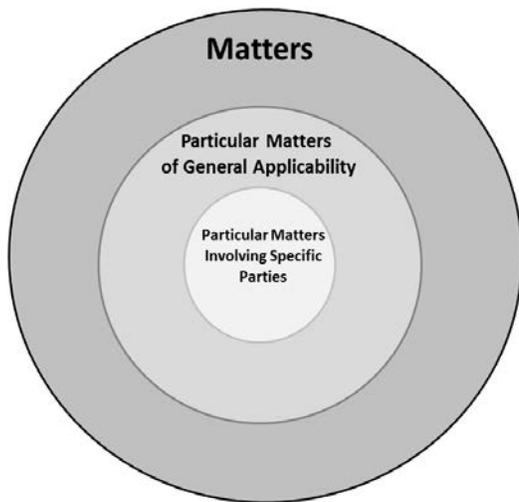


THE NETTLESOME QUESTION OF PARTICULAR MATTERS OF GENERAL APPLICABILITY

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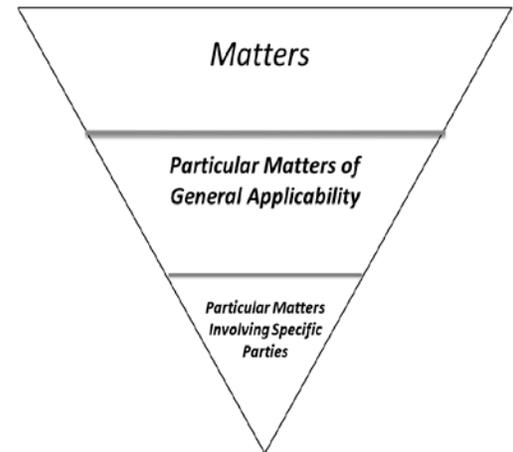


Types of Matters

Matters = Really Broad Matters

Particular Matters of General Applicability = Narrower Matters that are Focused on a Discrete and Identifiable Class of Persons

Particular Matters Involving Specific Parties = A Very Limited Group of Identified Parties is Involved in the Matter



Identifying Particular Matters of General Applicability: Roadmap for Analysis

- Step 1** How broad or narrow is the focus of the matter? Is the matter directed to a group of individuals or entities?
- Step 2** Is the class that the matter focuses on discrete and identifiable from the general population?
- ❖ *Remember:* A class is not discrete and identifiable simply because it is the focus of the matter. There must be an independent reason the class is discrete and identifiable, such as the class encompasses a particular industry, profession, or economic sector.
- Step 3** Does the matter have a distinct impact on the class that the matter focuses on, separate from the impact of the matter on the general population?
- ❖ *Remember:* A matter may still be a particular matter even if it has an impact beyond the class with which it is directly concerned or if it is motivated by broad public policy concerns. For example, regulations establishing safety standards for the trucking industry would be a particular matter because they relate to a particular, distinct group, even though broader public safety concerns likely motivate the rules.

Other Considerations

- **Threshold Evaluation.** The particular matter determination is a critical threshold step. If something is not a particular matter, there is no need to address any of the further elements.
 - ❖ *Don't conflate the particular matter determination with the direct/predictable effect analysis.*
- **Transitions.** Pay attention to transitions. It can be difficult to determine when one category transitions into another.
- **Dissecting Matters.** Breaking down broad matters into smaller components that may be considered particular matters is not generally required.
- **Appearances.** Is it the type of matter where the public would perceive a conflict or impartiality concern?

Group Exercise: Hypothetical Case Study

The Chinese government adopted a policy to restrict the export of 12 rare earth minerals. WTO initiated a case against China to eliminate the policy because it conflicts with international trade law. The minerals are used in a wide variety of industries in the United States, and a mineral shortage will undermine the competitiveness of these industries, including the car manufacturing industry which relies on one of these minerals for its ignition technology. Joe is an employee at the U.S. Trade Representative who has stock in General Motors.

Examples of Matters, Particular Matters (of General Applicability & Involving Specific Parties)**Matter**

Changes to health and safety regulation for all employers in the U.S. (2640.103(a)(1) Ex. 4)

Decision to allocate additional resources to the investigation or prosecution of white collar crime (2640.103(a)(1) Ex. 5); general policy discussions on an issue such as the Crime Bill (18 O.P. OLC 212)

Deliberation on the general merits of an omnibus bill such as the Tax Reform Act of 1986 (2640.103(a)(1) Ex. 5); deliberations of advisory panel on federal tax reform (OGE 05x01); regulations changing the method of calculating depreciation (2635.402(b)(3) Ex. 1)

Recommendations of the Council of Economic Advisors to the President about appropriate policies to maintain economic growth and stability (2640.103(a)(1) Ex. 6)

Formulation and implementation of a response of the U.S. to a military invasion of U.S. ally (2640.103(a)(1) Ex. 7); deliberations regarding a response to Iraq's invasion of Kuwait (OLC Unpubl. Op. Aug. 8, 1990)

Legislative proposal for broad health care reform (2640.103(a)(1) Ex. 8)

Particular Matter Involving Specific Parties

Lawsuits, legal actions, etc. – *e.g.*, fraud prosecution of failed savings and loan institution (2635.807 Ex. 9); Department of Justice civil complaint filed in federal court alleging violations of certain environmental laws by a company (2641.201(h)(1) Ex. 2); lawsuit against Mine Safety and Health Administration brought by trade association challenging regulation for mine workers (2641.201(h)(2) Ex. 2)

Applications submitted to federal agency – *e.g.*, license application to agency (2641.201(e)(2) Ex. 1); application for Food and Drug Administration drug approval (2641.201(e)(2) Ex. 4); state's application for additional funding for administrative support services (2640.201(c)(2) Ex. 2); city's application to Housing and Urban Development for federal assistance for a renewal project (2641.201(h)(1) Ex. 1); grant application to the Administration on Children and Families (2641.201(e)(1) Ex. 1); advisory committee evaluation of a university's performance of a grant to study the efficacy of a newly developed breast cancer drug (2640.203(g) Ex. 2); Yucca mountain license application and formal Nuclear Regulatory Commission adjudication (OGE 02x5)

Government contracts – *e.g.*, Department of Defense contract to produce an operator's manual for a radar device (2641.201(e)(2) Ex. 3); audit of government contractor (2641.201(e)(1) Ex. 2); government contract to produce a study on the efficacy of certain agency operations (2641.201(e)(2) Ex. 5); contract negotiations with consulting firm to perform geological research (2 O.P. OLC 313 (1978))

Investigations, enforcement actions or related actions – *e.g.*, OSHA investigation of a company (2641.201(e)(4) Ex. 1); internal deliberations concerning the merits of taking enforcement action against a company for certain trade practices (2641.201(h)(4) Ex. 1); development of initial set of criteria pursuant to which six states were to develop plans to desegregate their higher education systems (OGE 80x10); presentation of investigative findings about alleged criminal violation perpetrated in a particular state (3 O.P. OLC 426 (1979))

Issuance of approval or grant of rights – *e.g.*, Bureau of Land Management decision to grant a private company the right to explore for minerals on certain federal lands (2641.201(g) Ex. 1); Federal Trade Commission's review of proposed merger between two companies (2641.201(f) Ex. 1); initial review of proposed merger that has been announced in the media (even before a merger application was formally pending) (OGE 99x23)

Targeted legislation – *e.g.*, private relief legislation granting citizenship to a specific individual (2641.201(h)(2) Ex. 4); bill establishing a grant program for which only one known organization is eligible (OGE 87x3)

Certain trade and treaty matters – *e.g.*, bilateral treaty regarding transfer of ownership with respect to a parcel of real property and certain operations (2641.201(h)(2) Ex. 7)

Certain preliminary matters relating to government procurements – *e.g.*, procurement where a number of steps towards the procurement have been taken and parties had affirmatively expressed interest (OGE 90x12); draft RFP, once potential contractors are identified to the project (OGE 84x15)

Particular Matters of General Applicability
Regulations/Rulemakings Examples
Regulations establishing safety standards for trucks on interstate highways (2635.402(b)(3) Ex. 2)
Regulation applicable only to the meat packing industry (2640.103(a)(1) Ex. 3)
Consideration and implementation through regulation of sections of healthcare bill limiting the amount charged for prescription drugs (2640.103(a)(1) Ex. 8)
Regulation concerning the exportation of portable computers (2640.202(c) Ex. 1)
Regulation that contains new standards for the oversight of agency grants (2640.203(b) Ex. 1)
Department of Veterans Affairs regulation that will provide for expanded hospital health benefits for veterans (2640.203(d) Ex. 5)
Matters of general applicability affecting all states, such as the drafting and promulgation of a rule requiring states to expend additional resources implementing food stamp program (2640.201(c)(2) Ex. 2)
Mine Safety and Health Administration regulation establishing new occupational health and safety standards for mine workers (2641.201(h)(2) Ex. 1)
Proposed Food and Drug Administration rule requiring all manufacturers of a particular type of medical device to obtain pre-market approval for products (even if only 3-4 manufacturers are presently making the device, when there is nothing to preclude others from entering the market in the future) (2641.201(h)(2) Ex. 5); Food and Drug Administration's recommendation regarding the regulation of the ingredients of aspirin (2 OP OLC 151, 152 (1978));
Other Examples
Matter affecting employees who are invested in the Thrift Savings Plan (61 FR 66834); bill to raise the pay level of all federal employees paid under the General Schedule (2640.203(d) Ex. 4); determinations or legislation focused on the compensation and work conditions of the class of Assistant United States Attorneys (18 OP OLC 212)
Recommended changes to how Medicare reimbursements will be made to health care providers (2640.201(b) Ex. 2)
Advisory committee tasked with developing recommendations for new standards for AIDS vaccine trials involving human subjects (2640.203(g) Ex. 1)
National Science Foundation employee's formulation of policies for a grant program for organizations to produce science education programs targeting elementary school age children (2641.201(h)(2) Ex. 3)
Attorney project drafting a standard form contract and certain standard terms and clauses for use in all future agency contracts (2641.201(h)(2) Ex. 6)
Feasibility studies of Department of Defense and other basic conceptual work for a possible innovation to a missile system (2641.201(h)(3) Ex. 1)
Agency oversight group making recommendations on specific ways of limiting commercial use of a particular facility; consideration of whether new rules are needed for specific commercial users of a facility (OGE 00x4)
Informal, preliminary discussions with industry representatives about specific changes to agency standards governing a particular industry (OGE 06x8)
Drafting of technical manual for use by facilities operated by government agency (OGE 81x29)
Development of a set of criteria for use as investigatory guidelines for investigations in states with segregated higher education systems (OGE 80x10)
Implementing legislation for agency programs (OGE 81x1)
National Advisory Food and Drug Committee deliberations concerning use of low levels of antibiotics in animal feeds (2 OP OLC 151, 152 (1978))
The activities of the Federal Open Market Committee regulating interest rate-sensitive securities by determining the amount and cost of reserves available to banks and thrifts are particular matters of general applicability because they focus on a discrete and identifiable class of banks and thrifts. (Unpubl. OP OLC (June 30, 1993))