GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Office of Government Ethics

VIA EMAIL

February 19, 2015

[redacted]

Dear [redacted]

This responds to your January 29, 2015, email, by which you request post-employment advice. You explained to a member of my staff in a meeting on January 21, 2015, and in your January 29, 2015, email, that you recently left your position as [redacted] Department of Small and Local Business Development ("DSLBD") and have set up a private business, with a partner, that will advise others on how to comply with Certified Business Enterprise ("CBE") legislation. Specifically, your private business will perform services including compliance monitoring, workforce development monitoring, establishing small business development programs, small business opportunities outreach, and capability assessments.

You asked for guidance on a number of specific questions and stated a clear desire to avoid any public perception that you are violating the District's post-employment rules. Specifically, you asked for advice on the following questions:

1) Your private business is having a launch party in April 2015 and will invite companies that may be interested in its services, including the service of CBE monitoring. Some, though not all, of the companies in attendance may be companies you had substantial dealings with while at DSLBD. In all cases, those in attendance would be using your private business for their future endeavors on matters neither you nor DSLBD has been involved with previously;
2) Your business partner set up a meeting with a development company to discuss future services your company can provide. While [redacted], you worked substantially with that developer on a project [hereinafter, Project 1], which is now complete. That same developer will soon break ground on another project [hereinafter, Project 2], involving a different parcel of land. As [redacted] your only involvement in Project 2 was to sign off on a document. You were not personally and substantially involved in any of the background work. You asked whether you can attend the meeting, which you anticipate will center around new projects the developer will be developing, in which you had no involvement and will be occurring locally, regionally, nationally, and internationally; and
3) Are there any restrictions that preclude your partner from appearing before DSLBD, for any time period, because you were [redacted]?

First, I will review the various post-employment restrictions. Following that, I will respond to your specific questions.

Post–Employment Restrictions

Although the District has in place post-employment rules, they are not meant to prevent District employees from working in the private sector after their government service ends or to be so restrictive as to make following the post-employment rules impossible. There are, however, certain requirements you must follow during three somewhat overlapping post-service time periods.[1] Those time periods are a one-year "cooling-off" period, a two-year ban on behind-the-scenes activities and working on matters over which employees had official responsibility, and a permanent ban on working on particular government matters involving specific parties. I will, in that order, discuss the restrictions imposed in each of the time periods.

One-Year Cooling-Off Period

A former District employee is prohibited, for one year, from having any transactions with the employee's former agency that are intended to influence the agency in connection with any particular government matter pending before the agency or in which it has a direct and substantial interest. Specifically, 6B DCMR § 1811.10 provides:

> A former employee (other than a special government employee who serves for fewer than one-hundred and thirty (130) days in a calendar year) shall be prohibited for one (1) year from having any transactions with the former agency intended to influence the agency in connection with any particular government matter pending before the agency or in which it has a direct and substantial interest, whether or not such matter involves a specific party.[2]

The restriction in 6B DCMR § 1811.10 "is intended to prohibit the possible use of personal influence based on past government affiliations to facilitate the transaction of business," (6B DCMR § 1811.11), which explains why the one-year prohibition is sometimes referred to as a cooling-off period. Accordingly, the prohibition applies "without regard to whether the former employee had participated in, or had responsibility for, the particular matter, and shall include matters that first arise after the employee leaves government service." *Id.* The prohibition also applies without regard to whether the former employee represents him or herself or someone else, either by appearance before the former agency or through communications with the agency. *See* DCMR § 1811.12.

Therefore, you, as a former District employee, are prohibited for one year from the date of your separation from service from having any transactions with DSLBD that are

[1] The discussion of post-employment restrictions that follows is based on 6B DCMR Chapter 18, which was revised and became effective on April 11, 2014.

[2] 6B DCMR § 1811.11 states that the "restriction in Subsection 1811.10 of this section is intended to prohibit the possible use of personal influence based on past government affiliations to facilitate the transaction of business. Therefore, the restriction shall apply without regard to whether the former employee had participated in, or had responsibility for, the particular matter, and shall include matters which first arise after the employee leaves government service."

intended to influence DSLBD on any particular government matter pending before DSLBD or in which DSLBD has a direct and substantial interest. This prohibition applies regardless of whether the matter is a particular government matter involving a specific party and regardless of whether you participated in or had responsibility for that particular matter when you were a DSLBD employee. In addition, this prohibition applies to matters that first arose after you left District service, as long as they concern a particular government matter pending before DSLBD or in which DSLBD has a direct and substantial interest, regardless of whether the matter involves a specific party. Although the term "direct and substantial interest" is undefined in 6B DCMR Chapter 18, it is clear that easily identified matters such as contracts, applications, filings, and particular projects such as a development project involving a particular parcel of land are included in that term.

Two-Year Ban: Behind-the-Scenes Advice and Official Responsibility

Former District government employees also are subject to a two-year ban that can take either or both of two forms. The first prohibits former employees from giving behind-the-scenes advice or assistance to someone else in representing another person before *any* District agency. Specifically, 6B DCMR § 1811.8 prohibits former employees for two years from knowingly "aiding, counseling, advising, consulting, or assisting" in representing any other person (except the District of Columbia) before an agency as to a particular government matter involving a specific party[3] if the former employee participated personally and substantially in that matter as a government employee.

Although the term "participated personally and substantially" is not defined in 6B DCMR § 1899.1, relevant federal regulations do define the term, and I turn to them here.[4] To participate "personally" means to participate "(i) [d]irectly, either individually or in combination with other persons; or (ii) [t]hrough direct and active supervision of the participation of any person he supervises, including a subordinate." 5 C.F.R. § 2641.201(i)(2). To participate "substantially" means that the employee's involvement is "of significance to the matter," 5 C.F.R. § 2641.201(i)(3), and, of note for the purposes of the second form of the two-year ban, "requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue." *Id.* Pursuant to 6B DCMR § 1811.8, then, you are prohibited from giving any behind-the-scenes advice or assistance on any particular matter involving a specific party on which you participated personally and substantially as a government employee.

The second form of the two-year ban prohibits former District employees form working on matters in which they did not participate personally and substantially, but over which they had official responsibility. Specifically, 6B DCMR § 1811.5 prohibits them for two years from knowingly "acting as an attorney, agent, or representative in any formal or informal matter before an agency if [they] previously had official responsibility for that matter."[5]

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[3] The term "particular government matter involving a specific party" is defined in 6B DCMR § 18991 as "any judicial or other proceeding, application, request for a ruling or other determination, contact, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the District government is a party or has a direct and substantial interest, and which has application to one (1) or more specifically identified persons or entities."

[4] *See* 6B DCMR § 1811.1 ("District employees shall comply with the provisions of 18 U.S.C. § 207 and implementing regulations set forth at 5 C.F.R. Part 2641, Subparts A and B [post-employment conflict of interest provisions].").

[5] For purposes of § 1811.5, 6B DCMR § 1811.6 provides that "a matter for which the former government employee had official responsibility is any matter that actually was pending under the former employee's responsibility within a

Permanent Ban for the Lifetime of Particular Matters Involving Specific Parties

A former District government employee also is "permanently prohibited from knowingly acting as an attorney, agent, or representative in any formal or informal appearance before an agency as to a particular matter involving a specific party if the employee participated personally and substantially in that matter as a government employee." 6B DCMR § 1811.3. Similarly, 6B DCMR § 1811.4 provides that a former employee is "permanently prohibited from making any oral or written communication to an agency with the intent to influence that agency on behalf of another as to a particular government matter involving a specific party if the employee participated personally and substantially in that matter as a government employee."

These two provisions, in other words, operate as permanent bans on your undertaking representational activities regarding any particular matters involving specific parties on which you participated personally and substantially (i.e. did substantive work) while in the government's employ. The bans apply for the lifetime of each particular matter involving specific parties.

Specific Questions

With respect to Question #1, involving your private business's launch party, your business is permitted to hold the launch party and you are permitted to attend, even though some of the companies that will be invited are ones with which you had substantial dealings while you worked at DSLBD. Although you had substantial dealings with some of these companies while [redacted], you are not prohibited from dealing with them now that you are in the private sector. You should be mindful, though, of the one-year prohibition against appearing before DSLBD, as explained above. In addition, you are prohibited from revealing confidential information you received or learned in connection with your District government employment.

With respect to Question #2, regarding meeting with a development company with which you worked substantially while [redacted], you are permitted to meet with the developer, even though you worked substantially with that developer while you worked at DSLBD. In terms of Project 1, which you state is now complete, if it were ongoing, you would be prohibited from working in a representational capacity before the District on that project, from the private sector, for the lifetime of that project. This would be so because it is a particular matter involving a specific party in which you participated personally and substantially while [redacted]

With respect to Project 2, because the project involves a different plot of land than Project 1, moved on a different timeline, had a different business plan, and had its own budget, it is a different particular matter from Project 1, even though it involves the same specific parties as Project 1. In addition, from your description of your involvement, which was limited to signing a document, I conclude that you did not participate personally and substantially in that particular matter as a DSLBD employee. Instead, your involvement was one of official responsibility, which triggers the two-year ban,

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period of one (1) year before the termination of such responsibility." Further, 6B DCMR § 1811.7 provides that the two-year period in 6 DCMR § 1811.5 is to be "measured from the date when the former employee's responsibility for a particular matter ends, not from the termination of government service, unless the two (2) occur simultaneously."

rather than the permanent ban. Accordingly, in two years, you may appear before your former agency, DSLBD, in connection with Project 2. Again, appearance, for the purposes of post-employment, includes all communications with your former agency that are intended to influence that agency on behalf of another person, including in-person meetings, correspondence, emails, and telephone conversations.

In addition, because you did not participate personally and substantially in Project 2 while you worked at DSLBD, you are permitted to do behind-the-scenes work now. You do not have to wait the two years to work behind-the-scenes on something for which you only had official responsibility, as is the case here. Remember, though, that you can never reveal confidential information you received or learned in connection with your District government employment.

With respect to Question #3, whether there are any restrictions that preclude your partner from appearing before DSLBD, for any time period, because you were [redacted], no, there are not. As long as your partner is not a former DSLBD employee subject to the post-employment restrictions outlined above, your partner is not subject to post-employment restrictions merely because he or she is the partner of someone (you) who is subject to post-employment restrictions. Therefore, your partner is permitted to appear before DSLBD now, representing the interests of your private business and those of your clients, without restriction.

This advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1162.19), which empowers me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

You also are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that your identity will not be disclosed unless you consent to such disclosure in writing. We encourage individuals to so consent in the interest of greater government transparency. Please, then, let me know your wishes about disclosure.

If you have any questions or wish to discuss this matter further, I can be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

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