The Files

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WHR:dp

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Conflict-of-Interest Statute; Discussion with Chairman Budge of SEC.

Chairman Hamer Budge of the Securities and Exchange Commission telephoned the Attorney General on Friday, July 25, to see if the Department of Justice had any precedents construing 18 U.S.C. 208, one of the provisions of the conflict-of-interest laws. The Attorney General asked me to look into the matter and telephone Chairman Budge.

The inquiry turned on the definition of "particular matter" as that term is used in section 208. The Chairman initially expressed the view that the term applied only to a matter before the Commission for adjudication, and did not extend to rule-making or other activities of more general scope. After examination of the statute and what I thought to be relevant legislative material, I advised him that, although this might be true of section 207, I did not believe it was true of section 208.

Section 207 treats the matter thus:

> " . . . in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or party or parties . . . " (Sections 207(a) and 207(b).

The Attorney General's "Memorandum Re: The Conflict-of-Interest Provisions of Public Law 87-849" contains the following statement regarding the above quoted language from 207:

"The quoted language does not include general rule-making, the formulation of general policy or standards, or other similar matters."

In our recent Weinberg opinion, we concluded that representation of a party in an attempt to secure the passage of relatively general legislation engaged in by a former employee was not within the prohibition of section 207 because it was not a "particular matter." However, even in dealing with this section, we were careful to point out that we did not decide the question of whether legislative representation per se was outside of the coverage of section 207, since it was quite conceivable that there could be legislation of a very particular type. Likewise, it is conceivable that there could be rule-making by an agency other than "general rule-making" as that term is used in the Attorney General's Memorandum.

The language of section 208, dealing with present employees is significantly different in this respect than is the language of section 207 quoted above. Section 208 treats the matter thus:

". . . in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest,or other particular matter . . . " (Section 208).

The difference in treatment, of course, consists in the absence in section 208 of the additional modifying language "involving a specific party or parties." The Attorney General's Memorandum contains no such expression regarding the language of section 208 as it does with respect to that of 207.

The fact that section 208 deals with present employees, while section 207 deals with former employees, and the further fact that section 208 provides two escape clauses for the employee who finds himself in a position of conflict--disclosure and clearance from the appointing authority, or

else disqualification from the determination--makes a difference in treatment of this particular subject matter both rational and understandable. While there are obvious limits to the term "particular matter" even when it is not modified by the language relating to parties, the line marking those limits ought not to be drawn between a matter for adjudication, on the one hand, and a matter relating to rule-making, on the other. If a sufficiently small and discreet enough group of persons or entities would be affected by the proposed rule-making, such a proceeding could very well be encompassed within the provisions of section 208. Were the affected groups sufficiently large, the limits of the requirement that the entity have a "financial interest" in the proceeding as well as the limits of the term "particular matter", would doubtless somewhere be reached. It did not seem profitable to further discuss the subject in the abstract, and the Chairman fully understood that the Department would not render even an informal opinion on the subject without a full presentation of the facts.

The legislative history of the Act, found in H.R. Report No. 748, 87th Congress, 1st Session, sheds little, if any, light on the subject. At page 20, the House Report states that:

> ". . . the word 'particular' would be inserted before 'other matters' to emphasize that the restriction applies to a specific case or matter and not to a general area of activity."

Since the language of 203 in this respect is the same as that of 208, and both differ therein from 207, presumably the comment is applicable to section 208 as well as to section 203. However, the distinction drawn by the quoted language is not between a matter for adjudication and a matter involving rule-making, but "a specific case or matter" as opposed to "a general area of activity." These rather imprecise terms may serve as general guides, but they do little more than that.

Dick Berg called my attention to the case of Air Transport Association of America v. Harnandez, U.S. D.C.

D.C., 264 Fed. Supp. 227 (1967), which involved a related situation affecting the Equal Employment Opportunity Commission. The decision there, however, was based on constitutional due process concepts invoked by a party before the regulatory agency, rather than on conflict-of-interest laws which are basically designed for the protection of the Government, rather than for parties litigating before the agency. However, the factual situation is close enough to the one which may obtain in this situation to make the case of some importance.

cc: Mr. Rehnquist
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