

Office of Government Ethics

81 x 19 -- 06/12/81

Letter to a Government Employee dated June 12, 1981

This is in response to your request that we examine your investment as a limited partner in [a Partnership] to determine whether the investment might bring any of the Federal conflict-of-interest laws into play in relation to matters with which [your office] becomes concerned. It appears that [the Partnership] is a limited partnership engaged in the acquisition and operation of oil and gas properties, that its general partner is a corporation with three stockholders, [the Corporation], and that [the Partnership] has sold 200 limited partnership units, of which you own six. We understand that some of the other limited partners are lawyers and thus could conceivably represent private persons not connected with [the Partnership] who have dealings with [your office].

The statutes relevant to your inquiry are 18 U.S.C. §§ 207(g) and 208(a). Section 207(g), although placed among the post-employment provisions of the conflict-of-interest laws, is not directed to the activities of former Government employees, but applies to an individual outside the Government who is the partner of a Government employee. In general, it prohibits the outsider from representing anyone before a Department or agency in a matter in which his partner has participated in his official capacity or (with more pertinence to you) which is within the latter's official responsibility. Neither this Office nor, we are informed, the Office of Legal Counsel of the Department of Justice, has passed definitively on the question whether the word "partner" in section 207(g) includes the members of limited as well as general partnerships. If it is construed to extend to limited partners, a fellow investor in [the Partnership] may not appear in [your office] on behalf of a client during your tenure in that office.

Section 207(g) was enacted in its present form as part of the revision of section 207 accomplished by the Ethics in Government Act of 1978. It stems from the former section 207(c), first put on the statute books in 1962, and does not vary from that enactment either in substance or in any wording that is of significance here. The following paragraph of the House Judiciary Committee report on the enacting bill sketches the

background and purpose of former section 207(c):

The status and obligations of partners of Government employees under the conflict of interest statutes is not specified in present law. Under the Canons of Ethics of the American Bar Association (Canons 6, 36, and 37) and at common law (see *United States v. Standard Oil Co.*, 136 F. Supp. 345 (D.C.N.Y., 1955)), the activities of partners are to some extent imputed to each other and to some extent disqualify non-Government partners from activities with which Government partners have become identified. The unsettled state of the law has given rise to serious confusion as to the precise limits of the doctrine of imputation. For this reason, the bill (sec. 207(c) a provision later dropped and (d) later redesignated (c)) prescribes the disqualification of partners of Government employees and former Government employees in the executive branch, the independent agencies, and the District of Columbia, and the limits on such disqualification. (H. Rep. 748, 87th Cong., 1st Sess. 12 (1961).)

The Senate Judiciary Committee also commented on the provisions of sections 207(c) and (d) of the House bill in the context of their application to law partners. S. Rep. No. 2213, 87th Cong., 2d Sess. 16 (1962).

Although the statements of the committees provide the basis for an argument that the present section 207(g) should be read to apply only to the partners of a law firm, that result is difficult to reach in the absence of anything in the statute itself to suggest it. However, it is not unreasonable to read the statute with the model of a law partnership in mind -- that is, to construe now section 207(g) as applying to the partners of a business or professional enterprise in which it would be normal for them to know each other and for all of them to engage, more or less, in the operations and management of the entity.

We must also consider whether section 207(g) applies to the members of a limited partnership, a form of organization not used by law partners. It is possible to argue that such persons are not within the coverage of the statute. Limited partnerships were far from common in the United States two decades ago if for no other reason than their lack of popularity as vehicles for tax

shelters. And there can be little doubt that because of their rarity they were not in the minds of the Members of Congress during their work on former section 207(c) and accompanying provisions. There is no mention of them in the legislative history of the 1962 legislation or in the interpretive writings of scholars and Government officials that were published shortly after its enactment. Nevertheless, we are once again confronted with the unmodified word "partner" in section 207(g) and must concede it would be dubious to aver that it excludes limited partners as a class.

With the purpose of resolving the uncertainties of the statute by formulation of a reasonable standard, we have concluded that since a partnership enterprise, whether general or limited, produces operational relationships among partners, the partners so involved are subject to the prohibition of section 207(g). With respect to members of a limited partnership in particular, this means that general partners are invariably restricted from appearing before a limited partner in the Government and that limited partners are invariably restricted from appearing before a general partner in the Government.

On the other hand, where the question is whether a limited partner can appear before another limited partner, we think a distinction of scale is proper. If the partnership is a vehicle for investment by a sizable number of generally unrelated persons, it is our view that non-Government limited partners are free of section 207(g)'s restraint. But if the number of partners is small, we deem it necessary to make a judgment as to the applicability of section 207(g) case by case. For example, there are limited partnerships of a handful of personally acquainted individuals engaged in the construction and operation of dwellings under programs of HUD. In our opinion, where such individuals form a number of limited partnerships to participate with each other repeatedly in housing ventures, they fall within section 207(g) because of the close working relationships they have developed among themselves. Similarly, where the limited partners of a small venture have as a practical matter assumed advisory functions, we are of the opinion that section 207(g) would reach them. Conversely, absent circumstances that tend to cause departures from the traditionally non-participatory role of a limited partner, we take the view that section 207(g) does not come into play in a small entity, whether in the housing industry or any other.

As for the limited partners of [the Partnership] in particular (except any who are also stockholders or officers of the corporate general partner), it appears from the material you forwarded that they are outside the compass of section 207(g) because of their considerable number and concomitant lack of a role in the operations of [the Partnership]. Accordingly, we are of the opinion that section 207(g) would not prevent anyone who is simply a limited partner in [the Partnership] from appearing in a matter which you are handling, or for which you otherwise have official responsibility.

The second statute relevant to your inquiry, 18 U.S.C § 208(a), in general provides that an officer or employee of the Government may not participate as such in a "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 . . . has a financial interest" (Emphasis added.)

Section 208(a) would require you to refrain from taking part in any matter that might come before [your Office] in which [the Partnership] is directly involved. A matter involving [the Partnership] is, by virtue of your status as a limited partner, a matter in which you have a financial interest. That is so aside from any question of the applicability to [the Partnership] of the words "organization in which he serving as . . . partner."¹

Aside from matters directly involving [the Partnership], you may find before you a matter involving an interest of the petroleum industry as a whole. Conceivably, your investment in [the Partnership] might be disqualifying under section 208(a) in that circumstance, but a judgment can be made only on a case-by-case basis. In any event, a grant of a waiver of disqualification under section 208(b)(1) by the appropriate official of your Department might well be proper in a situation of that kind.

If a person who, to your knowledge, is a limited partner of [the Partnership] were to appear before you in a matter of any kind, we recommend that you recuse yourself from it. Although, as pointed out in the footnote below, section 208(a) can be construed not to compel you as one limited partner dealing with another to take that step, we are of the view that you as a ranking official of [your Department] would best do so to preclude the possibility of adverse appearances. If, for any

reason, recusal would be impractical, you could seek the protection of a waiver under section 208(b).

We trust that you will find this discussion helpful.

Sincerely,

J. Jackson Walter
Director

1 The word "serving" in this passage indicates that the word "partner," as used the second time in section 208(a), and therefore the first time as well, refers only to a general partner. It is inapt, if not linguistically incorrect, to speak generally of a limited partner's function as one of providing services.