

The result is the same, since 18 U.S.C. §208(a) extends to the financial interests of employees' minor children.

3. An employee is the treasurer of a local chapter of the Audubon Society, which has applied to EPA for a grant. The employee receives no pay for these duties.

He is nonetheless barred from participating in any way, including rendering any advice or recommendation, in the EPA decision on the application, since he is an officer in an organization which has a financial interest in the matter.

4. An EPA employee is serving as Project Officer on a contract with a consulting firm to study emission control technologies for the steel industry. The consulting firm approaches the EPA employee to discuss possible future employment with the firm. The employee states that he will consider the matter.

Until he rejects the offer, the employee must disqualify himself from any action as Project Officer, since any such action would be likely to affect the financial interests of an organization with which he is negotiating for employment. Of course, if the employee accepts the offer, he must continue to disqualify himself so long as he remains with EPA.

5. An EPA employee works in pesticide registration. His wife holds stock in a pesticides manufacturing company as part of a retirement plan.

The employee may not participate in processing an application from the firm in which his wife holds stock.

6. An EPA employee works in pesticide registration. His wife works for a pesticide manufacturing company that has applied for an EPA pesticide registration.

The EPA employee is not statutorily prohibited from working on the company's pesticide registration since 18 U.S.C. §208(a) does not extend to a spouse's employer. However, see the appearance rules, infra.

Waiver

The statute contains the following provision at 18 U.S.C. §208(b) for waiver of the restriction:

> 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, controversy, 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 (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

EPA regulations at 40 C.F.R. §3.303 provide that only the Agency Counselor (now Designated Agency Ethics Official) may grant waivers under 18 U.S.C. §208(b)(1). The Administrator has designated the Deputy General Counsel as Agency Ethics Official. Deputy Counselors (Assistant Administrators, Regional Administrators, Heads of Staff Offices reporting to the Administrator, Deputy Assistant Administrators and their successors under subsequent reorganizations) may not grant waivers, no matter how insignificant the financial interest. However, the regulation does provide that employees are to submit waiver requests to the Agency Counselor through their Deputy Counselors.

Waiver requests will be considered for rulemaking and policy matters in limited circumstances. In considering waiver requests, the following factors will be considered: the amount of the

financial interest; the size of the company; the proportion of the company's total stock the employee owns and the employee's role in the decision-making process. Waivers will generally not be granted where the financial interest involves amounts over $10,000 or where the employee is dealing with applications, contracts, grants or adjudications which directly and specifically affect the companies in which he or she holds stock, no matter how small the financial interest.

EPA regulations at 40 C.F.R. Subpart C, Appendix C, have implemented the waiver authority of 18 U.S.C. §208(b)(2) by exempting:

(1) bonds other than corporate bonds;

(2) mutual fund shares (including money market funds);

(3) insurance policies;

(4) cash, savings accounts, certificates of deposit, and shares in Federal credit unions;

(5) real property which is the personal residence of the employee; and

(6) pensions, retirement, group life, health or accident insurance plans or other employee welfare or benefit plans from former employers (except profit-sharing or stock bonus plans).

Clean Air Act Restrictions (40 C.F.R. §3.505)

Under Section 318 of the Clean Air Act, certain high-level officials listed in 40 C.F.R. Part 3, Subpart B, Appendix D, may not be employed by, serve as attorney for, act as consultant to, or hold any other official or contractual relationship to:

(1) the owner or operator of any major stationary source or any stationary source which is subject to a standard of performance or emission standard under Section 111 or Section 112 of the Clean Air Act;

(2) any manufacturer of any class or category of mobile sources subject to regulation under the Clean Air Act;

(3) any trade or business association of which an owner or operator of a stationary source or a manufacturer of mobile sources is a member; or

(4) any organization (including a non-profit organization) which is a party to litigaton or engaged in political, educational or informational activities relating to air quality.

In addition, officials subject to Section 318 are prohibited from owning any financial interest which "may be inconsistent with" their EPA positions. Although the Section 318 restriction cannot be avoided by recusal or waiver, our regulations treat such interests in the same manner as a financial interest is treated under 18 U.S.C. §208.

Section 318(d) provides for a fine or not more than $2500 or imprisonment not to exceed one year for violation of these restrictions.

Toxic Substances Control Act Restrictions

Members of the advisory committee established under Section 4(e) of the Toxic Substances Control Act (Pub. L. No. 94-469, October 11, 1976) and their designees are subject to the following additional restrictions:

(1) they may not accept employment or compensation from any person subject to any requirement of the Act or any rule or order issued under it, for a period of twelve months after their committee service ceases; and

(2) they may not hold any stocks or bonds or have any substantial pecuniary interest in any person engaged in the manufacture, processing or distribution in commerce of any substance or mixture subject to any requirement of the Act or of any rule or order issued under it.

This provision is enforceable by an action for a court order to restrain violations.

Surface Mining Control and Reclamation Act of 1977 (SMCRA) Restrictions

A Federal employee who performs any function under SMCRA (such as reviewing Environmental Impact Statements submitted by the Office of Surface Mining in the Department of the Interior) may not own a "direct or indirect interest" in underground or surface mining operations. Violation is punishable by a fine of up to $2500 or imprisonment up to one year, or both. 30 U.S.C. §1211(f). See also, 30 C.F.R. §706 et seq. The term "direct or indirect" includes holdings by spouses, minor children and other relatives residing in the employee's home. The term "financial interest" includes lands, stocks, bonds, warrants, partnership shares or other holdings and includes arrangements to receive a salary or pension from coal mining interests.

EPA Standards

In addition, EPA regulations provide at 40 C.F.R. §3.103(e) that employees shall:

> avoid any action, whether or not specifically prohibited by law or regulation (including the provisions of this part), which might result in, or create the appearance of:
>
> (1) Using...public office for private gain;
> (2) Giving preferential treatment to any organization or person;
> (3) Impeding Government efficiency or economy;
> (4) Losing...independence or impartiality of action;
> (5) Making a Government decision outside official channels; or
> (6) Affecting adversely the confidence of the public in the integrity of the Government.

These standards are based on government-wide regulations. They are not easy to apply and can raise delicate questions of judgment. It is impossible to list all the situations which may arise, but a few examples are:

1. A Project Officer sends a resume to the company which is performing the contract he is administering. Although there would be no violation of 18 U.S.C. §208(a) if the employee promptly ceased to perform the duties of Project Officer, his action was nonetheless construed to be improper as a violation of the appearance standards unless he made prior arrangements with his Deputy Counselor.

2. An EPA employee participates in the award of a grant to a non-profit organization in which her husband is an officer. The husband will not personally receive any financial benefit from the grant. This is not a violation of 18 U.S.C. §208(a) because the statute does not prohibit participation in a matter affecting the financial interests of an organization of which the employee's spouse is an officer or employee. However, the action was construed to be improper under the appearance standards.

3. An employee who holds New York City municipal bonds participates in a construction grant decision involving New York City. This would not violate the statute because bonds other than corporate bonds are exempt, but there may be a problem of appearances.

4. An employee participates in a matter specifically involving his former employer. Employment with the company ceased only

within the previous two years. There is no statutory violation but the participation can create an appearance of favoritism.

Remedies

The Designated Agency Ethics Official is authorized to direct that an employee dispose of a financial interest that creates an actual or apparent conflict of interest. Before this remedy must be invoked, employees may avoid problems under 18 U.S.C. §208 by:

(1) avoiding participation in matters affecting their financial interests by issuing a recusal statement to employees under their supervision and to their immediate supervisors, with a copy to the Designated Agency Ethics Official;

(2) seeking a waiver from the Designated Agency Ethics Official under 18 U.S.C. §208(b) and 40 C.F.R. §3.303;

(3) requesting a change in duties; or

(4) disposing of the interest or placing the assets in "blind trust" approved by the Office of Government Ethics.

Deputy Counselors should consult with the Designated Agency Ethics Official if an employee proposes to place assets in a "blind trust" or if an order to divest seems necessary.

II. Financial Disclosure

Designated EPA employees are subject to one of two types of financial disclosure:

(1) public disclosure under the Ethics in Government Act of 1978, or

(2) confidential statements of employment and financial interest under Executive Order 11222.

The Justice Department's Office of Legal Counsel ruled on April 11, 1980, that the Ethics in Government Act repealed the requirement that certain employees file additional public disclosure statements under the Toxic Substances Control Act, the Resource Conservation and Recovery Act, the Clean Air Act and the Environmental Research, Development and Demonstration Authorization Act. Consequently, these requirements are no longer in effect and Deputy Counselors should not retain the "Statements of Known Financial Interest" which employees have submitted under these statutes.

The purpose of financial disclosure is to assist the Agency in preventing conflicts of interest on the part of certain key employees. IT IS IMPORTANT TO NOTE, HOWEVER, THAT 18 U.S.C. §208(a) APPLIES TO ALL FINANCIAL INTERESTS, INCLUDING INTERESTS NOT REQUIRED TO BE REPORTED. MOREOVER, DISCLOSURE DOES NOT PERMIT EMPLOYEES TO ACT IN MATTERS IN WHICH THEY HAVE A FINANCIAL INTEREST; 18 U.S.C. §208 STILL APPLIES.

Executive Personnel Financial Disclosure Reports (SF 278)

Under the Ethics in Government Act, the following employees must file with the Designated Agency Ethics Official a Standard Form 278, Financial Disclosure Report:

(1) Presidential appointees;

(2) those whose positions are classified at GS-16 or above in the General Schedule (including all SES employees) or whose basic rate of pay under other pay schedules is equal to or greater than the rate for GS-16 (step 1);

(3) Administrative Law Judges;

(4) Schedule C employees (unless exempted by the Office of Government Ethics); and

(5) the Designated Agency Ethics Official.

Consultants who are paid at a daily rate equal to or exceeding the daily rate for GS-16 and who are expected to work more than 60 days in a 365 day period must also file. If a consultant has not filed because he or she did not expect to work more than 60 days, a SF 278 must be filed within 15 days after the 61st working day if the consultant actually works more than 60 days.

Non-covered employees acting in covered positions for more than 60 days must also file.

The Standard Form 278 must be filed:

(1) within 30 days after assuming a covered position unless the employee has left a covered position within the previous 30 days;

(2) by May 15 of each year, provided the employee has worked in a covered position for more than 60 days in the previous calendar year; and

(3) within 30 days after leaving a covered position unless the employee has assumed another covered position.

The Designated Agency Ethics Official may extend these deadlines by up to 45 days for good cause, and the Office of Government Ethics may grant an additional extension of up to 45 days.

The Designated Agency Ethics Official submits his or her report to the Administrator. All others who are required to file submit their reports to the Designated Agency Ethics Official. In addition, copies of the reports of the Designated Agency Ethics Official and of all Presidential appointees are submitted to the Office of Government Ethics. Reports are retained for six years unless needed in a ongoing investigation. (Reports of Presidential nominees who are not subsequently confirmed are retained for one year, unless needed in an ongoing investigation.)

These forms are available to the public. However, those wishing to examine a report or receive a copy must file a written statement with the Designated Agency Ethics Official indicating name, occupation and address and the name and address of any person or organization on whose behalf the inspection or copy is requested. The requester must also sign a statement that indicates that he or she is aware that it is unlawful to use the reports for any unlawful purpose, any commercial purpose (except public dissemination by news media), credit purposes or solicitations of funds for charitable or political purposes. These requests are also available to the public.

The Attorney General may bring an action to assess a civil penalty of up to $5000 for willful failure to file or falsifying a report. In addition, falsifying a report may be a criminal offense under 18 U.S.C. §1001.

Confidential Statements of Employment and Financial Interest

Employees who must file a Standard Form 278 need not file any other disclosure statement. However, Executive Order 11222 requires certain other employees to file EPA Form 3120-1, Confidential Statement of Employment and Financial Interest. Employees who are required to file these statements must submit them to their Deputy Counselors within 30 days after entrance on duty and by July 31 of each year and must update the statements quarterly if there are any changes. (Note: although the 1973 EPA regulation establishes June 30 as the due date, the Office of Government Ethics and its predecessor at the former Civil Service Commission have advised that July 31 is more appropriate because the reports cover the period July 1 - June 30.)

The incumbents of all positions listed in Appendix B to 40 C.F.R. Part 3, Subpart C, or their successors under subsequent reorganizations must file a confidential statement unless they are required to file a Standard Form 278. (Note: even if a special government employee who would otherwise be required to file SF 278 is not expected to work more than 60 days, he or she must nonetheless file a confidential report.)

The Designated Agency Ethics Official or Deputy Counselors may require employees who are not otherwise required to do so to file confidential financial statements. In general, employees at the GS-13 level (or above or comparable pay levels under other systems) should be required to file if they:

(1) exercise judgment in making a government decision respecting contracts or grants, including project officers, members of technical evaluation panels, inspectors, auditors and initiators of procurement requests; or

(2) exercise judgment or provide advice in regulatory decisions which may have an economic impact on those outside the government.

Without the prior approval of the Office of Personnel Management, no employee below grade GS-13 can be required to file. However, EPA has special authority from OPM to require certain lower-level employees to file (e.g., in the Office of Mobile Source Enforcement), and Deputy Counselors should consult with the Designated Agency Ethics Official if they wish to seek approval for requiring lower-level employees to file.

Deputy Counselors should also note that an employee whose position is not listed in Appendix B of 40 C.F.R. Part 3, Subpart C, is not required to file unless the Designated Agency Ethics Official or a Deputy Counselor has specifically directed the employee to do so in writing. A requirement to file is grievable.

In addition, an older version of the EPA Form 3120-1 states that employees must list the amounts of their holdings. Disclosure of amounts is not required. These forms were printed in 1976 when EPA was planning to revise its regulations to require disclosure of amounts. However, the Ethics in Government Act was passed before the Civil Service Commission approved our proposed changes and the requirement never went into effect.

Confidentiality

EPA Form 3120-1 is confidential. These forms must be kept in a locked cabinet and they must not be disclosed except to the following: (1) Designated Agency Ethics Official; (2) Deputy Counselors; (3) Office of Inspector General; and (4) consistent with the Privacy Act any person for good cause as determined by the Administrator or Director of the Office of Government Ethics. (Good cause would include disclosure on the written request of a Congressional Committee or Subcommittee but would not include disclosure to individual Members of Congress.) The reports may also be disclosed to staff members who assist the Designated Agency Ethics Official and the Deputy Counselors in their review functions. Such staff members must be designated in writing and initial any reports that they review.

III. Representing Outsiders

Regular government employees (those employed to serve more than 130 days in a 365 day period) may not act as "agent or attorney" (that is, communicate with intent to influence on behalf of another) before federal agencies or the District of Columbia. Employees likewise may not represent outsiders in court proceedings in which the United States or the District of Columbia is a party or has a direct interest. The basic statute at 18 U.S.C. §205 provides that:

> Whoever, being an officer or employee of the United States...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, or 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 substantial interest--
>
> Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

A parallel provision at 18 U.S.C. §203 forbids employees to receive compensation in connection with the representational activities of the employee or others before federal agencies (not courts). Lawyers thus may not receive a share of partnership income attributable to federal agency representational activity. However, an employee could receive a fee for non-representational work performed in connection with a federal agency, so long as the employee did not actually communicate with intent to influence (but see 40 C.F.R. §3.503 for additional restrictions). Note also: this restriction can have post-employment effects, since current partnership income may be attributable to work done while a partner was with the government.

Restrictions on partners

Although this provision is misplaced in the context of post-employment provisions, 18 U.S.C. 207(a) also provides that partners of present government employees may not act as "agent or attorney" with respect to any "particular matter" (including a policy or rule-making matter) in which the government employee is participating or has participated "personally and substantially."

Examples

1. An employee has received EPA permission to work as a consultant to a firm which has been awarded a contract by the Department of Energy. A controversy arises concerning the scope of work of the contract and the firm asks the EPA employee to discuss the matter with the DOE contracting officer to seek additional compensation for an alleged change in the scope of work.

The employee may not do so, since he would be acting as agent for an outsider in a claim or controversy in which the government is a party. Moreover, for the employee to assist the firm in the preparation of its claim may violate the standards of 40 C.F.R. §3.503(c).

2. An EPA employee is an officer in an environmental organization and has been asked to present testimony on behalf of the group at an EPA rule-making proceeding.

He may not do so. Although there is a statutory exception for testimony under oath, such activity on the part of an EPA employee has been construed to violate the appearance standards of 40 C.F.R. §§3.103 and 3.503. However, the employee may appear as a concerned individual rather than as a representative of a group, since the employee would not be acting as "agent or attorney."

3. An employee has received permission to work as a consultant to an architect/engineering firm which is competing for a subagreement under an EPA construction grant. The firm has asked the EPA employee to present its proposal to EPA's grantee.

The employee may not do so. Although the restriction of 18 U.S.C. §205 does not apply, since the representational activity is not before EPA, the problem of appearances is clear. In addition, for an EPA employee to work on projects funded by EPA may also violate the appearance standards of 40 C.F.R. §3.503(c), and Deputy Counselors should consult with the Designated Agency Ethics Official before approving any such outside employment.

Exceptions (18 U.S.C. §§203 and 205 and 40 C.F.R. Part 3, Subpart A, Appendix A)

1. With the approval of the Agency Ethics Official, an employee may act as agent or attorney for his or her parents, spouse, child, or any person for whom, or for any estate for which, the employee is serving as guardian, executor, administrator, trustee or other personal fiduciary except where the employee has participated in the same matter on behalf of the government or where the matter is the subject of the employee's official responsibility.

2. Nothing in 18 U.S.C. §203 or §205 prevents an employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt. (However, an employee may not serve as an "expert witness" for an outside party in a government matter.)

3. An employee may act without compensation as agent or attorney for anyone who is the subject of disciplinary, loyalty or other personnel proceedings, provided the employee's official duties do not conflict with such representation. Employees should consult with their Deputy Counselor or the Designated Agency Ethics Official before undertaking such representation.

See Section XI concerning the applicability of this restriction to special government employees.

Employees on IPA Assignments

EPA employees detailed to State or local governments or to universities or other organizations under the Intergovernmental Personnel Act (5 U.S.C. §§3371 - 3376) remain subject to the conflict-of-interest laws and EPA regulations. However, 18 U.S.C. §§203 and 205 do not apply where an employee is "acting in the proper discharge of official duties." In March of 1980, the Department of Justice opined that EPA employees detailed to States to carry out programs for which EPA and the States have a joint responsibility under the environmental statutes may represent a State's position before EPA. Such employees are acting "in the proper discharge of official duties" because the environmental statutes contemplate that EPA employees will be detailed to important State positions, and it is essential to the statutory scheme that such employees be allowed to represent the States in their dealings with EPA.

Persons assigned to EPA under the Intergovernmental Personnel Act are subject to all the conflict-of-interest statutes and EPA regulations.

IV. Post-Employment Conflict of Interest Restrictions

The post-employment conflict of interest provisions at 18 U.S.C §207 establish three types of restrictions:

Permanent restrictions

Former employees are forever barred from representing anyone other than the United States before a Federal court or agency with respect to "a particular matter involving a specific party or parties" in which they ever participated "personally and substantially" (that is, on a matter of substance as contrasted with mere administrative processing of vouchers, etc.) as government employees. Participation is broadly defined to include advice and recommenda-

tions as well as decision-making. However, the restriction applies only to matters which involve specific parties, such as contracts, grants and adjudications, and it covers only actual representation of another. The restriction does not cover rulemaking, and former employees may represent an outside party in proceedings governed by rules they helped to make.

The restriction does not prohibit former employees from seeking contracts with the agency for which they formerly worked, nor does it bar work on contracts with which former employees were involved.

Two-year restrictions

Former employees who had "official responsibility" for particular matters involving a specific party or parties but did not actually participate in them are barred for a period of two years from representing outside parties on such matters. This restriction applies only to particular matters which were under a former employee's responsibility during his or her final year in the responsible position. The terms of this restriction are the same as those of the permanent restriction.

In addition, former employees who have been designated as "senior employees" by statute or by the Office of Government Ethics are prohibited for two years from assisting an outside party "by personal presence" in connection with particular matters in which such employees ever participated personally and substantially. This means that a former "senior employee" may not attend a meeting or hearing to assist an outside party's representative where such a matter will be discussed, even if the former employee does not directly communicate with intent to influence.

The "senior employee" list is reviewed annually. "Senior employees" at EPA include Assistant Administrators, Office Directors, Regional Administrators, some Directors of Staff Offices reporting to the Administrator and a few Division Directors. See 5 C.F.R. §737.33

One-year restriction

Former employees who served in "senior employee" positions and who left EPA after February 28, 1980, are subject to a one-year "quarantine" which prohibits any communication with EPA with intent to influence on any matter, including rulemaking, regardless of whether the former employees participated in the matter. The Office of Government Ethics has construed communications with courts and Justice Department attorneys in connection with cases involving EPA as falling within the restrictions. However, employees may occupy such positions in an "acting" or "temporary" capacity for up to 60 days without becoming subject to the one-year restriction. 5 C.F.R. §737.25(e).

Exceptions to the One-Year Restriction

1. Employees of State or local governments, universities, hospitals or medical research facilities

   Elected officials of State or local governments and those whose principal employment is with an agency or instrumentality of a State or local government or a hospital, medical research institution or institution of higher education may communicate with EPA on behalf of these entities.

2. Furnishing scientific or technical information

   The restriction does not prohibit former employees from furnishing scientific or technical information at the agency's request or in connection with performance of work under assistance agreements or contracts.

3. Testifying under oath

   The restriction does not prohibit former employees from testifying at a proceeding under oath or penalty for perjury. However, service as an "expert witness" is not allowed.

4. Personal communications

   Communications of a personal nature, such as those concerning an individual's own payroll vouchers, are permitted.

5. Employees who left government service before July 1, 1979

   Only the permanent restriction applies in its present form to employees who left government service before July 1, 1979. For these persons, the present two-year restriction on representing outsiders on matters which were under their official responsibility lasted only one year and the ban on "aid and assistance" by personal presence did not apply. See 40 C.F.R. Part 3, Subpart A, Appendix C.

Penalties

The penalties for violation of 18 U.S.C. §207 include a fine of up to $10,000 and up to two years in prison. Alternatively, the agency may impose administrative sanctions, such as debarment from agency proceedings.

Restrictions in EPA Contract regulations

In addition to the statutory post-employment restrictions, EPA contract regulations at 41 C.F.R. §15-1.55 establisn a one-year prohibition against award of a noncompetitive contract to a former EPA employee or to a firm in which a former employee is an officer or director when the former employee was involved in developing or negotiating the contract proposal or will be involved in the management, administration or performance of the project. The Deputy Administrator may waive this prohibition if award would be unlikely to involve a violation of 18 U.S.C. §207 or EPA standards of conduct regulations. The waiver may be granted only if there is no indication of improper influence or favoritism and if award would be in the best interests of the government.

Although there is no prohibition against the award of a competitive contract involving a former employee, the official to whom the Director of the Procurement and Contracts Management Division reports must determine that there is no likely violation of 18 U.S.C. §207 or indication of improper influence or favoritism in awards within one year after the employee leaves EPA.

Examples

1. An EPA employee served on a technical evaluation panel for a contract award. After he left EPA, he went to work for the contractor and was assigned to work as project manager on the contract he helped to award. A dispute arises over the meaning of a contract term and the company's management asks the former employee to present the company's point of view to EPA.

He may not do so because the contractual matter involved a particular party or parties - the offeror - at the time the former employee participated. It is the same particular matter, and presenting the company's position to EPA would amount to communication with intent to influence. Note, however, that it is proper for the employee to work on the contract and even to deal with the EPA Project Officer on matters involving the day-to-day performance or administration of the contract, since this is not communication with intent to influence. However, because this exception involves a delicate question of judgment, a former employee should seek

written advice from the Designated Agency Ethics Official before dealing with EPA on grants and contracts where the restriction would otherwise apply.

2. Same situation, except that the company merely asks the former employee to prepare a written submission to EPA for the signature of the company's president.

He may do so, since the statute bars only representational activity, not aid and assistance.

3. A former EPA attorney (not a "designated senior employee") advised the Office of Air Quality Planning and Standards on a draft emission standard. After he leaves, a private client engages him to represent a company in a court proceeding in which the application of the rule is at issue.

He may do so, since rulemaking is not "a particular matter involving a specific party or parties."

4. A former Regional Administrator was responsible for an enforcement proceeding during his final year at EPA, but did not personally participate in the matter. Immediately after his resignation from EPA, the firm which was the subject of the enforcement action asks the former Regional Administrator to discuss settlement with EPA and the Justice Department.

He may not do so during the first two years after leaving EPA. In addition, the one-year "quarantine" applies to former Regional Administrators.

5. Same situation, except that the Regional Administrator was on an IPA assignment or reassigned to Headquarters for a year before leaving EPA.

He still may not do so, but in this case the restriction lasts only one year. The two-year restriction is measured from the date official responsibility ceases and not from the date the former Regional Administrator left EPA.

V. Rule Against Supplementation of Government Salary

The statutory restriction against supplementation of employees' salaries by outside sources is at 18 U.S.C. §209 and provides as follows:

> (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, or 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 prohibits 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).

The purpose of this restriction is to bar supplementation of employees' salaries by outside parties, except as specified above. For example, a former employer could not agree to make up the difference between an EPA employee's government salary and the salary he or she was earning from the private employer. The statute does not forbid receipt of outside <u>earned</u> income nor does it generally prohibit income under deferred compensation plans. The question is whether a former employer is providing a special benefit <u>because</u> of the employee's government employment.

VI. <u>Gifts, Gratuities and Entertainment</u> (40 C.F.R. §§3.400-3.402)

EPA employees may not, directly or indirectly, accept gifts from anyone who: (1) is financially affected by the way EPA employees perform their jobs; (2) has or is seeking to obtain an EPA contract or grant; or (3) conducts operations or activities

which EPA regulates. Of course, offering or accepting anything of value for the purpose of influencing official action is a crime under the bribery statute. (18 U.S.C. §201)

Exceptions

1. Food

Employees may accept food or refreshments of nominal value during a meeting or an inspection tour where there is no arrangement for separate billing. For example, if consistent with the transaction of official business, it would be proper for an employee to accept a lunch in a corporate dining room.

Employees may also accept food or refreshments at widely attended gatherings sponsored by industrial, technical or professional organizations if the employee is representing EPA.

Employees are not authorized to accept "business lunches"; they must pick up their own checks.

2. Transportation

Employees may accept incidental transportation in kind from a private organization in connection with official duties. For example, employees on inspection tours may accept rides from the airport to the plant, if the firm customarily provides this service for visitors. Because of the appearance problem (and because it arguably amounts to an impermissible augmentation of EPA appropriations), employees generally should not accept rides in corporate aircraft. (See discussion of travel expenses below.)

3. Unsolicited advertising or promotional material

Employees may accept unsolicited advertising or promotional material of nominal value (under $10 U.S. retail), such as pens, pads, calendars and the like. Items which are not of an advertising or promotional nature may not be accepted no matter how inexpensive, and items of more than minimal value may not be accepted even if they are advertising or promotional materials.

4. Gifts from family and friends

It is permissible to accept such gifts if it is obvious that the personal relationship, and not the business relationship, prompted such gifts. Any gifts from other than family and in excess of $100 in value must be reported on the annual SF 278.

5. Benefits available to all employees

Employees may purchase articles at stores which give discounts to all government employees. They may also accept loans

from banks or other financial institutions on customary terms.

6. Foreign gifts and decorations

Under 5 U.S.C. §7342, employees may retain gifts of "minimal value" (under $140 U.S. retail) tendered by foreign governments as a souvenir or gesture of courtesy. Employees may not solicit such gifts. Employees may also accept such gifts of more than minimal value if the gift is in the nature of an educational scholarship or medical treatment or if it appears that refusal to accept the gift would cause offense or embarrassment or otherwise adversely affect U.S. foreign relations.

However, tangible gifts of more than minimal value must be turned over to the Agency for disposal. If such an acceptance occurs, Deputy Counselors should consult with the Designated Agency Ethics Official.

All gifts from foreign governments must be reported to the Office of International Activities.

When an Employee is Offered a Gift

Employees must decline to accept prohibited gifts. If the circumstances seem to require temporary acceptance for prudential reasons, employees must file a report with their supervisors. Gifts should be returned to the donor, if possible. If not, they must be donated to a public or charitable organization. Employees should ordinarily inform donors of the disposition of gifts.

Examples

1. An employee is on an inspection tour and a company representative meets him at the airport. On the way to the plant the industry representative suggests that they stop at a restaurant and have lunch. The industry representative insists on paying the bill.

   The employee may properly accept the ride, but not the lunch.

2. An employee is on an inspection tour of a foreign automobile plant. A company representative takes him to the company's executive dining room for lunch. At the conclusion of the inspection tour, the president of the company calls several hundred employees together and presents the employee with a watch, a calculator and a music box, all inscribed with the company's trademark.

Under the circumstances, it was proper to accept the lunch. Although the employee would be required to decline similar gifts from an American company, it would probably be prudent to accept the gifts in this case. When the employee returns to the U.S. he

must file a written report with his supervisor and donate the watch and the music box to charity. If the calculator is worth less than $10 U.S. retail it would be proper to keep it. If not, it must also be donated. Employees must make a written report to their supervisors describing acceptance and disposition of gifts.

Honoraria

Employees cannot accept payment for any official appearance. Unless the appearance is clearly in the nature of private outside activity, 18 U.S.C. §209 forbids acceptance of such augmentations of salary. (Note: even if an honorarium is received for a permissible outside activity, 2 U.S.C. §441i prohibits employees from accepting an honorarium of more than $2000 for any one appearance or honoraria totaling more than $25,000 in any one calendar year. In addition, all appearances by Presidential appointees in relation to government matters are "official" and no honorarium can be accepted.)

Organizations which would otherwise pay an honorarium to an EPA employee have sometimes made a donation to the EPA Scholarship Fund instead. However, employees must make it absolutely clear that the organization is not required to make a donation to the Scholarship Fund or to anyone else as a condition of their appearance. The employee may not designate the Scholarship Fund or any other charity to receive the donation. Moreover, any donation to the Scholarship Fund or to any other charity must be made directly--not through the employee. If the check is made out to the employee, the money is earned on behalf of the United States and must be deposited in the Treasury.

VII. Outside Employment (40 C.F.R. §§3.500-3.510)

Outside employment is permitted unless it would:

(1) violate federal or State law;

(2) give rise to a real or apparent conflict of interest;

(3) involve work for an EPA contractor or subcontractor on an EPA project; or

(4) involve use of EPA time or property, or the use of information confidential to EPA.

Prior approval for outside employment

Employee's must have the written approval of their Deputy Counselor of the Designated Agency Ethics Official before engaging in the following types of outside employment:

(1) regular self-employment (selling, service work, etc.);

(2) consulting services;

(3) holding state or local public office; or

(4) work involving an EPA contractor or subcontractor.

Moreover, employees are encouraged to seek approval of any outside activity where there is any question of impropriety.

Teaching, speaking, writing and editing

Additional conditions apply here. Employees may not:

(1) instruct people on dealing with specific matters pending in EPA;

(2) pursue such activities in connection with trips at government expense;

(3) approve or disapprove of advertising;

(4) express or imply official EPA support or approval of the work; or

(5) accept outside compensation for any work performed as a part of government duties.

If writing is related to an employee's official duties, it must either omit mention of the employee's connection with EPA or include the following disclaimer:

> This (article, book, etc.) was (written/edited) by (name) in (his/her) private capacity. No official support or endorsement by the Environmental Protection Agency is intended or should be inferred.

Examples

1. An employee has a realtor's license and would like to sell real estate in his spare time.

This is permissible as long as it is: (1) performed on the employee's own time; (2) no EPA facilities, such as telephones, are used; (3) the employees will not communicate with any federal agency with intent to influence (such as by seeking FHA or VA

loans); and (4) the employee receives the written approval of his Deputy Counselor.

2. An employee has written an article about a project he worked on at EPA and wants to submit it to a publisher.

This is permissible, so long as the employee and the publisher either omit mention of his EPA employment or include a disclaimer. Note that it would be unlawful for the employee to accept any outside compensation for writing which was part of his EPA duties. 18 U.S.C. §209. In this case, he is merely describing duties he performed for EPA. However, it would be improper to use confidential EPA information for personal gain. 40 C.F.R. §§3.103(c) and 3.503(j).

3. An employee has been asked to work on a project for a consulting firm and requests the approval of his Deputy Counselor.

This employment is approvable so long as: (1) it is not performed in connection with any EPA contract or subcontract, and (2) it would not involve communication with any federal agency with intent to influence in violation of 18 U.S.C. §205. Of course, the employee may not participate in any EPA matter which affects the financial interest of the consulting firm. (Note: although the regulation does not expressly prohibit work on EPA grants or subagreements under EPA grants, such outside employment may nonetheless present a problem of appearances. Deputy Counselors should consult the Designated Agency Ethics Official whenever an employee requests approval of such outside employment.)

VIII. Travel Expenses

Since it would amount to an unauthorized augmentation of EPA appropriations under decisions of the General Accounting Office, employees may not accept outside reimbursement for official travel except under several narrow statutory exceptions. fn/ These provisions are described below:

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fn/ Unless the donor of travel expenses is a state or local government or an organization listed under Section 501(c)(3) of the Internal Revenue Code, employees may not accept a greater amount than EPA would have provided under the Travel Regulations. See 18 U.S.C. §209 and 5 U.S.C. §4111.

(1) The Intergovernmental Personnel Act (IPA) at 5 U.S.C. §§3371-3376 authorizes employees on detail to accept travel expenses from State and local governments, domestic universities and certain non-profit organizations listed by the U.S. Office of Personnel Management. There is no minimum period for an IPA detail. When this authority is used, the EPA personnel office prepares an IPA agreement which specifies that EPA will bear all salary costs and the receiving entity will provide travel expenses.

(2) Under 5 U.S.C. §4111, employees may be authorized to accept travel expenses from non-profit charitable, educational, scientific and religious organizations listed pursuant to Section 501(c)(3) of the Internal Revenue Code. Under EPA regulations at 40 C.F.R. §3.505(b)(2), employees must have advance written approval to accept such travel expenses. The Administrator has delegated approval authority to the Designated Agency Ethics Official. When this authority is used, the employee should send a brief memo to the Designated Agency Ethics Official indicating the nature of the travel and stating that the organization which has offered to pay travel expenses is listed under Section 501(c)(3) of the Internal Revenue Code. To expedite a reply, the request should contain a concur/nonconcur signature line.

(3) Under 5 U.S.C. §7342(c)(1), employees may accept expenses for travel "entirely outside the United States" from foreign governmental entities and from public international organizations in which any government participates.

(4) Under 5 U.S.C. §3343, employees or the Agency may accept travel expenses (including domestic travel expenses) through details to public international organizations in which the United States participates as a government. There is no minimum period for such details. All that is necessary is an exchange of correspondence expressing an agreement.

(5) Under 22 U.S.C. §§2455(f) and 2458a, employees may accept travel expenses from virtually anyone if the U.S. International Communications Agency in the State Department approves the activity as within the Mutual Educational and Cultural Exchange Program under Chapter 33 of Title 22, U.S. Code.

(6) Travel expenses of witnesses under 5 U.S.C. §5751. (Amounts collected in excess of actual expenses must be turned over to EPA).

(7) Under 22 U.S.C. §1451, EPA may, with State Department approval, assign employees with "special scientific or other

technical or professional qualifications" to serve with a foreign government if the host government agrees to pay all compensation, travel expenses and allowances.

The Office of International Activities makes the necessary arrangements for international travel.

IX. Use of Government Vehicles, Property and Personnel

Employees may not use or allow the use of government property or time for other than official purposes. Examples of activities within this prohibition include:

(1) use of government offices for outside business or other activities (except for approved employee recreational, welfare and other activities;

(2) use of other equipment (copying machines, word processors, telephones, etc.) for other than EPA business;

(3) use of services of subordinates for other than official business.

See 40 C.F.R. §§3.104(a) and 3.503(h). See also 18 U.S.C. §641, the criminal provision which prohibits theft and conversion of government property to one's own use or the use of another.

Misuse of government-owned or leased motor vehicles is a particularly sensitive area. Such vehicles are to be used only for official purposes, and EPA property management regulations at Section 115-39.602-1 (based on 31 U.S.C. §1344) provide a minimun penalty of one month's suspension for violation of this prohibition. Moreover, since 1976 EPA's Appropriation Act has prohibited the use of appropriated funds to transport any officer or employee between his or her home and the office.

Employees should also be aware that the government alone is liable for damages arising from vehicle accidents which occur in the course of official duty. However, the employee is immune from suit only where the employee was acting "within the scope of employment" at the time of the incident. 28 U.S.C. §2679.

Therefore, any use of a government vehicle which is not clearly official must be avoided.

X. Political Activity

The Hatch Act at 5 U.S.C. §7324 prohibits federal employees from (1) using official authority to interfere with or affect the result of any election, and (2) taking an active part in political management or in political campaigns. However, intermittent employees

are subject to this restriction only on the days they actually work, and Presidential appointees are not subject to restriction (2). 5 C.F.R. §733.123. The penalty for violation is removal from office unless the Merit Systems Protection Board unanimously determines that a suspension of not less than 30 days is warranted. 5 U.S.C §7325.

The prohibition is very broad and includes such activities as organizing a political party or club, soliciting or collecting political donations, driving voters to the polls on behalf of a candidate, becoming a candidate for or campaigning for public office, actively managing or assisting in a campaign, initiating or circulating a nominating petition and serving as a delegate, alternate or proxy to a political convention. Performing clerical work in connection with political campaigns is also prohibited.

Employees may, however, attend political fund-raising gatherings and political meetings, and they may contribute to political parties or organizations. Of course, they may also express personal political views and preferences, so long as they do not do so in the context of official duties. However, employees must be careful to avoid crossing the line into "active participation." Endorsing or opposing a candidate in a political broadcast or advertisement would be a violation as would addressing a political gathering or fund-raiser. Although the Hatch Act does not apply to spouses of federal employees, employees should nonetheless be careful to avoid "active participation" through the political activities of spouses, such as by assisting in a fundraising gathering.

There is an exception for elections in counties in which large numbers of residents are federal employees, such as the counties surrounding the District of Columbia. In these counties, federal employees may be candidates for public office and actively participate in partisan elections, <u>but only as independent candidates or on behalf of independent candidates</u>.

In addition to the Hatch Act, there are criminal provisions regarding political activity which apply to all federal employees (including Presidential appointees). These prohibitions include:

(1) using official authority to affect a federal election (18 U.S.C. §595);

(2) promising government employment, contracts or other benefits as a consideration, favor or reward for political activity, or promising special consideration for such benefits (18 U.S.C. §600);

(3) depriving anyone of federal employment or benefits for refusal to make a political contribution (18 U.S.C. §601);

(4) soliciting political contributions from other federal employees (18 U.S.C. §602);

(5) making a political contribution to another federal employee in connection with a federal election (18 U.S.C. §603); and

(6) soliciting or receiving political contributions on government premises (18 U.S.C. §607).

XI. Standards for Special Government Employees

The principles discussed earlier in this pamphlet generally apply to all govenment employees, including temporary or intermittent experts or consultants. Moreover, except for the Hatch Act prohibition against political activity, these standards apply during the entire period of temporary or intermittent EPA employment and not merely on the days when a temporary or intermittent employee is actually working for EPA.

However, Congress has recognized that "special Government employees" (those appointed to work less than 130 days in any 365 day period) are likely to have other business or professional interests and should not be subject to all of the restrictions which apply to regular employees. Accordingly, the standards which apply to special government employees differ in the following respects from those which apply to regular employees:

(1) The prohibitions of 18 U.S.C. §§203 and 205 concerning receipt of income from representational activities before federal agencies and on representing outside parties before federal courts or agencies (see page 12) do not generally apply. Special employees are barred from such activities only where (1) they have personally participated in the same particular matter involving a specific party or parties as government employees, and (2) after their 60th day of actual service in a 365 day period, a particular matter involving a specific party or parties is pending in the department or agency which employs them. Since a court case is not "pending in" a federal agency, the second prohibition does not apply to matters before courts.

(2) The restrictions in EPA regulations at 41 C.F.R. §15-55 on noncompetitive contract awards during the first year after employment ceases (see page 15) apply to special government employees only if they have actually worked more than 60 days during their final 365 days of EPA employment.

(3) The general rules against receipt of gifts, gratuities, enter-

tainment or favors do not apply to receipt of salary, bonuses or other compensation or benefits from a special government employee's non-government employer.

(4) The prohibition on supplementation of government salary at 18 U.S.C. §209 does not apply to special government employees.

(5) All special government employees (except temporary and summer employees below the grade of GS-13 and employees participating in an intern or other training program) are required to file EPA Form 3120-1, Confidential Statement of Employment and Financial Interest, within 30 days after entrance on duty. This statement must be kept current throughout the period of employment. If a special government employee is paid at a rate equal to or greater than the basic daily rate of pay for GS/GM-16 and is expected to work more than 60 days, the Standard Form 278, Executive Branch Financial Disclosure Report, must be filed with the Designated Agency Ethics Official within 30 days after entrance on duty (unless the employee has left another position for which filing was required within the previous 30 days), by May 15 of each year and within 30 days after employment has ceased (unless within 30 days the employee assumes another position in the Executive Branch for which filing is required). If such a special government employee is not initially expected to work more than 60 days but actually does so, the report is due within 15 days after the 61st actual day of service. If a special government employee files an Standard Form 278 within 30 days after entrance on duty, then an EPA Form 3120-1 is not required to be filed.

(6) The Hatch Act prohibitions on taking an active part in political management or political campaigns apply only on the days when a special government employee is actually working. The prohibition applies to the entire day even if the special government employee works a partial day.

Examples

1. A special EPA employee is a member of a university faculty. The university asks the employee to negotiate a contract with the Department of the Interior on behalf of the university.

The employee may do so, assuming he did not at any time deal with the particular contract matter on behalf of the government.

2. Same situation, except that the special employee is asked to negotiate a contract with EPA. At the time of the negotiations, the special employee will have actually worked for EPA for a total of 55 days in the previous 365 days.

The employee may do so, assuming he has not participated in the same particular matter on behalf of EPA. However, if he had worked for EPA for more than 60 days in the previous 365 days, he may no longer communicate with EPA with intent to influence in such a matter. Moreover, 40 C.F.R. §3.602 forbids a special employee to use "inside information," that is, information obtained as a result of government employment which has not been made available to the the public or which would not be made available on request, for personal gain or to assist any outside party.

In addition, there is a problem of appearances whenever a special government employee negotiates with the office in which he or she is employed or if the negotiations are related to the subject matter of his or her consultancy. Such contacts should be avoided, If a situation arises where it seems necessary for a special government employee to negotiate with the office in which he or she is working, Deputy Counselors should consult with the Designated Agency Ethics Official.