

§ 200.735-7

memorandum of the circumstances to the Director of Personnel.¹⁸

[45 FR 36064, May 29, 1980; 45 FR 40975, June 17, 1980; 73 FR 32226, June 5, 2008]

§ 200.735-7 Negotiation for employment.

(a) An employee may not negotiate employment with anyone outside the Commission with whom he or she is personally transacting business in any matter on behalf of the Commission or the United States, or while he or she is immediately or personally engaged in representing the Commission in any matter in which the prospective employer is a participant or witness or counsel for such a person, whether or not such a person takes a substantive position in an adversary proceeding in opposition to the Commission's position.

(b) An employee who wishes to negotiate employment with another Government agency at a time when he or she is representing the Commission in a particular matter in which the other Government agency is taking a position adverse to the Commission should disclose this intention to his or her Division Director, Office Head or Regional Administrator prior to taking any action.

(c) No employee shall undertake to act personally on behalf of the Commission in any capacity in a matter¹⁹

¹⁸ 18 U.S.C. 208, provides among other things, that a member or employee is prohibited from participating personally and substantially in any matter in which to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as an 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. This section (of the Criminal Code) does not apply if the employee has received a written determination made by an authorized official that the interest is not so substantial as to be deemed likely to affect the integrity of the employee's service. Note: Members of the Commission may follow the procedural provision contained in Part V, Section 503 of the Executive Order 11222.

¹⁹ Employees should bear in mind that in this connection the word *matter* is construed very broadly. See 200.735-8 and footnote 20, thereto, *infra*.

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that, to his or her knowledge, affects even indirectly any person or organization outside the Commission with whom he or she is discussing or entertaining any proposal for future employment, except pursuant to the direction of the Commission, his or her Division Director, Office Head, or Regional Administrator, as provided in § 200.735-6. See footnote 18.

§ 200.735-8 Practice by former members and employees of the Commission.

(a)(1) No person shall appear in a representative capacity before the Commission in a particular matter if such person, or one participating with him or her in the particular matter, participated personally and substantially in that matter while he or she was a member or employee of the Commission.²⁰ As used in this rule, a *matter* means a discrete and isolatable transaction or set of transactions between identifiable parties.²¹

²⁰ As used in this paragraph, a single investigation or formal proceeding, or both if they are related, shall be presumed to constitute a particular matter for at least 2 years irrespective of changes in the issues. However, in cases of proceedings in which the issues change from time to time, such as proceedings involving compliance with section 11 of the Public Utility Holding Company Act (15 U.S.C. 79k), this paragraph shall not be construed as prohibiting appearance in such a proceeding, more than two years after ceasing to be a member or employee of the Commission, unless it appears to the Commission that there is such an identity of particular issues or pertinent facts as to make it likely that confidential information, derived while a member or employee of the Commission, would have continuing relevance to the proceeding, so as to make participation therein by the former member or employee of the Commission unethical or prejudicial to the interests of the Commission.

²¹ This definition is taken from Formal Opinion 342 of the ABA Ethics Committee. The opinion states that "work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR9-101B (which states 'a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee') from subsequent private employment involving

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(2) No person who has been a member or employee shall, within 2 years after his or her employment has ceased, assist, by personal presence, a person appearing in a representative capacity before the Commission in any matter in which he or she participated personally and substantially while a member or employee of the Commission at any time within a period of 1 year prior to the termination of such responsibility.

(3) No person who has been a member or an employee shall, within 2 years after his or her employment has ceased, appear in a representative capacity before the Commission in any matter which was under his or her official responsibility as a member or employee of the Commission at any time within a period of 1 year prior to the termination of such responsibility. The term *official responsibility* as defined in 18 U.S.C. 202 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."

(4) No employee in a position which is designated by the Director of the Office of Government Ethics shall, within one year after his or her employment has ceased, appear in a representative capacity before the Commission or communicate with the Commission or its employees with the intent to influence.²² This restriction does not apply to members who ceased employment before July 1, 1979, or to employees who ceased employment prior to February 28, 1980.

(b)(1) Any former member or employee of the Commission who, within 2 years after ceasing to be such, is employed or retained as the representative of any person outside the Government in any matter in which it is contemplated that he or she will appear before the Commission, or communicate with the Commission or its employees, shall, within ten days of such retainer or employment, or of the time when appearance before, or commu-

the same regulation procedures, or points of law * * *."

²²This prohibition appears in the Ethics in Government Act of 1978. Pub. L. 95-521.

nication with the Commission or its employees is first contemplated, file with the Secretary of the Commission a statement which includes:

(i) A description of the contemplated representation;

(ii) An affirmative representation that the former employee while on the Commission's staff had neither personal and substantial responsibility nor official responsibility for the matter which is the subject of the representation; and

(iii) The name of the Commission Division or Office in which the person had been employed.

(2) Employment of a recurrent character may be covered by a single comprehensive statement. Each such statement should include an appropriate caption indicating that it is filed pursuant to this section. The reporting requirements of this paragraph do not apply to

(i) Communications incidental to court appearances in litigation involving the Commission; and

(ii) Oral communications concerning ministerial or informational matters or requests for oral advice not otherwise prohibited by paragraph (a) of this section.

(c) As used in this section, the term *appear before the commission* means physical presence before the Commission or its employees in either a formal or informal setting or the conveyance of material in connection with a formal appearance or application to the Commission. As used in this section the term *communication with intent to influence* does not encompass communications which are not for the purpose of influencing the Commission or any of its employees or which, at the time of the filings, are reasonably believed not to involve any potential controversy. As used in this section, the term *representative* or *representative capacity* shall include not only the usual type of representation by an attorney, etc., but also representation of a corporation in the capacity of an officer, director or controlling stockholder thereof.

(d)(1) Partners or associates of any person disqualified from appearing or practicing before the Commission in a particular matter by paragraph (a)(1)

of this section are also disqualified. Such partners or associates (the *firm*) may request a waiver of this prohibition from the Commission by writing a letter to the General Counsel of the commission setting forth the facts of the proposed representation and the individual's disqualification. In appropriate situations, a firm may request a generic waiver with respect to a number of different matters. Upon the advice of the Office of the General Counsel, the Commission, or the General Counsel exercising delegated authority, will advise the requestor of the Commission's response.

(2) Waivers ordinarily will be granted where the firm makes a satisfactory representation that it has adopted screening measures which will effectively isolate the individual lawyer disqualified under paragraph (a)(1) of this section from participating in the particular matter or matters and from sharing in any fees attributable to it. It will be considered significant for purposes of this determination that:

(i) The firm had a pre-existing securities law practice prior to the arrival of the disqualified attorney;

(ii) The matter was previously the subject of consideration by the firm or the client was already advised by the firm;

(iii) In cases where the matter or client became the subject of consideration by the firm subsequent to the firm's employment of the lawyer individually disqualified, that the matter was not brought to the firm because of the disqualified attorney.

(3) Notwithstanding the existence or non-existence of any of these factors, no waiver will be issued if the proposed representation would create a significant appearance of impropriety or would otherwise adversely affect the interests of the government.²³ All pro-

²³ For example, no waiver will be granted if, during the course of representing a client who has an interest with respect to a matter before the Commission, a firm employs, or accepts as a partner, a member of the staff or of the Commission who at any time during the course of that representation had direct and substantial responsibility for the same matter, and whose departure would result in a significant adverse impact upon that matter at the Commission.

ceedings with respect to waivers shall be a matter of public record except to the extent that such public disclosure might violate attorney-client privilege or breach the attorney's obligation to preserve the confidences and secrets of this or her clients, reveal the existence of ongoing private investigations, interfere with law enforcement proceedings, or otherwise be inconsistent with the public interest.

(e) Persons in doubt as to the applicability of any portion of this section may apply for an advisory ruling of the Commission.²⁴

[45 FR 36064, May 29, 1980, as amended at 50 FR 23669, June 5, 1985]

§ 200.735-9 Indebtedness.

(a) The Securities and Exchange Commission considers the indebtedness of its members and employees to be essentially a matter of their own concern and will not be placed in the position of acting as a collection agency or of determining the validity or amount of contested debts. Nevertheless, failure on the part of an employee without good reason and in a proper and timely manner to honor debts acknowledged by him or her to be valid, or reduced to judgment by a court, or to make or to adhere to satisfactory arrangements for the settlement thereof, may be a cause for disciplinary action. In this connection each member and employee is expected to meet his or her responsibilities for payment of Federal, State and local taxes. For purposes of this section, *in a proper and timely manner* means in a manner which the agency determines does not, under the circumstances, reflect adversely on the Government as his or her employer.

(b) Compensation due members and employees is subject to garnishment for child support and alimony obligations. (42 U.S.C. 659).

§ 200.735-10 Miscellaneous statutory provisions.

Each member and employee is responsible for acquainting himself or

²⁴ Attention of former members and employees is directed to Formal Opinion 342 of the Committee on Ethics of the American Bar Association, 62 A.B.A.J. 517 (1975) and to 18 U.S.C. 207.