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**Post-Government Employment Restrictions in
Executive Branch of Federal Government:
Challenges about Minimizing Conflict of Interests and
Qualifying the Public Sector**
*A comparative Approach between Regulations in
The United States of America and Brazil*

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- **Table of Contents**

1. Abstract
2. Introduction
3. Regulation in Brazil
 - 3.1. Regulatory Agencies
 - 3.2. Decree 4187/2002
 - 3.3. Inter-American Convention Against Corruption and the Draft of Law no. 7528/2006
 - 3.4. Draft of Law no. 7528/2006
 - 3.5. Código de Ética da Alta Administração Federal (Ethics Code for High Officials in Federal Government) and Decree 6029/2007
 - 3.6. Administrative cases
4. Regulation in USA
 - 4.1. 18 United States Code §207
 - 4.1.1. Life time restrictions
 - 4.1.2. Two-years restrictions
 - 4.1.3. One-year restrictions
 - 4.1.3.1. Senior Personnel
 - 4.1.3.2. Very-Senior Personnel
 - 4.1.3.3. Restrictions Related to Foreign Entities
 - 4.1.3.4. Former Detaille
 - 4.1.3.5. Exceptions and Waivers
 - 4.2. 41 United States Code §2104
 - 4.3. Tendencies in North-American Regulation about Post-Government Employment Restrictions
 - 4.4. Ethics Pledge – Mr. Barack Obama Administration
 - 4.5. Judicial cases
5. Conclusions: Proposals for an efficient model of regulation in Brazil
6. References

- **Abstract**

This paper was written in Washington, DC, as the Program Minerva final research paper. Specifically, it aims to compare both the North American and the Brazilian regulation systems about solving conflict of interests between public and private sectors after an officer leaves the government service. Laws in both countries were analyzed (such as Decree 4187/2002, regulation in Brazilian regulatory agencies, Inter-American Convention Against Corruption of the Organization of American States, the Draft of Law 7528/2006, the Ethics Code for High Officials in Federal Government Title and the Decree 6029/2007, as the United States Code and the Ethics Pledge of Mr. Obama Administration), besides judicial and administrative cases.

The conclusions of the paper were that in the United States of America the enforcement of the laws is more efficient and the restrictions in post-government employment are stricter; while in Brazil, enforcement is weak, as the restrictions made (exception for Regulatory Agencies). As a result of years of tougher enforcement of the regulation, government personnel in the North American country seems to be more educated and inclined to follow the rules.

The Bill 7528/2006 – that waits in Congress for almost five years – represent a hope of advance in Brazilian regulation system of avoiding conflict of interests. However, a legislative change was proposed (to prohibit representational conducts while lasting the cooling off period, instead of prohibiting the acceptance of determined jobs in private sector), in order to improve it.

- **Introduction**

A very challenging issue rises in the Public Sector management: how to minimize conflicts of interests between both Public and Private Sectors and yet hire skilled and experienced people to public employments.

As anyone knows, mostly of the times, private jobs can be very profitable; some of public employments, otherwise, if not as profitable, are a source of classified information and experience which are very well considered and rewarded in the private sector.

However, the public sector certainly also takes advantage of the experiences obtained by people at the private sector. So, just stopping the “revolving doors” will not ensure public interests, seeing that talented people will refuse to be hired by the Public Administration, because of all the constraints imposed, after public service ending.

So, how assure public interests as a whole, avoiding, for instance, public servants to make decisions focusing only in possible future undue profits at the private sector?

Regulation of the issue in Brazil is inceptive; only few regulatory agencies have extensive laws about the issue, while most of the officials are just subject to a four month “cooling off” period, after leaving the government. However, as it is widely known, to assure the supremacy of the public interests in detriment to private ones must be the aim of the government; in that sense, some more effective regulation is needed and expected.

That being said, since 2006 a bill remains in Senate trying to provide a discussion about minimizing conflict of interests, by prohibiting some conducts, such as to represent a firm before the federal government in matters where the former official have had some influence, when in the Administration.

On the other hand, although The United States of America has already a very comprehensive regulation, apparently it is not yet enough to stop some conflict of interests of happening – as this seems impossible. Several decisions from judicial courts and from the Office of Government Ethics can prove it, as it will be shown.

Apparently, however, the solution seems to lie in two aspects, already followed by North American Administration: prohibiting former officials of representing a private business before the government for a determined period after the ending of public service, and enforcing the law and its penalties in a very severe way, in order to discourage any violations and to educate government personnel.

- **Regulation in Brazil**

- **Regulatory Agencies**

In 1995, with the aim to decentralize the Federal Administration, changes in the federal Constitution were made so that the services once delivered as Government's monopoly to the population could be granted to private businesses, in order to maximize their efficiency.

To assure the balance between all the involved interests (Administration, consumer and the private sector), regulatory agencies were created (the first one in 1996), such as ANATEL (telephony services), ANP (petroleum) e ANEEL (energy). In present days, Brazil has seven more agencies: ANVISA (health surveillance), ANS (health private system), ANA (water), ANTAQ (water transportation), ANTT (land transportation), ANCINE (cinema) and ANAC (commercial aviation).

Since the first beginning, the Government was well succeeded to put the "quarentena" into the regulation, in order to minimize unwanted consequences of the revolving doors at agencies. Although the "cooling off" periods are not the same, almost every regulatory agency has a particular regulation about the issue, as seen in the table below:

Agency	Law	Year	Post-Government Employment restrictions
ANEEL	9427	1996	12 months
ANATEL	9472	1997	-

ANP	9478	1997	12 months
ANVISA	9782	1999	01 year
ANVISA	9961	2000	12 months
ANA	9984	2000	-
ANTAQ	10233	2001	01 year
ANTT	10233	2001	01 year
ANCINE	MP2228-1	2001	-
ANAC	11182	2005	-

Therefore, the “quarentena” (post-government employment restriction) was legally established to improve the control on the movement into and out of the Government of certain officials in key posts with access to information about public policies, especially when this movement could result in economic or political benefits for the private sector in detriment to public interests.

In 2000, with the intention to create a general legislation (instead of particular ones), the Federal Law 9986 was enacted to manage all the human resources of regulatory agencies, despite the specific topics about each agency, still present.

Thus, if the agency itself did not establish any post-employment restriction for directors, a minimum of four months would be necessary to “cool off” and the official could not represent the interests or act on behalf of any business with any relation with his or her former agency.

The 9986 Federal Law says that:

"Art 8 The former director is unable to exercise any activity or to provide any service in the sector regulated by their

agency, for a period of four months from the resignation or termination of its mandate. (Wording by Provisional Measure No. 2216-37 of 2001)

§ 1. It is included within the period mentioned in the caption any periods of leave not taken.

§2. During the impediment, the former director will be linked to the agency, are entitled to compensatory remuneration equivalent to the position of management he held and benefits attached thereto. (Wording by Provisional Measure No. 2216-37 of 2001)

§ 3. The provisions of this article applies the former director dismissed the request, if it has already completed at least six months of its mandate.

§ 4. The former director who violates the impediment mentioned in this article are liable to the crime of administrative law, subject to the penalties of the law, without prejudice to other sanctions, administrative and civil. (Wording by Provisional Measure No. 2216-37 of 2001)

§ 5. In the case of the former director to be a public servant, he may choose to apply the provisions of § 2, or return to the performance of his public position or employment, provided there is no conflict of interest. (Included by Provisional Measure No. 2216-37, 2001) "¹

¹ Act 9986, free translation.

However, as we can see, the “cooling off” period is something a bit longer than a vacation. Four months, certainly, cannot erase the influence that the now former official could have in the agency.

Last, but not least, a remarkable fact for Brazilian legislation is that in Federal Law 10233/2001² (ANTAQ and ANTT) regulated not just **post**-government employment restrictions, but also **ante**-government employment restrictions from people who intend to be a Director in these agencies.

Also, in the same law, there is an effort of the Government to make sure that no one is going to misuse any classified or privileged information at any time, ever, under very severe penalties (yet we know that in just a few cases the penalty is really applied to the violator).

We can see the same provision in Law 9782/1999, but, in a different way, since in this legislation the ban of using any privileged information has a term, just one year, after the Director leaves the agency³.

² Article 58. Is prevented from exercising the office of director of ANTT and ANTAQ the person who maintains or has maintained, in the twelve months preceding the date of commencement of office, one of the following links to explore any of the company activities regulated by the Agency:

I - direct participation as a shareholder or partner;

II - an administrator, manager or member of the Audit Committee;

III - employee, even with suspended employment contract, including its sponsor institution, foundation or pension fund.

Sole Paragraph. It is also prevented from exercising the office of director or senior council member association, regional or national interests representing employers or labor-related activities regulated by the Agency.

Article 59. Until one year after leaving office, it is forbidden to the former Director impersonate any person or interest before the agency whose Board has participated.

Sole Paragraph. It is also prohibited, the former Director to use inside information obtained as a result of the position held, under penalty of improper conduct. (free translation).

³ Article 14. Until one year after leaving office, is not allowed to former director impersonate any person or interest before the agency.

Sole Paragraph. During the period specified in the caption is also prohibited, the former director, use privileged information for personal benefit obtained as a result of the position held, under penalty of administrative act of misconduct (free translation).

In all cases seen, during the time of “quarentena”, the former official will be compensated with the same payment received while in the Agency, except when he or she cannot get another job without any kind of conflict of interests with the Public Administration. This compensation will be due after an analyses by the Public Ethics Committee (Comissão de Ética Pública).

- **Decree 4187/2002**

In 2002, the President, in order to regulate the provisory measures (Medidas Provisórias) published in September 2001, decided to enact the 4187 Decree, which spread to all federal administration the post-government employment restrictions, till then only applied to the Regulatory Agencies, as seen before.

So, another remarkable administrative advance to regulate revolving doors was that, from that moment and on, no high federal official was allowed to leave the government direct to private sector, taking all the information that he or she could achieve while in the key public post.

But, regretfully, the restrictions only were applied to some very few authorities (such as Ministers) and for a very short period: also for only four months!

In second clause⁴, the officials pointed are Ministers, officers in special requirements positions and occupants of a certain level of remuneration (level

⁴ "Art 2. The second holding positions of Minister of State, Special Nature-Group and Senior Management and Advisory - DAS, level 6, and equivalent authorities, who have had access to information that may have economic repercussions, are prevented from exercising activities or from providing any service in the industry of its operations for a period of four months from the dismissal.

6 and above), besides another ones that may have had access to information with potential economic repercussion.

As generic as it could be, in October, 2002, there was an legislative change that classified these last officials exclusively as the members of Government Council, Monetary Council, Economic Policy Chamber, Foreign Commerce Chamber of the Government Council, the Committee of Management of the Chamber of Foreign Commerce and the Committee of Monetary Policy of the Central Bank of Brazil (Clause 3^a).

As we can see, just few government personnel were included in those restrictions. For sure, many others should have been included, in order to really strengthening the political system and the public interests.

Of course, it would be unfair to say that this relevant administrative measure was nothing, but certainly it was not enough to minimize the possible unwanted influence of a former officer, not just because so few officials were included in the restrictions, but also because four months is a really short period, even more if we take as a comparison the period of two years in the US Code (which one we are going to talk about a little bit further).

During the four months that the official is prohibited to get another job in business where is likely to occur a conflict of interests, the Decree

(...)

Article 3 For the purposes of this Decree, authorities have had access to information that may have economic repercussions are exclusively members of the Governing Council, the National Monetary Council, the Economic Policy Chamber and the Chamber of Foreign Trade of the Governing Council, Management Committee of the Chamber of Foreign Trade and Monetary Policy Committee of the Central Bank of Brazil. (Wording given by Decree No. 4405 of 10.03.2002)

provides financial compensation in the same amount that the civil servant used to receive while in the Administration⁵.

Of course, this won't be due if the officer got another job in a different sector, with no chances of a conflict of interests, or if he or she has another source of income, such as retirement, or another public job, to where he or she would return when finished his or her service at the government.

Finally, the Decree says that it is up to the Comissão de Ética Pública (Public Ethics Committee) to determine if there is any chance to a conflict of interests to happen in the new desired occupation, so that the official would have to refuse the proposal while in the post-employment restrictions.

- **Inter-American Convention Against Corruption (Organization of American States) and the Draft of Law no. 7528/2006**

In 1996, in Caracas, Venezuela, the Inter-American Convention Against Corruption was signed by most of the members of Organization of American States (OAS)⁶, as an attempt to prevent corruption in federal and local governments of each country.

Article III says that:

“Preventive Measures

For the purposes set forth in Article II of this Convention, the States Parties agree to consider the applicability of

⁵ Art. 4. During the fourth absence, the authorities referred to in art. 2 are bound to the second body or the foundation in which worked and are entitled to compensatory remuneration equivalent to the position they occupied at a cost borne by the respective budgets of funding.

⁶ Exemptions: St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines, Grenada Dominica and Antigua & Barbuda.

measures within their own institutional systems to create, maintain and strengthen:

1. Standards of conduct for the correct, honorable, and proper fulfillment of public functions. These standards shall be intended to prevent conflicts of interest and mandate the proper conservation and use of resources entrusted to government officials in the performance of their functions. (...).”

As we can see, all the States have agreed in implementing measures in order to prevent conflict of interests between private and public sector.

OAS, in its official site, informs that Brazil still has a long way to go, seeing that since First Mechanism for Follow-Up on the Implementation of the Convention it was recommended that:

“c - Establish, as appropriate, proper restrictions upon those who leave public service, such as prohibiting them from having any role in matters in which they were involved by reason of their office or position, or with any entity with which they were recently associated, for a reasonable period of time.”⁷

Yet, in response to the sent questionnaire, Brazil said that:

“Bill 7.528/2006 has been prepared and sent to Congress, dealing with conflicts of interest in the exercise of position or employment in the federal executive branch, as well as

⁷ MECHANISM FOR FOLLOW-UP ON THE OEA IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION 12 December 2008 Fourteenth Meeting of the Committee of Experts Original: Portuguese December 8-12, 2008 Washington, DC.

subsequent impediments to the exercise of public functions. The bill was drafted by the CGU, debated in the Council on Public Transparency and Combating Corruption, and submitted for public consultation.⁸⁴ (Measures a), b) and c))”⁸

In the third Mechanism of Follow-Up, the Committee has said:

“[195] The Committee takes note of the steps taken by the country under review to advance in its implementation of measures a) and b) from the foregoing recommendation, and the need to continue to give attention thereto, recalling that Draft Law No. 7.528/2006, regulating conflicts of interest within the Federal Executive Branch, is still being processed in the National Congress. [196] In its response, the country under review did not refer to measure c) of the foregoing recommendation. Consequently, the Committee reiterates the need for Brazil to give additional attention to its implementation, bearing in mind what was said in the previous paragraph with respect to Draft Law No. 7.528/2006.”⁹

The apparent reason why Brazil has not even mentioned the Draft Law n. 7528/2006 must be that it is in the Senate for **four** years, with no perspective at all to be enacted. Specifically, since February, 20th, 2008, the Draft of

⁸ Idem.

⁹ MECHANISM FOR FOLLOW-UP ON THE OAS IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION 16 September 2011 Nineteenth Meeting of the Committee of Experts Original: Portuguese September 12 – 16, 2011 Washington, DC.

Law is in the “Mesa da Câmara” in order that an appeal presented by Representative Rodrigo da Maia and others that were not identified could be examined¹⁰.

Interesting to notice that the grounds of the appeal are that this was a complex issue and should be analyzed in detail, but it seems not to be happening, since the bill is not being discussed, or even analyzed by any Congressman.

Jorge Hage Sobrinho, Minister of Controladoria-Geral da Uniao, presented the Draft of Law to the President of Brazil (at that time Mr. Luis Inacio Lula da Silva), as an instrument to Federal Government to improve patterns of ethical procedures among government employees. In his words,

"In developing the present proposal have been identified in comparative law the most advanced regulatory provisions in order to prevent the public servant acts influenced by private interests, do not we have forgotten, however, the principles governing the matter in Brazil, which , while crude and treated in sparse standards could not be ignored. (...) 4. In this sense, seeking to advance in the treatment of situations generated by the confrontation, to damage the collective interest, between private and public interests, I present to you the attached proposal, whose main objectives are:

a) adequate legislation homeland that provided for in international conventions, especially the United Nations Convention against Corruption, adopted by the General Assembly of the United Nations on October 31, 2003, ratified by Congress and promulgated by Decree No. 5687 of January 31, 2006; b) preventing conflicts of interest and corruption of agents of the Federal Executive; c) establish requirements and restrictions on the Federal Public Administration servers that have access to inside information; d) provide for further impediments to the exercise of office or employment under the Federal Executive Branch, and,

¹⁰ <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=334907>

e) define responsibilities for monitoring, evaluation and prevention of conflicts of interest (...).

6. For all the above, I understand that this proposal constitutes an important milestone in Brazilian legislation aimed at preventing corruption, the pair also meet international commitments signed by Brazil. "¹¹

However, all of these arguments were not enough to pass the bill in Congress. Not yet, at least.

- **Draft of Law no. 7528/2006**

As already have been told, Draft of Law no. 7528/2006 is an attempt of Brazil to meet compliance with the Inter-American Convention Against Corruption of OAS.

It could be said that it tries to establish a new ethical pattern in post-government employment in Brazilian Government, since it addresses most of the issues that are expected to minimize conflict of interests between public and private sectors, when personal interests of employees are involved.

As second article says, all the following officers shall submit to the law-to-be:

I - Minister of State;

II - of special nature or equivalent;

III - president, vice-president and director, or equivalent, in autarchy, foundations, public companies or public corporations of mixed economy, and

IV - Direção e Assessoramento Superiores and higher - DAS, and levels 5 or 6 equivalent.

¹¹ EM no 005/2006/CGU-PR Brasília, 13 de outubro de 2006, original in Portuguese, English free translation <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=334907>

Paragraph one. Beyond officers referred to in subparagraphs I to IV submit out the provisions of this Act to the occupants of positions or whose jobs provide access to privileged information able to bring economic or financial advantage for the officer or a third part, as regulated.”¹²

So, a huge step would be taken if this now draft of law becomes a real law.

In addition to that provision, the PL 7528/2006 also brings a remarkable progress since it establishes that, for life, the former officer will be prohibited of releasing privileged information that had be obtained because of the government service. Besides that, for one year, the former government employee shall not

“a) provide, directly or indirectly, any person or service to who has established legal relationship relevant because of tenure or employment;
b) to accept position of manager or director, or establish professional ties with natural or legal person performing activities related to the area of jurisdiction of the office or job;
c) conclude with organs or agencies of the Federal executive, contracts service, consulting, advisory or similar activities, linked, albeit indirectly, agency or entity that has held the office or employment, or
d) intervene, directly or indirectly, on behalf of private interests before organ or entity in there busy office or

¹² PL 7528/2006, free translation.

employment or which has established relationships relevant because of tenure or employment.”¹³

As we will see *infra*, one of the difference between Brazil and US regulations is exactly this, while in Brazil the officer is prohibited to seek a job in a company that had any relationship with the past position, in the US, the employee is allowed to accept any offer, in any place. However, most of the times, representational conducts before Federal Government, on behalf of a specific third party are forbidden (while lasting the regulated period – one, two years, or even for life).

Another interesting question about PL 7528/2006 is that within the “cooling off” period, no compensations will be due by the Federal Government. However, if the Public Ethics Committee decide that is just impossible for the former employee to get an allowed job in order to keep him or her employed, than a wage will be paid, even though any service is not being done.

§ 1 The officials referred to in items I to IV of the second article, not occupiers of actual positions may be authorized by the Public Ethics Commission to receive the equivalent value the remuneration of office, when characterized, in the opinion of the Commission, the impossibility of exercise activity does not conflict with the performance of duties of office or employment by they occupied.

- **Código de Ética da Alta Administração Federal (Ethics Code for High Officials in Federal Government)**

¹³ Idem.

The Ethics Code for High Officials in Federal Government, 2009, brings us a very important provision about post-government employment restrictions for almost the same officials mentioned in the Bill 7528/2006:

“Article 14. After leaving office, the public authority may not:

I - acting on behalf of a person or entity, including union or trade association, in business or in a process which he or she has acted in virtue of his position;

II - advise the person or entity, including union or trade association, making use of information not publicly available about programs or policies of the agency or entity of the Federal Public Administration that was linked or who has had relationships direct and relevant in the six months prior to the end of the exercise of public office.

Article 15. In the absence of law on a different period will be four months from the dismissal, the period of interdiction activity incompatible with the position previously held, forcing them to the public authority to observe this deadline, the following rules:

I - do not accept post of administrator or counselor, or establish professional ties with a person or entity with which you have maintained direct and significant official relationship in the six months prior to discharge;

II - not to intervene in or on behalf of a person or entity, organization or entity with the Federal Public Administration that has had direct and significant official relationship in the six months prior to dismissal.”

As it can be seen, the Ethics Code is much more comprehensive than Decree 4187/2002, since it establishes that, for a life time, the former authority shall not act on behalf of a person or entity in a business or in a process which he or she has acted in virtue of his position, when in the government service.

However, the regulation enforcement is really poor, since the provided penalty is a mere “ethical censorship” – *censura etica*, in a free translation – to the official who had violated it, applicable by the Public Ethics Committee (created by a decree of May, 26th, 1999).

As we can see, it is imperative let the Bill 7528/2006 pass in order to guide the revolving doors between public and private sector, so that no one gets hurt.

- **Administrative Cases**

Unfortunately, no judicial cases were found in Superior Tribunal de Justiça’s site. However, here is an example of ethical judgment cases, involving conflict of interests found in the site of Comissão de Ética Pública (Public Ethics Committee):

"3.1 MF - Examination of consultations on the possibility of lecturing (former Minister of Finance, Antonio Palocci) and participate in events (former Executive Secretary of the same agency, Murilo Portugal) during the compliance period of quarantine. Decided to approve the present proposal of the rapporteur Marcilio Marques Moreira in the following sense:

3.1.1 Antonio Palocci - The Institute of quarantine that is subject prevents him from lecturing - paid or unpaid - on topics related to the fields of his recent work

as an authority. You are not prohibited, however, within four months of absence, speak at public or private educational or research on topics of an academic nature, related to their training, always observing the provisions of articles. 14 and 15 of the Code of Conduct of the Federal Administration.

3.1.2 Murilo Portugal - The invitation to participate in an event promoted by the IMF, which will bear the travel expenses and accommodation, there are no objections, since Brazil is a founding member of the IMF, a public international organization, and this Commission have concluded that participate in events sponsored and funded by it does not create ethical objections, nor to officials and employees in office or for quarantine. Regarding the participation event in Spain, considering the information provided:

3.1.2.1 Participation is forbidden, if the invitation and costs are the responsibility of Banco Santander, the entity's area of operations of the Ministry of Finance;

3.1.2.2 If the invitation and costs are the responsibility of the University Menendez Pelayo, participation is possible, since the observed restriction to address a topic related to his recent activity as a public authority, always observing the provisions of articles. 14 and 15 of the Code of Conduct of the Federal Administration. "¹⁴

¹⁴ <http://www4.planalto.gov.br/cep-reunioes/atas/reunioes-de-2006/24-04-2006/?searchterm=Processo> and Apuração and Ética. Original version:

“3.1 MF – Exame de consultas sobre a possibilidade de proferir palestras (ex-Ministro da Fazenda, Antonio Palocci) e participar de eventos (ex-Secretário-Executivo da mesma pasta, Murilo Portugal) durante o período de cumprimento da quarentena. Decidiram os presentes aprovar proposta do Relator Marcílio Marques Moreira no seguinte sentido:

3.1.1 Antonio Palocci – O instituto da quarentena a que está sujeito impede-o de proferir palestras – remuneradas ou não – sobre temas ligados aos campos de sua recente atuação enquanto autoridade. Não lhe é vedado, entretanto, nos quatro meses de impedimento, proferir palestras em entidades públicas ou privadas, de ensino ou pesquisa, sobre temas de caráter acadêmico, inerentes à sua formação, observando sempre o que dispõem os arts. 14 e 15 do Código de Conduta da Alta Administração Federal.

3.1.2 Murilo Portugal - Quanto ao convite para participar de evento promovido pelo FMI, o qual arcará com as despesas de viagem e alojamento, não há objeções, uma vez que o Brasil é membro fundador do FMI, organismo público internacional, e esta Comissão já concluiu que participar em eventos por ele patrocinados e custeados não cria objeções de ordem ética, nem para autoridades e funcionários em exercício, nem para os em quarentena. Quanto à participação de evento na Espanha, considerando as informações prestadas:

3.1.2.1 A participação é vedada, no caso de o convite e os custos serem de responsabilidade do Banco Santander, entidade da área de atuação do Ministério da Fazenda;

Therefore, as it is evident, the law enforcement is really weak, and probably does not reach its goal of avoiding conflict of interests between public and private sectors, especially when considering that scandals in the media are so often that, apparently, their relevance to people seems decreased over time.

3.1.2.2 No caso de o convite e os custos serem de responsabilidade da Universidade Menendez Pelayo, a participação é possível, desde que observada a restrição para tratar de tema relacionado com sua recente atividade enquanto autoridade pública, observando sempre o que dispõem os arts. 14 e 15 do Código de Conduta da Alta Administração Federal.”

- **Regulation in the United States**

- **18 United States Code § 207**

The United States regulates post-government employment restrictions for federal personnel, both executive and legislative branches, in the US Code, mostly in Title 18, §207, which is a criminal regulation, as known. However, some other restrictions were found, such as the Procurement Integrity Act, recently enacted and to be codified as 41 U.S.C. §2104 (formerly 41 U.S.C. §423). In this paper, only civil federal personnel of the executive branch will be analyzed.

Roughly, we can say that there are three kinds of restriction related to the time the now former officer have to wait, after leaving federal government, till he or she can act in behalf of a private party (or a foreign one):

- a. Lifetime restriction;
- b. two-years restriction;
- c. one-year restriction;

- a. **Lifetime restriction¹⁵.**

¹⁵ 18 U.S.C. § 207 **1) Permanent restrictions on representation on particular matters.**— Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest, **(B)** in which the person participated personally and substantially as such officer or employee, and **(C)** which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title.

This restriction, the most radical one, imposes to a former government employee a lifetime ban on communication to or appearances before anyone in service in the government when he or she is “in connection with a particular matter in which [the former officer] participated personally and substantially as such officer or employee”.

In other words, there are three requirements to this restriction:

i. **Particular matter:** Basically, it is **not** a generic matter. So, it needs to involve specific issues and determined parties, besides, of courses, the federal government interest in the issue. A mere rulemaking, policy formulation, legislation, cannot be considered as a particular matter, because affects not only one party, but a group (whether small or large). Code of Federal Regulations (CFR) definition to this restriction is clear: “*Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties*”¹⁶.

Examples given by CFR:

Example 1: A Government employee formulated the policy objectives of an energy conservation program. He is not restricted from later representing a university which seeks a grant or contract for work emerging from such a program.

Example 2: A Government employee reviews and approves a specific city's application for Federal assistance for a renewal

¹⁶ 5 C.F.R., §2637.201 (c).

project. After leaving Government service, she may not represent the city in relation to that project.

As we can see, this provision aims to reduce any incentives to officers “switch sides”, after leaving government and, yet, to reduce the temptation to guide their conducts, while in service, to individual and future profits, instead of public interests.

ii. Personal and substantial participation: This means that any participation of the former officer is **not** enough to restriction applies. The employee must had been involved in the particular matter personally and substantial. CFR defines that:

“Participate ``personally” means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. ``Substantially,” means that the employee’s involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.”¹⁷

Substantial, in the other hand, can be defined as **relevant**. In OGE words, “(...) a finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.”¹⁸.

¹⁷ 5C.F.R., 2637.201 (d).

¹⁸ Idem.

Examples given by CFR:

Example 1: If an officer personally approves the departmental budget, he does not participate substantially in the approval of all items contained in the budget. His participation is substantial only in those cases where a budget item is actually put in issue. Even then, the former Government employee is not disqualified with respect to an item if it is a general program rather than a particular matter involving a specific party. The former Government employee may, however, have official responsibility for such matters. (See Sec. 2637.202(b).)

Example 2: A Government lawyer is not in charge of, nor has official responsibility for a particular case, but is frequently consulted as to filings, discovery, and strategy. Such an individual has personally and substantially participated in the matter.

iii. Prove that the former officer or employee acted knowing with respect to each element of the crime: This particular state of mind is very complex and hard to prove, especially in Courts. The statute establishes as a requirement to criminal prosecution that the former employee or officer must act knowing that his or her actions are taking place to influence public decisions¹⁹ and all of

¹⁹ US Code, Title 18, §207, 1. “knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter”.

other elements in the offense (such as knowing that his or her form agency still has a substantial interest in the particular matter)²⁰.

iv. To whom the restriction may be applied: This restriction applies to **all executive branch employees** (former government employees and senior employees included) , as well as to some special kind of public officers who serve 130 days or less in a particular calendar year²¹:

“Special Government Employee means an officer or employee of an agency who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed 130 days during any period of three hundred and sixty five consecutive days, temporary duties either on a full time or intermittent basis (18, U.S.C. 202).

In conclusion, if the case matches these exposed criteria, the former employee or officer is not allowed to communicate or appear before federal government, even agencies, for lifetime, in behalf of the other party with intent to influence the federal decisions. Of course, we cannot expect the same severity for work behind the scenes, since the regulation only applies to formal representations or communications.

Maybe some could perceive the lifetime ban as something immoderate, but it is good to stress that the actual applied situations are very few and, after all, any conflict of interests will be solved by the interpretation of legal statues, whether by Courts or the Office of Government Ethics.

²⁰ This is a controversial interpretation, since grammatically the statue seemingly to requires only that the action is intending to influence government decisions. See United States v. Nofzinger and the Revision of 18 U.S.C.]207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal law, 65 Notre Dame Law Review, 803 (1990).

²¹ 5 CFR]2637.211(f).

Interesting to notice, also, that there is another provision for a lifetime restrictions, regarding US Trade Representatives and Deputy US Trade Representatives as it will be seen *infra*.

b. Two-years restrictions²²

Just like the lifetime restriction, the 2-year limitation prohibits the same representational activities for this limited period in time. Much more reasonable in its length, this determination has much in common with the first one seen, since it also requires two criteria to be applied, a) particular matter; and b) prove that the former officer or employee acted knowing with respect to each element of the crime.

The crux in this situation, that distinguish the two-year period from the lifetime period, is that the now former employee or officer reasonably should know or knew that the particular matter “(...) *was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia*”.

So, it is not necessary a personal and substantial participation in the particular matter; if the former officer knew or reasonably should

²² **18 U.S.C. §207 (...) (2) Two-year restrictions concerning particular matters under official responsibility.**— Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and
(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

know that he or she had under his or her responsibility that particular issue, it is enough to the regulation being applied.

However, it is relevant notice that the 2-year period ban should be counted from the termination of official responsibility, rather from the termination of the federal employment²³.

Official responsibility, therefore, is defined in 18 USC §202, as “(...) *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*”²⁴.

But, as a matter of fact, the responsibility must not be for subsidiary issues, such as budgeting. It has to be for planning, organizing and controlling the issue. As CFR says “(...) *‘Administrative’ authority as used in the foregoing definition means authority for planning, organizing and controlling matters rather than authority to review or make decisions on ancillary aspects of a matter such as the regularity of budgeting procedures, public or community relations aspects, or equal employment opportunity considerations. Responsibility for such an ancillary consideration does not constitute responsibility for the particular matter, except when such a consideration is also the subject of the employee’s proposed representation*”²⁵.

Example given by CFR:

“Example 1: During her tenure as head of an agency, an officer’s subordinates undertook major changes in agency enforcement standards involving occupational safety.

²³ 5 C.F.R., 2637. 202 (e): “(...)The statutory two-year period is measured from the date when the employee’s responsibility in a particular area ends, not from the termination of Government service, unless the two occur simultaneously. The prohibition applies to all particular matters subject to such responsibility in the one-year period before termination of such responsibility.”

²⁴ 18 U.S.C. §202 (b)

²⁵ 5 C.F.R.2637.202 (3).

Eighteen months after terminating Government employment, she is asked to represent Z Company which believes it is being unfairly treated under the enforcement program. The Z Company matter first arose on a complaint filed after the agency head terminated her employment. She may represent Z Company because the matter pending under her official responsibility was not one involving “a specific party.” (Moreover, the time-period covered by 18 U.S.C. §207(c) has elapsed.)²⁶

Finally, this restriction applies to every government employee or officer, including special government employees, as seen before, and self-disqualification for a task, in order to get away from the restriction, could not be applied, in contrast with the life-time ban (since it is not a requirement that the employee had a personal and substantial involvement in the particular matter in debate).

c. One-year restrictions²⁷

The one-year period is the most condescend one of those restrictions determined by the USC and applies to every former government employee that, within the year before termination of his or her public service, had worked personal

²⁶ 5 C.F.R., 2637.202 (d).

²⁷ 18 U.S.C. §207 **1) In general.**— Any person who is a former officer or employee of the executive branch of the United States (including any independent agency) and is subject to the restrictions contained in subsection (a)(1), or any person who is a former officer or employee of the legislative branch or a former Member of Congress, who personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period preceding the date on which his or her service or employment with the United States terminated, and who had access to information concerning such trade or treaty negotiation which is exempt from disclosure under section 552 of title 5, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information, knowingly represent, aid, or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates. Any person who violates this subsection shall be punished as provided in section 216 of this title.

and substantially in a trade or treaty negotiation and have had access “(...) to information concerning such trade or treaty negotiation which is exempt from disclosure (...)”.

Besides being indulgent in the length of time, it has to be reinforced that the restriction applies not only to representational activities, but also to almost **any activity**, since it prohibits aiding; advising or assisting a third party, other than the United States, in the following year after public services is finished.

In other words, this one-year restriction requires that the former officer should have had participated **personally and substantially** in an **ongoing trade or treaty negotiation, within the year before separation.**

As “personally and substantially” mean are already known, remains to be seen the concept of ongoing trade or treaty negotiation.

An **ongoing trade and a treaty negotiation** are defined very clearly in the 18 U.S.C. §207 as:

*“(A) the term “trade negotiation” means negotiations which the President determines to undertake to enter into a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988, and does not include any action taken before that determination is made; and
(B) the term “treaty” means an international agreement made by the President that requires the advice and consent of the Senate”.*

The OGE, in Memo 90x17, 1990, specifies that:

“Unless there is an earlier public announcement of a determination by the President, a trade negotiation commences to be "ongoing" when, at least 90 days before entering into a trade agreement, the President notifies both the House of Representatives and the Senate of his intention to enter into an agreement. (...)

A negotiation on a treaty commences to be "ongoing" at the point when both (1) the determination has been made by a competent authority that the outcome of a negotiation will be a treaty and (2) discussions with a foreign government have begun on a text. Trade and treaty negotiations both cease to be ongoing when an agreement or treaty enters into force or when all parties to the negotiation cease discussion based on a mutual understanding that the agreement or treaty will not be consummated”.²⁸

Also, it is necessary that the “behind the scenes action” should be based in classified **information** obtained while in the government service, as 18 U.S.C. §207 say:

“(...)and who had access to information concerning such trade or treaty negotiation which is exempt from disclosure under section 552 of title 5, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information (...).”

Also known as the Freedom of Information Act (FOIA), this provision generally defines which information should be publicly available, and which not. So, for our purposes, all information that is exempt from disclosure is not to be used

²⁸ OGE Memo 90x17, at 3, 1990.

in the year after termination on behalf of a third party, other than the United States of America and the District of Columbia.

Again, the intention of the legislator is clear in reducing the “revolving doors”, since it tries to prevent any conflict of interests, after employee leaves the public sector. However, every element of the provision must be known by the former employee, which leads to a very hard time to prosecution in Courts.

Finally, it must be stressed that this is not the only one restriction on disclosing classified information, as the OGE recognizes in Memo 90x17, and the used of classified information on behalf of a third part must be handled very carefully:

“It is important to note that, although a post-employment activity may not be prohibited by section 207(b), a former employee must still be careful to comply with other statutory restrictions. (...) Also, former employees remain covered by statutory restrictions prohibiting the release of classified information.”²⁹

c.1. Senior Personnel³⁰

²⁹ OGE Memo 90x17, at 3, 1990.

³⁰ 18 U.S.C § 207 (c) **One-Year Restrictions on Certain Senior Personnel of the Executive Branch and Independent Agencies.—**

(1) Restrictions.— In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including an independent agency), who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

In addition to those restrictions, senior personnel of the Executive Branch are also subject to a broader provision that prohibits the former senior employee “(...) *within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency (...)*”

In other words, in the year after leaving the government service, **senior officer shall not communicate or appear** (representational actions) before **anyone** in the Department or Agency where he or she used to work in order to influence **any** decision, regarding to **any** matter.

Senior employee, by definition, is [18 U.S.C. §207(c)]
“(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,
(ii) employed in a position which is not referred to in clause (i) and for which that person is paid at a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule, or, for a period of 2 years following the enactment of the National Defense Authorization Act for Fiscal Year 2004, a person who, on the day prior to the enactment of that Act, was employed in a position which is not referred to in clause (i) and for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5304 or section 5304a of title 5, was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service on the day prior to the enactment of that Act,

- (iii) appointed by the President to a position under section 105 (a)(2)(B) of title 3 or by the Vice President to a position under section 106 (a)(1)(B) of title 3,
- (iv) employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade (as specified in section 201 of title 37) is pay grade O-7 or above; or
- (v) assigned from a private sector organization to an agency under chapter 37 of title 5.³¹

As the OGE says, "The purpose of this one-year "cooling off" period is to allow for a period of adjustment to new roles for the former senior employee and the agency he served, and to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former senior position."³²

Since this provision requires the senior *status*, it starts running a year after it had ceased, not from the termination of the service. Generally, the pay levels match the ones of undersecretaries of cabinet departments and of the highest levels of the executive schedule, including some highly paid civil servants.³³

This provision does not apply to special government employees and the Director of the OGE is allowed to waive the restriction to people mentioned in ii. and iv. (*supra*) if:

“(i) the imposition of the restrictions with respect to such position or positions would create an undue hardship on the

³¹ 18 U.S.C. § 207 (c).

³² OGE Memo 90x17 at 4.1990.

³³ Luneburg, William V. and Susman, Thomas M. *The Lobbying Manual*. 3 Ed.. American Bar Association. p.452.

department or agency in obtaining qualified personnel to fill such position or positions, and

(ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.”³⁴

c.2. Very Senior Personnel

Very senior personnel are defined by the USC as :

“(A) serves in the position of Vice President of the United States,

(B) is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of pay payable for level II of the Executive Schedule, or

(C) is appointed by the President to a position under section 105 (a)(2)(A) of title 3 or by the Vice President to a position under section 106 (a)(1)(A) of title 3.”³⁵

In addition to all precedent restriction (except the one for senior personnel), this one prohibits representational action on behalf of a third party before the former Agency or Department where the very senior officer had worked **and before the Executive Schedule employee**, which is the highest-ranking government officials, regardless of the agency in which the Executive Schedule works³⁶.

³⁴ 18 U.S.C. §207 (c) 2 C.

³⁵ 18 U.S.C. § 207, (d) 1.

³⁶ Luneburg, William V. and Susman, Thomas M. *The Lobbying Manual*. 3 Ed.. American Bar Association. p.453.

Unlike the restriction to senior personnel, the OGE is not allowed to waive any of the restrictions, in order to benefit the former senior employee.

c.3. Restrictions Relating to Foreign Entities³⁷

To very senior and senior officers, there are still restrictions related to foreign entities.

For one year after leaving their position, very senior and senior employee cannot:

“(A) represents a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties, or (B) aids or advises a foreign entity with the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties,”³⁸

As the United States Code makes clear, **all** kind of conducts are prohibited, not only representational ones. So, “behind the scenes” aid or advice

³⁷18 U.S.C. § 207 (f) Restrictions Relating to Foreign Entities.—

(1) Restrictions.— Any person who is subject to the restrictions contained in subsection (c), (d), or (e) and who knowingly, within 1 year after leaving the position, office, or employment referred to in such subsection—
(A) represents a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties, or
(B) aids or advises a foreign entity with the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties, shall be punished as provided in section 216 of this title.

³⁸ Idem.

also cannot take place, if on behalf of a third foreign entity³⁹, in order to attempt to influence any government decision .

As OGE states: *“The one-year period is measured from the date when an employee ceases to be a senior employee or a very senior employee, not from the termination of Government service, unless the two occur simultaneously”*⁴⁰.

Also, OGE has observed that a *“(…) foreign commercial corporation will not generally be considered a foreign entity for purposes of section 207(f) unless it exercises the functions of a sovereign.”*⁴¹

Last, but not least, very interesting question raises in provision 18 U.S.C. 207 (f) 2, that determines **a life time ban** for formers US Trade Representatives or Deputy US Trade Representatives to be advisors or to represent a foreign entity before US Government.

c.4. Former Detailee

In 2002, title 18 of the US Code, section 207 was amended by a part of the Digital Tech Corps Act of 2002. Therefore, another restriction was added:

“(I) Contract Advice by Former Details.— Whoever, being an employee of a private sector organization assigned to an agency under chapter 37 of title 5, within one year after the end of that assignment, knowingly represents or aids, counsels, or assists in representing any other person (except the United States) in connection with any contract with that agency shall be punished as provided in section 216 of this title.”⁴²

³⁹ By foreign entity, take countries or a political party (18 U.S.C. § 207 (f) 3).

⁴⁰ OGE Memo 90 x17

⁴¹ SUMMARY OF POST-EMPLOYMENT RESTRICTIONS OF 18 U.S.C. § 207

⁴² 18 U.S.C § 207, I.

Thus, the one who is not an officer or a government employee, but works in an agency as a detailee is expressly restrained, also, and cannot help, in any way, any other person than the United States, as long as in a matter related to any contract with that agency.

d. Exceptions and Waivers

Some exceptions may be applied to some cases, by the 18 U.S.C.. In order to keep them clear, they are going to be presented in this paper as the Code itself, since they are very specific and hard to put in other words:

“(j) Exceptions.—

(1) Official government duties.—

(A) In general.— The restrictions contained in this section shall not apply to acts done in carrying out official duties on behalf of the United States or the District of Columbia or as an elected official of a State or local government.

(B) Tribal organizations and inter-tribal consortiums.— The restrictions contained in this section shall not apply to acts authorized by section 104(j) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450i (j)).

(2) State and local governments and institutions, hospitals, and organizations.— The restrictions contained in subsections (c), (d), and (e) shall not apply to acts done in carrying out official duties as an employee of—

(A) an agency or instrumentality of a State or local government if the appearance, communication, or representation is on behalf of such government, or

(B) an accredited, degree-granting institution of higher education, as defined in section 101 of the Higher Education Act of 1965, or a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986, if the appearance, communication, or representation is on behalf of such institution, hospital, or organization.

(3) International organizations.— The restrictions contained in this section shall not apply to an appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States.

(4) Special knowledge.— The restrictions contained in subsections (c), (d), and (e) shall not prevent an individual from making or providing a statement, which is based on the individual’s own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received.

(5) Exception for scientific or technological information.— The restrictions contained in subsections (a), (c), and (d) shall not apply with respect to the making of

communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee. For purposes of this paragraph, the term “officer or employee” includes the Vice President.

(6) Exception for testimony.— Nothing in this section shall prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. Notwithstanding the preceding sentence—

(A) a former officer or employee of the executive branch of the United States (including any independent agency) who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the United States) in that matter; and

(B) a former officer or employee of the District of Columbia who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the District of Columbia) in that matter.

(7) Political parties and campaign committees.—

(A) Except as provided in subparagraph (B), the restrictions contained in subsections (c), (d), and (e) shall not apply to a communication or appearance made solely on behalf of a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party.

(B) Subparagraph (A) shall not apply to—

(i) any communication to, or appearance before, the Federal Election Commission by a former officer or employee of the Federal Election Commission; or

(ii) a communication or appearance made by a person who is subject to the restrictions contained in subsections ^[1] (c), (d), or (e) if, at the time of the communication or appearance, the person is employed by a person or entity other than—

(I) a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party; or

(II) a person or entity who represents, aids, or advises only persons or entities described in subclause (I).

(C) For purposes of this paragraph—

(i) the term “candidate” means any person who seeks nomination for election, or election, to Federal or State office or who has authorized others to explore on his or her behalf the possibility of seeking nomination for election, or election, to Federal or State office;

(ii) the term “authorized committee” means any political committee designated in writing by a candidate as authorized to receive contributions or make expenditures to promote the nomination for election, or the election, of such candidate, or to explore the possibility of seeking nomination for election, or the election, of such candidate, except

that a political committee that receives contributions or makes expenditures to promote more than 1 candidate may not be designated as an authorized committee for purposes of subparagraph (A);

(iii) the term “national committee” means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level;

(iv) the term “national Federal campaign committee” means an organization that, by virtue of the bylaws of a political party, is established primarily for the purpose of providing assistance, at the national level, to candidates nominated by that party for election to the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(v) the term “State committee” means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level;

(vi) the term “political party” means an association, committee, or organization that nominates a candidate for election to any Federal or State elected office whose name appears on the election ballot as the candidate of such association, committee, or organization; and

(vii) the term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(k)

(1)

(A) The President may grant a waiver of a restriction imposed by this section to any officer or employee described in paragraph (2) if the President determines and certifies in writing that it is in the public interest to grant the waiver and that the services of the officer or employee are critically needed for the benefit of the Federal Government. Not more than 25 officers and employees currently employed by the Federal Government at any one time may have been granted waivers under this paragraph.

(B)

(i) A waiver granted under this paragraph to any person shall apply only with respect to activities engaged in by that person after that person’s Federal Government employment is terminated and only to that person’s employment at a Government-owned, contractor operated entity with which the person served as an officer or employee immediately before the person’s Federal Government employment began.

(ii) Notwithstanding clause (i), a waiver granted under this paragraph to any person who was an officer or employee of Lawrence Livermore National Laboratory, Los Alamos National Laboratory, or Sandia National Laboratory immediately before the person’s Federal Government employment began shall apply to that person’s employment by any such national laboratory after the person’s employment by the Federal Government is terminated.

(2) Waivers under paragraph (1) may be granted only to civilian officers and employees of the executive branch, other than officers and employees in the Executive Office of the President.

(3) A certification under paragraph (1) shall take effect upon its publication in the Federal Register and shall identify—

(A) the officer or employee covered by the waiver by name and by position, and

(B) the reasons for granting the waiver.

A copy of the certification shall also be provided to the Director of the Office of Government Ethics.

(4) The President may not delegate the authority provided by this subsection.

(5)

(A) Each person granted a waiver under this subsection shall prepare reports, in accordance with subparagraph (B), stating whether the person has engaged in activities otherwise prohibited by this section for each six-month period described in subparagraph (B), and if so, what those activities were.

(B) A report under subparagraph (A) shall cover each six-month period beginning on the date of the termination of the person's Federal Government employment (with respect to which the waiver under this subsection was granted) and ending two years after that date. Such report shall be filed with the President and the Director of the Office of Government Ethics not later than 60 days after the end of the six-month period covered by the report. All reports filed with the Director under this paragraph shall be made available for public inspection and copying.

(C) If a person fails to file any report in accordance with subparagraphs (A) and (B), the President shall revoke the waiver and shall notify the person of the revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

(D) Any person who is granted a waiver under this subsection shall be ineligible for appointment in the civil service unless all reports required of such person by subparagraphs (A) and (B) have been filed.

(E) As used in this subsection, the term "civil service" has the meaning given that term in section 2101 of title 5.

(I) Contract Advice by Former Details.— Whoever, being an employee of a private sector organization assigned to an agency under chapter 37 of title 5, within one year after the end of that assignment, knowingly represents or aids, counsels, or assists in representing any other person (except the United States) in connection with any contract with that agency shall be punished as provided in section 216 of this title."

To simplify the complex system of exceptions and waivers, OGE have done the following chart⁴³:

Exception/Waiver	(a)(1)	(a)(2)	(b)	(c)	(d)	(f)	(I)
Official Government Duties § 207(j)(1)	X	X	X	X	X	X	X
State and Local Government and Institutions, Hospitals, and Organizations § 207(j)(2)				X	X		
International Organizations § 207(j)(3)	X	X	X	X	X	X	X
Special Knowledge § 207(j)(4)				X	X		

⁴³ 18 U.S.C. § 207 Exceptions and Waivers: A Quick Reference Guide, October 2009.

Scientific or Technological Information § 207(j)(5)	X	X		X	X		
Testimony § 207(j)(6)	X	X	X	X	X	X	X
Political Parties and Campaign Committees § 207(j)(7)				X	X		
Presidential Waiver § 207(k)	X	X	X	X	X	X	X
OGE Waiver § 207(c)(2)(C)				X		X	

So, as an example, none of the prohibitions are applied if the former employee is acting on behalf of the United States or on behalf of a State or local government, as an elected official.

However, it has to be stressed that in information orally obtained from OGE, specifically Ms. Julie Eirinberg, associate general Counsel of OGE⁴⁴, the waiver **K** *supra* has never been used.

⁴⁴ Meeting in November, 3rd, 2001, at OGE.

▪ **41 United States Code §2104 (To Be Codified)**

Very recently, the enactment of the Procurement Integrity Act , to be codified at Chapter 41 of the U.S.C, Section 2104 (formerly 41 U.S.C §423⁴⁵) brought some other post-government employment restrictions to the North-American regulation.

⁴⁵ **41 U.S.C § 423 (...)**

(d) Prohibition on former official's acceptance of compensation from contractor

(1) A former official of a Federal agency may not accept compensation from a contractor as an employee, officer, director, or consultant of the contractor within a period of one year after such former official—

(A) served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000;

(B) served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to that contractor; or

(C) personally made for the Federal agency—

(i) a decision to award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10,000,000 to that contractor;

(ii) a decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;

(iii) a decision to approve issuance of a contract payment or payments in excess of \$10,000,000 to that contractor; or

(iv) a decision to pay or settle a claim in excess of \$10,000,000 with that contractor.

(2) Nothing in paragraph (1) may be construed to prohibit a former official of a Federal agency from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in subparagraph (A), (B), or (C) of such paragraph.

(3) A former official who knowingly accepts compensation in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.

(4) A contractor who provides compensation to a former official knowing that such compensation is accepted by the former official in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.

(5) Regulations implementing this subsection shall include procedures for an official or former official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether the official or former official is or would be precluded by this subsection from accepting compensation from a particular contractor.

In other words, this section prohibits certain former federal employees from accepting employment (even as a consultant) with a contractor for a one-year period, if he or she:

“(A) served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000;

(B) served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to that contractor; or

(C) personally made for the Federal agency—

- (i) a decision to award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10,000,000 to that contractor;*
- (ii) a decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;*
- (iii) a decision to approve issuance of a contract payment or payments in excess of \$10,000,000 to that contractor; or*
- (iv) a decision to pay or settle a claim in excess of \$10,000,000 with that contractor.”*

However, we could say that a major flaw in this regulation comes next, at 2:

(2) Nothing in paragraph (1) may be construed to prohibit a former official of a Federal agency from accepting

compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in subparagraph (A), (B), or (C) of such paragraph.

As it can be seen, it seems to be quite easy to escape the law enforcement, since the former official can be hired by a division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the original contract. Therefore, a compensation for any undue conduct while in government service will be guarantee, (ever since in another division of the contractor).

- **Tendencies in North-American Regulation about Post-Government Employment Restrictions**

Important to notice that even the regulation system in the United States of America in post-government employment restrictions could be considered one of the most comprehensive in the world, still there is a tendency to increase it.

In the site of OGE, it is seen as a tendency of the next Congress (112th) to reinforce these presented restrictions, and even to increase some of them:

“Legislators in the 111th Congress focused on imposing additional post-employment restrictions for certain government employees, a trend which appears to be surfacing again in the 112th Congress. Proposed legislation directed at the former Minerals Management Service, National Highway Traffic Safety Administration, and the

Federal Aviation Administration (FAA) would have either directly prohibited current government employees from working for certain prospective employers or penalized specified prospective employers for hiring certain government employees. The FAA Air Transportation Modernization and Safety Improvement Act proposed in the 111th Congress called for three-year post-employment restriction period for certain former employees and has been reintroduced in the first session of the 112th Congress. S. 223, 112th Cong. (2011); H.R. 658, 112th Cong. (2011). OGE will continue to monitor legislative activity involving post-employment restrictions and provide relevant updates as events unfold.”⁴⁶

⁴⁶ <http://www.usoge.gov/DisplayTemplates/ModelSub.aspx?id=2147484463>

- **Ethics Pledge – Mr. Barack Obama Administration**

In 2009, when President Barak Obama took office, all new political appointees (non-career ones) were determined to sign an Ethics Pledge form, which had some more extensive restrictions about employment after government service and even before this. Also nominees from the last Administration had to sign it, after a 100 day period to think about it.

Most of them, as the clauses name left clear, aimed to regulate the revolving doors, or, in other words, discourage new and old appointees to “switch sides”.

Therefore, besides the law, the new employee was obliging himself or herself **not to**

* for a period of **two years after the date of the appointment**, participate in any particular matter involving specific parties that were directly and substantially related to the former employer or former clients, including regulations and contracts;

* for a period of **two years after the date of the appointment**, (for former lobbyists):

(a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;

(b) participate in the specific issue area in which that particular matter falls; or

(c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.

Also, appointees obliged themselves to extend the “cooling off” period of **one year** determined in 18 U.S.C 207 (c), **into two years**; and not to lobby “any covered executive branch official or non-carrier Senior Executive Service appointee **for the remainder of the Administration**”.

The Ethics Pledge seems to be settled as a response to a Presidential campaign compromise, since is very well known the global desire to minimize switching sides between Public and Private sectors in detriment to public interests.

- **Judicial Cases**

Here are two judicial cases that we will take as an example of the law enforcement in the United States. Both of them were taken from the site of OGE⁴⁷:

“United States v. Lonette Bryan

Lonette Bryan was an employee of the U.S. General Services Administration (GSA) as a contract specialist from December 1997 to November 2002. She was responsible for overseeing the proposal, award, administration, modification, renewal, and termination of certain contracts between the U.S. and specified private companies authorized to sell products and services to offices of the Federal Government at previously negotiated prices.

In or about September 2000, Bryan was assigned as the designated GSA contract specialist for the Software Professionals Inc. contract. Software Professionals, Inc., made computer technology professionals available to the Federal Government on a contract basis. The contract was for five years with an expiration date of April 2003. Between September 2000 and November 2002, Bryan personally and substantially participated in the administration and modification of the Software Professionals contract, including receiving,

⁴⁷ <http://www.oge.gov/OGE-Advisories/Legal-Advisories/DO-05-014--2004-Conflict-of-Interest-Prosecution-Survey/>

reviewing, negotiating, and ultimately recommending approval of an important contract modification proposed by Software Professionals in August 2002.

Bryan terminated her employment with GSA in November 2002 and began working for Software Professionals in February 2003. Between March and August 2003 Bryan, on behalf of Software Professionals, knowingly communicated with GSA multiple times with the intent to influence GSA to extend the term of the Software Professionals contract and later, to award Software Professionals a new contract to sell its services to the Federal Government.

On April 7, 2004, Bryan pleaded guilty to one count of violating 18 U.S.C. § 207(a)(1), one of the post-Government employment communication restrictions. On July 23, 2004, she was sentenced to two years supervised probation, substance abuse treatment, and a \$25.00 special assessment.

The Eastern District of Virginia handled the prosecution.”

“United States v. Nick Walters

The Defendant, Nick Walters, was the State Director of the United States Department of Agriculture Rural Development (USDARD). Part of the duties of USDARD included fielding loan and grant applications from community facilities to provide funding to rural communities that would help the overall community.

In March 2006, the Natchez Regional Medical Center in Natchez, Mississippi, contacted USDARD for information on the possibility of receiving a community facilities loan to improve their hospital. On March 21, 2006, the Defendant and his staff met with the Board of Directors of the Medical Center and provided them with information on the community facilities loan program. On March 23, 2006, the CFO of the Medical Center was authorized to apply for a community facilities loan with USDARD. The authorization was executed through a resolution by the Medical Center’s Board of Directors, and a copy of the resolution was provided to the Defendant. The Defendant also spoke to the Board about hiring a financial advisor, and recommended Kidwell and Company (Kidwell). Kidwell was hired by the Board. During the period of time spanning March 2006 through September 2006, the Defendant attended meetings and communicated with the Medical Center’s Board of Directors and Kidwell about the loan program as it would apply to the Medical Center.

On August 4, 2006, the Defendant resigned from his position as State Director at USDARD. After his resignation, the Defendant communicated with employees of USDARD on behalf of the Medical Center about the community facilities loan and application. He also assisted the Medical Center with filing a formal application for a community facilities loan with USDARD.

The Defendant was charged with one count of violating 18 U.S.C. § 207(a)(1). On October 27, 2009, the Defendant pleaded guilty. On December 15, 2009, he was sentenced to three years of probation, a \$1,000 fine, and a \$25 special assessment fee.

The United States Attorney's Office for the Southern District of Mississippi handled the investigation and prosecution of this case.”⁴⁸

As it can be seen, in both featured cases, within a period from **one to three years**, former officials were criminal convicted; the first one to *two years supervised probation, substance abuse treatment, and a \$25.00 special assessment*, and the second one to *three years of probation, a \$1,000 fine, and a \$25 special assessment fee*.

Therefore, it is highly probable that the goal of avoiding conflict of interests is being reached by Federal Government, especially considering that people, in general, are very concerned about their reputation, and a criminal conviction (even a mild one) is something that could ruin anyone's *curriculum*.

⁴⁸ Idem.

▪ **Conclusions and Proposals for an efficient model of regulation in Brazil**

As a conclusion of this paper, we could say that regulation in Brazil still is not able to prevent conflict of interests of happening. And this is due, mainly, to the weak law enforcement, either because it is just an “ethical censorship”, either because the path to punishment is too long. Also, it can be said that scandals on the media are so frequent that no one seems to care anymore about their reputations, unfortunately.

Yet, enacting Bill 7528/2006 also won't solve all Brazilian issues, since it would be recommended some minor improvements in its text.

For instance, in article 6, item II, of the Draft of Law 7528/2006 it would be better and easier to oversight former officials if only representational conducts before Federal Government, on behalf of the third party, would be forbidden (while lasting the “cooling off” period). As a result, he or she could accept any job offer at any time after government service is extinguished. However, **for one year**, he or she could not appear before any Government Agency or Department on behalf of anyone.

Three goals would be reached:

- No compensation would be ever due by the Federal Government, since no job would be prohibited for anyone (article 7, §12, Bill 7528/2006);
- It would be easier to oversight misconduct of former federal authorities, since it would be forbidden for them to appear before Federal Government;
- Working at Federal Government would be attractive, even with some kind of low wages, since it would be

possible to leave at any time to private sector. Therefore more skilled people would be interested in it.

Although it seems more restricted in its origins, Bill 7528/2006 would be improved if some minor changes take place, in order to save public money in compensations for nothing (since no service would be done while lasting the “cooling off” period) and to make things easier for overseeing.

However, with or without changes, enacting of Bill 7528/2006, for sure, will be a major step forward for Brazilian people, once the country will be honoring international commitment (OAS), besides improving the ethical pattern in Federal Government.

While it is still at the Congress, nevertheless, imperative to tell that Brazilian regulation, exception made for Regulatory Agencies is poor and insufficient to avoid conflict of interests between public and private sectors.

In the other hand, American regulation seems to be in another level, since it is not only more restricted, as more enforced. Punishment is a certainty and the fear of being caught and convicted is always the best way to guarantee order (besides education, of course).

An ideal regulatory system would be the one that could educate people in order to avoid any kind of conflict of interests of happening, so that no crime would be committed. In this sense, The United States has a lot to teach, since many organisms like the OGE, or the internal Ethics Official of each agency, play a very important role in advising and educating government personnel. Apparently, people listen to them, trying to avoid being prosecuted in Courts.

For sure, this result was achieved after an effort to enforce the laws properly, no matter who was involved. Nowadays, the enforcement is not that

often, because civil servants are already aware of all consequences applied in case of a violation.

In Brazil, these first two steps are still missing: a real and effective regulation and its severe enforcement.

In other words, without the law and its very severe enforcement when any violation is detected, no goal would be reached, since it is virtually impossible to oversight every little misconduct of every officer in the government.

Education, as a conclusion, is the key to a working system. In order to reach this, as told, some convictions would be expected, but just as a way to improve the system and educate people, so that no more convictions would be needed.

▪ References

- Luneburg, William V. and Susman, Thomas M. *The Lobbying Manual*. 3 Ed.. American Bar Association. p.452.
- MECHANISM FOR FOLLOW-UP ON THE OEA IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION 12 December 2008 Fourteenth Meeting of the Committee of Experts Original: Portuguese December 8-12, 2008 Washington, DC.
- <http://www.oge.gov/OG-Advisories/Legal-Advisories/DO-05-014--2004-Conflict-of-Interest-Prosecution-Survey/>
- 18 U.S.C. § 207 Exceptions and Waivers: A Quick Reference Guide, October 2009 in www.oge.gov
- OGE Memo 90x17 at 4.1990.
- United States v. Nofzinger and the Revision of 18 U.S.C. §207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal law, 65 Notre Dame Law Review, 803 (1990).
- <http://www4.planalto.gov.br/cep-reunioes/atas/reunioes-de-2006/24-04-2006/?searchterm=Processo and Apuração and Ética>
- EM no 005/2006/CGU-PR Brasília, 13 de outubro de 2006, original in Portuguese, English free translation <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=334907>
- Iron Triangles and Revolving Doors: Cases in U.S. Foreign Economic Policymaking Raymond Vernon, (Author), Debora L. Spar (Author), Glenn Tobin (Author), 1991.