

OFFICE OF GOVERNMENT ETHICS**5 CFR Parts 2637 and 2641**

RIN 3209-AA14

Post-Employment Conflict of Interest Restrictions**AGENCY:** Office of Government Ethics (OGE).**ACTION:** Proposed rule.

SUMMARY: Since 1980, 5 CFR part 2637 (formerly 5 CFR part 737) has provided guidance concerning the post-employment conflict of interest restrictions of 18 U.S.C. 207. As a result of amendments to section 207 that became effective January 1, 1991, employees terminating service in the executive branch or in an independent agency (or terminating service from certain high-level Government positions) since that date are subject to substantially revised post-employment restrictions. The purpose of part 2641 is to provide regulatory guidance explaining the scope and content of the statutory restrictions as they apply to employees terminating service on or after January 1, 1991. This proposed rule would expand the guidance previously published in part 2641 as interim or interim final rules and make minor modifications to those earlier rulemakings. It would also remove part 2637 from 5 CFR.

DATES: Comments are invited and must be received on or before May 19, 2003.

ADDRESSES: Send comments to the Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Richard M. Thomas. Comments may also be sent electronically to OGE's Internet E-mail address at <http://www.usoge.gov>. The subject line of E-mail messages should include the following reference: "Comments on proposed post-employment conflict of interest rule."

FOR FURTHER INFORMATION CONTACT: Richard M. Thomas, Associate General Counsel, Office of Government Ethics; Telephone: 202-208-8000; TDD: 202-208-8025; FAX: 202-208-8037.

SUPPLEMENTARY INFORMATION:**A. Substantive Discussion of Post-Employment Regulatory Guidance****I. Rulemaking History**

Since its enactment in 1962, 18 U.S.C. 207 has remained the primary source of post-employment restrictions applicable to former officers and employees of the executive branch and of independent agencies. In 1979 (interim rule) and 1980 (final rule), the Office of

Government Ethics (OGE) published regulatory guidance concerning section 207 as codified at 5 CFR part 737 (now 5 CFR part 2637). See OGE's regulations issued at 44 FR 19974-19988 (April 3, 1979), 45 FR 7402-7431 (February 1, 1980), 54 FR 50229-50231 (December 5, 1989), and 56 FR 3961-3965 (February 1, 1991), as amended, redesignated and corrected over the years.

Section 207 was substantially revised by the Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716, with technical amendments enacted by Pub. L. 101-280, 104 Stat. 149 (1990). As a result of these and subsequent amendments, employees terminating Government service (or service in certain high-level Government positions) on or after January 1, 1991, are subject to revised substantive prohibitions.

Pursuant to authority set forth in the Ethics in Government Act of 1978, as amended, and Executive Order 12674, as modified by Executive Order 12731 (hereinafter referred to as Executive Order 12674), OGE published executive branch guidance concerning certain aspects of the new version of 18 U.S.C. 207 on February 1, 1991 (56 FR 3961-3965), now codified at 5 CFR part 2641.¹ For purposes of section 207(c), the 1991 interim rule (1) Established procedures for exempting senior employee positions; (2) designated separate departmental and agency components; and (3) established procedures for future designations and modification of designations of departmental or agency components. The appendices to part 2641 reserved for listings of exemptions and designations were subsequently amended by final rules published at 57 FR 3115-3117 (January 28, 1992), 57 FR 11673 (April 7, 1992), 58 FR 33755-33756 (June 21, 1993), 62 FR 26915-26918 (May 16, 1997), 64 FR 5709-5710 (February 5, 1999), and, most recently, 68 FR 4681-4684 (January 30, 2003).

As described below in the discussions of §§ 2641.204, 2641.301(j) and 2641.302 as proposed, this proposed rule would make further minor modifications to existing part 2641. In addition, it would expand part 2641 to provide comprehensive guidance concerning 18 U.S.C. 207 as applicable to individuals terminating service on or after January 1, 1991 (or service in certain high-level Government

positions), incorporating amendments to section 207 enacted subsequent to the Ethics Reform Act.² As discussed more fully below, a future rulemaking would supplement the preliminary guidance at proposed §§ 2641.203 and 2641.206 concerning 18 U.S.C. 207(b) and (f).

This proposed rule does not address very limited amendments enacted on December 17, 2002, in section 209(d) of the E-Government Act of 2002, Pub. L. 107-347. These amendments, which pertain only to assignees from private sector organizations under the newly authorized Information Technology Exchange Program, had not been enacted when the proposed rule was developed and will not be effective until April 16, 2003, subsequent to the issuance of the proposed rule. See section 402(a)(1), Pub. L. 107-347. OGE invites comments concerning interpretation of these amendments—which add a new category of senior employee under section 207(c)(2)(A)(v) and a new restriction on contract advice in section 207(l)—which will be addressed in the final rule, as appropriate.

OGE is proposing to discontinue publication of 5 CFR part 2637. Due to the passage of time, employees who terminated service prior to January 1, 1991, could no longer be subject to any of the substantive restrictions of the previous version of 18 U.S.C. 207 other than the permanent bar for particular matters involving specific parties. Former employees, agency ethics officials and other interested parties can continue to consult the last edition of

² The statute has been amended several times since the Ethics Reform Act. Section 101(b)(8)(A) of Pub. L. 101-509, 104 Stat. 1389, amended 18 U.S.C. 207(c)(2)(A)(ii) to change the pay-based threshold for purposes of determining the applicability of section 207(c) from the rate for GS-17 to the rate for level V of the Executive Schedule. Section 705(a) of Pub. L. 102-25, 105 Stat. 75 reinstated section 207(k) authorizing Presidential waivers of section 207 in narrow circumstances, a provision that was later amended by Pub. L. 102-190. Section 609 of Pub. L. 102-395, 106 Stat. 1828, amended section 207(f) to extend that one-year restriction to three years in the case of any individual assuming the office of U.S. Trade Representative after October 6, 1992, the effective date of the law. Subsequently, section 21(a) of Pub. L. 104-65, 109 Stat. 691, amended section 207(f)(2) to permanently bar both the U.S. Trade Representative and the Deputy U.S. Trade Representative from engaging in the activities prohibited by section 207(f). Sections 5 and 6 of Pub. L. 104-179, 110 Stat. 1566, changed the rate of basic pay triggering "senior employee" status and added a new exception permitting former high-level officials to represent certain candidates and political organizations notwithstanding section 207(c) or (d). Finally, section 102(a) of Pub. L. 105-244, 112 Stat. 1585, made a conforming change to the exception at section 207(j)(2)(B) when it amended the definition of "institution of higher learning" in title 20 of the United States Code. (Pub. L. 103-322, 108 Stat. 1796 made only two very minor grammatical changes to section 207(c).)

¹ OGE also issued, by Memoranda to Designated Agency Ethics Officials, General Counsels and Inspectors General, summaries of the restrictions of 18 U.S.C. 207, as amended, on October 26, 1990, November 5, 1992, and February 17, 2000. The current version of the summary may be found on OGE's Web site at <http://www.usoge.gov> under "DAEOgrams" for the year 2000.

the CFR in which part 2637 was published, for interpretive guidance concerning the permanent bar and relevant exceptions as applicable to employees who terminated service before January 1, 1991. OGE will maintain a copy of part 2637 and suggests that all designated agency ethics officials keep a copy in their files.

As required by section 201(c) of Executive Order 12674, OGE is publishing this proposed rule after obtaining the concurrence of the Department of Justice. We also consulted with the Office of Personnel Management pursuant to title IV of the Ethics in Government Act of 1978, as amended. Section 402 of that Act provides, among other things, that the Director of OGE shall provide, in consultation with the Office of Personnel Management (OPM), overall direction of executive branch policies relating to preventing conflicts of interest, and develop, in consultation with the Justice Department and OPM, rules and regulations pertaining to the identification and resolution of conflicts of interest.

Subpart A—General Provisions

Proposed § 2641.101—Purpose

Proposed § 2641.101(a) explains that 18 U.S.C. 207 does not bar employment with any particular employer. Rather, it prohibits certain acts which involve, or may appear to involve, the unfair use of prior Government employment. The section would stress that the proscribed activities are prohibited even if they are undertaken for no compensation. The section would also note that the restrictions are personal to the employee and that they are not imputed to others, such as a law partner of a former employee. On the other hand, we have inserted a parenthetical cross-reference to the note following proposed § 2641.103 concerning the punishment under 18 U.S.C. 2 of a person or entity who “aids, abets, counsels, commands, induces, or procures commission” of a violation of 18 U.S.C. 207.

Proposed § 2641.101(b) makes two important points. First, it would emphasize that part 2641 provides interpretive guidance concerning the application of 18 U.S.C. 207 to former employees of the executive branch or of certain independent agencies of the Federal Government of the United States, including current employees who formerly served in “senior” or “very senior” employee positions. Second, although certain of the statute’s provisions also apply to former employees of the District of Columbia, Members and elected officials of

Congress and legislative staff, and employees of independent agencies in the legislative and judicial branches, the proposed paragraph specifically states that part 2641 is not intended to provide guidance to those individuals.

The note following proposed § 2641.101(b) warns that part 2641 does not purport to interpret post-employment restrictions that may be contained in laws or authorities other than section 207. Thus, for example, a former employee must comply with 18 U.S.C. 203 which restricts the acceptance of compensation in connection with certain representational activities undertaken by the employee or others at a time when the former employee was still serving with the Government. Under 41 U.S.C. 423(d), a former agency official may not accept compensation from a contractor for one year as an employee, officer, director, or consultant if the former official: (1) Served in certain procurement positions at the time the contractor was selected for or awarded a contract in excess of \$10,000,000; (2) served in certain positions relating to the administration of a contract with the contractor in excess of \$10,000,000; or (3) personally made certain decisions valued in excess of \$10,000,000 in relation to a contract with the contractor. *See* 48 CFR part 3. The proposed note does not refer to restrictions contained in any professional codes of conduct, as these are outside the jurisdiction of OGE.

The proposed note does not purport to set forth an exhaustive list of all post-employment restrictions, including agency-specific or position-specific restrictions. We were concerned that the burden associated with compiling and maintaining an exhaustive (and accurate) list would outweigh the benefit of such a listing in a regulation intended to provide guidance relating to 18 U.S.C. 207. If history is any indicator, post-employment restrictions are frequently amended, suspended or abolished, then amended again or reinstated (*see, e.g.,* the legislative history of 41 U.S.C. 423(d)). We also foresaw difficulties in defining the standards for inclusion in such a listing.

Proposed § 2641.102—Applicability

Section 207 has been amended several times over the years. Proposed § 2641.102 traces the most significant of these amendments and explains that, as a consequence of these changes, former employees are subject to varying post-employment restrictions depending upon the date of their termination from Government service (or from a “senior” or “very senior” employee position). Section 2641.102 as proposed indicates

whether an employee should consult 5 CFR part 2637 or part 2641 for regulatory guidance.

A note following § 2641.102 as proposed would warn that the guidance in part 2641 incorporates all amendments to 18 U.S.C. 207 enacted after the Ethics Reform Act of 1989 (and the related technical amendments to that Act), except as superseded. Significantly, as would be explained in the note, an individual who terminated Government service (or a “senior” or “very senior” employee position) before one or more of these amendments became effective would have become subject to a version of section 207 other than that reflected in part 2641 as proposed.

The substantive post-Ethics Reform Act amendments have concerned the applicability of sections 207(c), (d), or (f), the waiver authority in section 207(k), and the definition of “institution of higher learning” in section 207(j)(2)(B). The one-year restriction of section 207(c) has expired as to any former senior employee covered by a version of that restriction other than that described in part 2641. Moreover, the prior versions of section 207(f) are of relevance only in relation to the length of the restriction as it applied to a former United States Trade Representative or former Deputy United States Trade Representative who terminated service in the early 1990s. And, since the waiver authority in section 207(k) has not yet been utilized, a section 207(k) waiver would, in the future, be granted in accordance with part 2641, once it is finally adopted.

As discussed earlier, OGE is proposing to discontinue publication of 5 CFR part 2637. Since proposed § 2641.102(b) indicates that part 2637 should be consulted in relation to employees who terminated service prior to 1991, that section would also note the edition of the CFR in which part 2637 was last published.

Proposed § 2641.103—Enforcement and Penalties

It is the role of ethics officials, both at OGE and elsewhere, to give advice concerning the meaning of 18 U.S.C. 207. Section 2641.103(a) of the proposed rule notes that agencies are required by 28 U.S.C. 535 to report to the Attorney General any information, allegations, or complaints of possible violations of the laws in title 18 of the United States Code involving Government officers and employees, including violations of 18 U.S.C. 207 by former officers and employees.

When a matter involving a Federal conflict of interest law is referred to the

Department of Justice by an agency, 5 CFR 2638.603 requires that an agency concurrently notify the Director of OGE of the referral unless otherwise prohibited by law. The Office of Government Ethics has developed an optional "Notification of Conflict of Interest Referral" reporting form (OGE Form 202) that agencies can use for this purpose. After the final disposition of a referral, including any disciplinary or corrective action taken by the agency, agencies are required further to notify the Director of such disposition.

Proposed § 2641.103(b) cross-references the penalties and injunctions authorized to be imposed for violations of 18 U.S.C. 207. The section refers to 18 U.S.C. 216(a), (b) and (c) which, respectively, set forth the imprisonment terms and criminal fines for felony and misdemeanor violations of section 207, authorize the Attorney General to take actions to impose civil penalties for violations of section 207, set forth fine amounts, and authorize the Attorney General to seek injunctive relief to prohibit conduct that violates section 207.

The note proposed to follow § 2641.103 warns that a person or entity who "aids, abets, counsels, commands, induces, or procures" a violation of 18 U.S.C. 207 is punishable as a principal under 18 U.S.C. 2.

Notably, the new version of 18 U.S.C. 207 no longer provides for the administrative sanctions that were formerly authorized by the pre-Ethics Reform Act version of section 207(j). These procedures remain available, however, in the case of employees who terminated Government service prior to January 1, 1991. A number of agencies continue to publish procedures implementing former section 207(j). Given the passage of time, however, agencies may wish to weigh the likelihood that these procedures would be utilized against other factors, including the expense of continued publication and the availability of civil remedies.

Proposed § 2641.104—Definitions

Proposed § 2641.104 defines a number of terms that are used throughout the regulation. Although the terms are listed in proposed § 2641.104 in alphabetical order, they are discussed here *out of order* to facilitate our discussion. Other terms or phrases are defined in subsequent sections of the proposed regulation and are discussed further below.

The proposed definitions in § 2641.104 generally are intended to be consistent with definitions of the same terms previously published in 5 CFR

part 2637. In some cases, we have altered the wording in order to clarify the definition, ensure consistency with other OGE regulations, or add additional information to reflect an OGE, Department of Justice, or judicial interpretation that was not incorporated into part 2637. Several of the definitions were included in the interim rule published in 1991 at part 2641 to permit the immediate exercise of the OGE Director's authority to designate departmental and agency components for purposes of 18 U.S.C. 207(c) and to waive certain positions from sections 207(c) and (f). The proposed rule also would make several modifications to the definitions in existing part 2641 in order to clarify the meaning or update the definitions consistent with current interpretations.

The term "employee" is used in 18 U.S.C. 207 in a number of contexts. Primarily, the term "employee" is used in section 207 to describe the individuals subject to section 207 and to identify the current Government officials with whom post-employment contact is restricted and the decisions of whom a former senior or very senior employee cannot seek to influence on behalf of a foreign entity. The term is, however, used for other purposes in section 207 and in proposed part 2641. Thus, for example, the exception in section 207(j)(2)(A) benefits an individual who becomes an "employee" of certain specified entities, such as a State or local government. *See* proposed § 2641.301(c). Moreover, in the proposed regulation, we use the term "employee" to refer to an individual's employment relationship with a non-Federal entity. As proposed, § 2641.104 defines the term for the purpose of identifying the individuals subject to section 207. (The definition would exclude certain individuals who are subject to section 207 but for whom part 2641 was not intended to provide guidance, such as employees of independent agencies in the legislative or judicial branches.) Proposed § 2641.104 emphasizes that the definition is modified elsewhere in the regulation, as necessary, when the term "employee" is used for other purposes.

Consistent with 18 U.S.C. 202(a) and (c), the term "employee" is defined in proposed § 2641.104 to exclude enlisted members of the Armed Forces, the President, and the Vice President (except, with respect to the Vice President, as otherwise provided). Relevant provisions of part 2641 as proposed would specifically indicate that the Vice President is subject to 18 U.S.C. 207(d) and (f) and that, in certain circumstances, communications to or

appearances before the President and Vice President are prohibited. For purposes of clarity, the proposed definition of "former employee" emphasizes that the Vice President is a "former employee" only for purposes of sections 207(d) and (f).

The proposed definition of "employee" includes an individual appointed or detailed under the Intergovernmental Personnel Act (IPA), 5 U.S.C. 3371–3376. The IPA authorizes the assignment of employees of State or local governments (and certain other entities) to Federal agencies. Under 5 U.S.C. 3374(a), an individual who is assigned to a Federal agency may be "appointed" in the agency or may be deemed "on detail" to the agency. The IPA specifically provides that an individual, whether appointed or on detail to a Federal agency, is deemed an "employee" for purposes of 18 U.S.C. 207. 5 U.S.C. 3374(c)(2). The regulation would also acknowledge that an individual may be subject to section 207 under the terms of a statute other than the IPA.

The proposed definition of "employee" also excludes officers or employees of the District of Columbia. Although former employees of the District of Columbia must comply with 18 U.S.C. 207(a)(1) and (a)(2), proposed § 2641.101(b) emphasizes that part 2641 "is not intended to provide guidance to those individuals." Moreover, we were also persuaded to exclude District of Columbia officials from the definition of "employee" since section 207(a)(3) indicates that post-employment contacts with District of Columbia officials are not with "any officer or employee of any department, agency, court, or court-martial of the United States" within the meaning of sections 207(a)(1) and (a)(2).

"State" is defined in proposed § 2641.104 to include the District of Columbia. The definition of "State" in 18 U.S.C. 207(j)(7) specifically defines the term as including the District of Columbia. We also propose to define the District of Columbia as a State in view of the exceptions at sections 207(j)(1) and (j)(2) which permit a former employee to engage in otherwise prohibited representational activity on behalf of certain governments. We defined the District of Columbia as a State notwithstanding language in the exception at section 207(j)(1) which, since it refers to the District of Columbia separately, distinguishes the District of Columbia government from State and local governments. In this regard, we noted that the wording of section 207(j)(1) also distinguishes the District of Columbia government from the United States Government. We decided

that the District of Columbia must have been listed separately in section 207(j)(1) for purposes of indicating the exception's applicability to former District of Columbia employees who act on behalf of that government.

As defined in proposed § 2641.104, "Government service" means "a period of time during which an individual is employed by the Federal Government." The proposed definition provides some guidance concerning when service ends in the case of "special Government employees," including some advisory committee members and Reserve officers of the Armed Forces and officers of the National Guard of the United States. As defined in 18 U.S.C. 202(a), a special Government employee (SGE) is an officer or employee of the executive branch or any independent agency "who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis * * *." Many of these individuals serve the Government only a few days per year, often returning to private sector employment during interim periods.

In the case of civilians who serve the executive branch or independent agencies as SGEs, the definition of "Government service" proposed in § 2641.104 indicates that Government service refers to "the period of time covered by the individual's appointment (or other act evidencing employment with the Government), regardless of any interval or intervals between days actually served." Thus, sections 207(a)(1), (a)(2), and (b) are not triggered each time there is an interval between the days on which a civilian SGE actually performs work. Example 4 following the definition of "former employee" in proposed § 2641.104 is illustrative.

In the case of a Reserve or National Guard officer, status as an SGE is related to the performance of active duty or active duty for training. More specifically, unless otherwise an employee, a Reserve or National Guard officer is classified as an SGE only while on active duty involuntarily, while on active duty for training for any length of time, or while serving voluntarily on extended active duty for 130 days or less. See 18 U.S.C. 202(a). The definition of "Government service" in proposed § 2641.104 indicates that, in the case of Reserve or National Guard officers, the end of a period of active duty or active duty for training as an SGE is considered the end of

Government service for purposes of triggering the application of sections 207(a)(1), (a)(2), and (b). See example 5 following the proposed definition of "former employee" in § 2641.104. During periods when not serving on active duty, officers maintain their Reserve or National Guard status—categorized as either "active" or "inactive"—but they are not considered SGEs. Like civilians, Reserve and National Guard officers are, while special Government employees, subject to 18 U.S.C. 203 and 205. Similar to section 207, these statutes restrict an individual's ability to represent others before Federal departments, agencies, or courts.

The definition of the term "executive branch" derives from 18 U.S.C. 202(e)(1). According to 18 U.S.C. 202(e)(1), the executive branch includes "each executive agency as defined in title 5, and any other entity or administrative unit in the executive branch." The term "executive agency" is defined in 5 U.S.C. 105 to mean "an Executive department, a Government corporation, and an independent establishment." The "Executive departments" are enumerated in 5 U.S.C. 101. Accordingly, proposed § 2641.104 states that the term "executive branch" includes "an Executive department as defined in 5 U.S.C. 101, a Government corporation, and an independent establishment (other than the General Accounting Office) * * * and also includes any other entity or administrative unit in the executive branch." The definitions of the "judicial" and "legislative" branches are from corresponding definitions in 18 U.S.C. 202(e)(2) and (3). Following 18 U.S.C. 202(e)(3)(B), we include the General Accounting Office (GAO) in our proposed definition of "legislative branch" and specifically exclude GAO from our proposed definition of "executive branch."

We determined that it would be appropriate to define the term "Government corporation" by reference to two separate statutory provisions, one in title 5 and one in title 18 of the United States Code. For purposes of determining the employees subject to 18 U.S.C. 207, we propose to use the definition of "Government corporation" in 5 U.S.C. 103. As defined in that section for purposes of Government personnel rules, a Government corporation means a corporation owned or controlled by the Government of the United States. In contrast, we propose to rely on the definition in 18 U.S.C. 6 when necessary to identify the employees with whom post-employment contact is restricted, to

describe matters to which the United States is a party or has a direct and substantial interest, to specify the decisions of whom a former senior or very senior employee cannot seek to influence on behalf of a foreign entity, and to explain when an activity will be deemed undertaken on behalf of the United States. A corporation is an "agency" as defined in 18 U.S.C. 6 if it is a corporation "in which the United States has a proprietary interest." The Department of Justice's Office of Legal Counsel has distinguished a proprietary interest from one that is merely "custodial or incidental" as determined by reference to the corporation's "functions, financing, control, and management." 12 Op. Off. Legal Counsel 84 (1988). The proposed definition incorporates this Office of Legal Counsel guidance.

As defined in proposed § 2641.104, an individual becomes a "former employee" at the termination of Government service. Examples following the proposed definition of former employee illustrate the combined effect of this definition and those of "employee," "executive branch," and "Government service." Notably, proposed example 3 emphasizes that former employee status is triggered when an employee terminates *Federal* service. Thus, the example points out that an individual who served in a GS-14 position did not become a former employee when he terminated service in the executive branch to accept a position in the legislative branch. This result is dictated by language in 18 U.S.C. 207(a)(1), (a)(2) and (b) indicating that those restrictions commence when "service or employment with the United States" terminates. In contrast, we indicate that status as a "former senior employee" or "very senior employee" is triggered (for purposes of sections 207(c), (d), and (f)) at the termination of service in a senior or very senior position. This distinction appears both in the proposed definition of "former employee" and in proposed definitions of "former senior employee" and "former very senior employee."

The proposed revised definition of "senior employee" at § 2641.104 reflects the post-Ethics Reform Act of 1989 amendment of 18 U.S.C. 207(c) by the Office of Government Ethics Authorization Act of 1996, Pub. L. 104-179. Prior to the amendment of section 207(c)(2)(A)(ii) by that Act, section 207(c) applied, *inter alia*, to employees occupying positions for which the rate of basic pay was equal to or greater than that payable for level V of the Executive Schedule (EL-V). The amendment replaced the EL-V threshold with the

rate of basic pay payable for level 5 of the Senior Executive Service (ES-5).

Proposed example 2 following § 2641.104 reflects our conclusion in OGE Informal Advisory Letter 92 x 20 that step increases, or their equivalent, must be considered in determining whether an employee's basic rate of pay equals or exceeds the threshold rate of basic pay. In a subsequent advisory letter, we observed that this interpretation is not limited to the SL (senior level) or ST (scientific or professional) positions that were the subject of OGE Informal Advisory Letter 92 x 20. In the subsequent advisory letter, we stated that "[i]n general, for purposes of 18 U.S.C. 207(c)(2)(A)(ii), the "rate of basic pay" for any pay system refers to the base amount of actual pay for each individual employee, not the minimum rate of pay for a position's authorized pay range (footnote omitted)." OGE Informal Advisory Letter 98 x 2. Both OGE advisory letters, along with the others cited in this rulemaking document, are included in *The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics*, as published by the U.S. Government Printing Office, and are also available on OGE's Web site at <http://www.usoge.gov>.

Admirals and Generals in the uniformed services ("flag" officers) are senior employees because, as specified in 18 U.S.C. 207(c)(2)(A)(iv), they are "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 is * * * pay grade O-7 or above." A flag officer becomes a senior employee once "frocked." When frocked, an officer is authorized to wear the stars of the higher rank and to serve in a specified flag officer billet. He does not, however, receive the pay and allowances authorized by law for pay grade O-7 until he is actually promoted to that pay grade. We invite comment from the military departments concerning our interpretation of section 207(c) as it applies to flag officers.

As first published in part 2641 in early 1991, the term "senior employee" was defined to include individuals detailed to a position otherwise considered to be a senior employee position. We have revisited our earlier interpretation and propose to delete the reference to details. Our earlier interpretation was largely based upon a reading of 18 U.S.C. 207(g). Since that section indicates that an individual's former agency would include one to which the individual had been detailed, we stated in the regulation that a detail

to a senior employee position would trigger senior employee status for purposes of determining the applicability of section 207(c). Upon further review of this issue, we now deem it more significant that the statute generally defines senior employee positions by reference to rate of pay (except in the case of Presidential or Vice Presidential appointments under title 3 of the United States Code). In the case of Senior Executive Service employees who are detailed, an employee continues to be the incumbent of the position from which detailed for purposes of pay and benefits. 5 CFR 317.903(a). Accordingly, we are proposing to delete the reference to details in existing § 2641.101 from our revised definition of senior employee in proposed § 2641.104. Compare OGE Informal Advisory Letter 98 x 4 in which we determined that an employee was a "senior employee" under 18 U.S.C. 207(c)(2)(A)(i) because she was, despite her election to continue to receive the SES pay of her previous position, employed in an Executive Schedule position.

For the reasons discussed above in connection with the definition of "senior employee," the proposed definition in § 2641.104 of "very senior employee" differs from that previously published in part 2641 in relation to details. Separately, it should be noted that since the definition of "very senior employee" encompasses any employee who satisfies any of the criteria enumerated in proposed subparagraphs (1)-(4) of the definition, the definition may encompass an SGE. However, there is no provision exempting any former very senior employee from 18 U.S.C. 207(d) based upon length of service. Compare proposed definition of "senior employee" in § 2641.104.

Section 207(d) applies to, among others, any person who "is employed in a position * * * at a rate of pay payable for level I of the Executive Schedule" (emphasis added). Therefore, the current definition of "very senior employee," found in existing section 2641.104, would be modified slightly in the proposed rule to reflect the apparent intent of Congress that the restriction apply to any individual employed in a level I position, or in a position in a pay system other than the Executive Schedule for which the rate of pay is exactly equal to—but not greater than—the level I rate. See Memorandum for Kenneth R. Schmalzbach, Assistant General Counsel, Department of the Treasury, from Daniel Koffsky, Acting, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. § 207(d) to Certain*

Employees of the Treasury Department (November 3, 2000), available under "Other Ethics Guidance, Conflict of Interest Prosecution Surveys and OLC Opinions" on OGE's Web site, <http://www.usoge.gov>. Proposed § 2641.104 reflects a similar Congressional judgment in relation to the application of section 207(d) to individuals serving in the Executive Office of the President.

The terms "agency" and "department" are used throughout 18 U.S.C. 207. The definitions of both terms in proposed § 2641.104, respectively, are from 18 U.S.C. 6. These terms appear in sections 207(a)(1) and 207(a)(2), for example, in connection with identifying those employees to and before whom communications and appearances may not be made. See proposed § 2641.201(f). They similarly identify the scope of the representational bars set forth in sections 207(c) and 207(d). See proposed § 2641.204(g). They are also used in 18 U.S.C. 207(f) for purposes of identifying the decisions of whom a former senior or very senior employee cannot seek to influence on behalf of a foreign entity. Significantly, these terms were not defined for purposes of identifying those former employees to whom the various restrictions of section 207 apply. We are proposing to include any "independent agency" not in the legislative or judicial branches within the scope of our definition of "agency."

Even the "United States" is a "person" as that term is defined in proposed § 2641.104; sections 207(a)(1), (a)(2), (b), (c), and (d), prohibit post-employment activity that is undertaken on behalf of (or to assist) "any other person (except the United States)." In some places in the proposed regulatory text, we use the terms "person" and "entity" together even though the first term encompasses the latter.

The terms "agency ethics official" and "designated agency ethics official" are defined due to their use in a number of places in the regulatory text, including in proposed § 2641.105 concerning advice, in proposed § 2641.301 concerning exceptions and waivers, and in proposed § 2641.302 concerning separate departmental or agency component designations for purposes of 18 U.S.C. 207(c).

Finally, as this regulation is intended to be gender-neutral, proposed § 2641.104 indicates that the terms "he," "his," and "him" include "she," "hers," and "her," and vice versa.

Proposed § 2641.105—Advice

Proposed § 2641.105(a) indicates that current or former employees and others should seek advice concerning 18 U.S.C.

207 and part 2641 from an “agency ethics official.” The latter term is defined in proposed § 2641.104 as encompassing the designated agency ethics official (DAEO), the alternate DAEO, and any deputy ethics official as described in subpart B of 5 CFR part 2638. Proposed § 2641.105(a) notes that the agency in which the employee formerly served has the primary responsibility for providing such advice and that the agency may seek assistance from OGE. Proposed § 2641.105(a) does not require that agency advice be reduced to writing, although that format can provide the most protection to the employee. We expect that the decision whether to provide oral or written advice will be dictated by the circumstances.

An individual’s former agency remains the primary source of advice. Agency officials are more familiar with agency programs and policies than are OGE personnel, and questions arising under section 207 often require a detailed understanding of the facts surrounding agency operations. However, OGE personnel also will provide advice to current or former employees, including their representatives or non-Federal employers, as outlined in proposed § 2641.105(b). Based on its statutory responsibilities for the executive branch ethics program, OGE may provide advice in a matter where an agency has already provided a former employee with advice.

While OGE strongly encourages agencies to establish mechanisms to ensure that departing employees will receive advice concerning pertinent post-employment restrictions (*see, e.g.*, 5 CFR 2638.203(b)(6) and (7)), this regulation as proposed would not require the agency to set up any particular system in order to achieve this goal. The Office of Government Ethics is aware that some agencies require that employees meet with an agency ethics official as one step in the exit process. Others have developed systems that identify terminating employees who can then be provided with written materials concerning the post-employment laws.

Although reliance on the oral or written advice of an agency ethics official or OGE is a factor that will be taken into consideration by the Department of Justice when selecting cases for prosecution, proposed § 2641.105(c) warns that there may be circumstances that would cause the Department to initiate a prosecution notwithstanding the former employee’s reliance on such advice. The regulation would distinguish any case in which

OGE issues a “formal” opinion. *See* 5 CFR 2638.309. Proposed § 2641.105(e) would advise that there is no attorney-client relationship formed when a current or former employee seeks advice from an agency attorney concerning post-employment restrictions. Thus, an agency or OGE attorney is obligated to report violations of law to appropriate authority. *See, e.g.*, 5 CFR 2635.101(b)(11).

Section 2641.105(d) of the proposed rule emphasizes that a former employee does not risk a violation of 18 U.S.C. 207 when he contacts an agency ethics official, attorney, or other Government employee for the purpose of seeking prospective advice concerning the potential applicability of the statute to his own post-employment activities.

Subpart B—Prohibitions

Proposed part 2641 draws heavily from the language and explanations in 5 CFR part 2637 concerning provisions of 18 U.S.C. 207 that were not amended by the Ethics Reform Act of 1989 (or thereafter). However, we have incorporated a number of improvements designed to facilitate understanding of this very complex statute. We have organized part 2641 as proposed in a manner that we feel more clearly highlights the applicability, duration, and elements of each of the substantive provisions of section 207 that apply to former employees of the executive branch and independent agencies. In addition, more guidance is included concerning the scope of the statutory exceptions.

We have also included new and more numerous examples. However, the examples are illustrative, not comprehensive. Each agency may provide additional illustration and guidance to its own employees, consistent with this part, in order to address specific problems arising in the context of a particular agency’s operations. It is important to emphasize that the examples in part 2641 were drafted to illustrate the scope and meaning of 18 U.S.C. 207 only. Activity that is represented as permissible under section 207 may be prohibited by another post-employment law.

Proposed § 2641.201—18 U.S.C. 207(a)(1)

Section 207(a)(1) of title 18, United States Code, sets forth the permanent bar that was designated as section 207(a) in the pre-Ethics Reform Act of 1989 version of section 207. The target of this restriction is the former employee who participates personally and substantially in a particular matter involving a

specific party or parties while employed by the Government and who later “switches sides” by representing another person on the same matter, with the intent to influence, before a Federal department, agency, or court.

Proposed § 2641.201(b) provides cross-references to the appropriate paragraphs of proposed § 2641.301 for each of the exceptions and waivers that in certain circumstances negate the prohibition contained in 18 U.S.C. 207(a)(1).

Proposed § 2641.201(d)—Communication or Appearance

Section 207(a) bars certain communications to or appearances before the United States. Proposed § 2641.201(d) describes the statutory communication or appearance element. Although section 207(a) has been amended several times since 1962—and the operative language describing the offense in section 207(a)(1) has varied—OGE and the Department of Justice have long held that it covers only those actions involving some representational contact by the former employee with the Government. *E.g.*, 2 Op. O.L.C. 313 (1978); OGE Informal Advisory Letter 82 x 13. The current statutory language reinforces the longstanding view that some communication or appearance by the former employee is required for a violation of the statute.

The definition of “communication” at proposed § 2641.201(d)(1) is intended to be all-inclusive with respect to types of communication, content of communication, or means of communication. This intentionally broad definition covers all formal or informal communications of any sort; to the extent that a given communication might be thought trivial or insignificant, such issues may be dealt with in connection with other statutory elements, especially the requirement that the communication be made with the intent to influence the Government. *See* proposed § 2641.201(e).

The definition of “appearance” at proposed § 2641.201(d)(2) largely follows the language of 5 CFR 2637.201(b)(3). However, the proposed regulation focuses solely on physical presence and omits the reference, found in § 2637.201(b)(3), to “convey[ing] material to the United States in connection with a formal proceeding or application.” The latter phrase is unnecessary, since the conveying of material, such as pleadings and other documents, typically would constitute a “communication” anyway. *See* 5 CFR 2637.201(b)(3) (example 1) (under old rule, appearance included submitting brief in agency proceeding). Under the

statute as it existed prior to the 1989 amendments, it was more important to distinguish appearances from mere communications, as the two types of contacts were treated differently for certain purposes that are no longer relevant under the current statutory scheme. See 44 **Federal Register** 19974, 19975 (April 3, 1979) (preamble to 5 CFR part 737, now 5 CFR part 2637); OGE Informal Advisory Letter 81 x 35.

Proposed § 2641.201(d)(3) emphasizes that section 207(a) does not prohibit “behind-the-scenes assistance” that involves no contact by the former employee with the Government. See, e.g., *Beverly Enterprises, Inc. v. Trump*, 182 F.3d 183, 191 (3d Cir. 1999), cert. denied, 120 S.Ct. 795 (2000). Proposed example 5 is derived from a recent opinion of the Office of Legal Counsel, and it illustrates the principle that a former employee does not confine herself to permissible behind-the-scenes activity when she conveys information to the Government through an intermediary and does so with the intent that the information be attributed to her. See Memorandum for Amy L. Comstock, Director, OGE, from Joseph R. Guerra, Deputy Assistant Attorney General, OLC, January 19, 2001, available under “Other Ethics Guidance, Conflict of Interest Prosecution Surveys and OLC Opinions” on OGE’s Web site, <http://www.usoge.gov>. In this connection, see also proposed example 7 following proposed § 2641.201(f), which would illustrate the related point that a communication will be deemed to be made “to” an employee of the United States if it is conveyed to an employee through a third party with the intent that the information be attributed to the former employee.

Proposed § 2641.201(e)—With the Intent to Influence

Section 207(a) prohibits only those communications or appearances that are made with the intent to influence the United States. Proposed § 2641.201(e) describes this statutory element of intent to influence.

Prior to the 1989 amendments, the phrase “with the intent to influence” modified only “communication,” not “appearance.” See S. Rep. No. 170, 95th Cong., 1st Sess. 152–53 (1977); OGE Informal Advisory Letter 81 x 35.³ After the 1989 Act, it became clear that both

appearances and communications must be made with the intent to influence in order for a violation of section 207(a) to occur: “Any person who * * * knowingly makes, with the intent to influence, any communication to or appearance before * * *.” 18 U.S.C. 207(a)(1). (Identical language also appears in sections 207(a)(2), 207(c)(1), and 207(d)(1).) It is unclear, however, to what extent this 1989 change really altered the executive branch’s understanding of section 207(a): “appearance” had been used in conjunction with the statutory phrase “acts as agent or attorney for, or otherwise represents,” and OGE had already determined that this meant an appearance was prohibited only “if there were an actual or potential dispute.” OGE Informal Advisory Letter 81 x 35. See also 5 CFR 2637.204(e), 2637.201(b)(5); 2 Op. Off. Legal Counsel 313, at 316. As discussed more fully below, the existence of an actual or potential dispute is one of the recognized factors for determining intent to influence. Compare 5 CFR 2637.204(e) (under old rule, same standard for “acting as representative” and “attempting to influence”).

Proposed § 2641.201(e) uses basically the same test for the intent to influence as the prior section 207 regulations. See 5 CFR 2637.204(e). As articulated in the proposed regulation, the intent to influence may be found if the communication or appearance is made for either of the following purposes: “(i) [s]eeking a Government ruling, benefit, approval, or other discretionary Government action; or (ii) [a]ffecting Government action in connection with an issue or aspect of a matter which involves an appreciable element of actual or potential dispute.” Proposed § 2641.201(e)(1)(i) and (ii). In some respects, paragraph (1)(i) might be viewed as a subset of subparagraph (1)(ii), in the sense that any time a communication or appearance is made to seek “discretionary” Government action, there is at least the potential for a conflict of positions or other dispute between the Government and the private party being represented. Nevertheless, consistent with the prior section 207 regulations, OGE believes that it is appropriate to emphasize that any representational contact made for the purpose of seeking discretionary Government action would meet the element of the intent to influence.

The proposed regulation draws on various provisions in the prior regulations, as well as more recent administrative and judicial precedents, to provide guidance on when the intent to influence is present. Proposed

§ 2641.204(e)(2) sets out situations that generally have been recognized as involving no intent to influence. Several of the paragraphs in proposed § 2641.201(e)(2) repeat provisions or examples found in the prior section 207 regulations and other OGE precedents. For example, proposed § 2641.201(e)(2)(iii)—signing a tax return prepared for another person—and § 2641.201(e)(2)(v)—submitting an SEC Form 10-K—basically reiterate examples found in 5 CFR 2737.204(e). Some provisions in the proposed regulation make certain clarifications to the language used in the prior section 207 regulations and other OGE precedents. For example, proposed § 2641.201(e)(2)(iv), read in conjunction with proposed § 2641.201(d) (example 4), substantially preserves 5 CFR 2637.204(g) (example 1), pertaining to various aspects of the Federal grant application process and service by former employees as principal investigators, but clarifies the rationale. The proposed rule intentionally does not carry forward the provision on project responses in 5 CFR 2637.201(b)(7) because this provision was thought by OGE to be susceptible to misinterpretation. In OGE’s experience, the project response provision and the accompanying example sometimes have been construed as allowing former employees inappropriate latitude in communicating with the Government where there may be a potential for controversy in the course of performing Government contracts or submitting proposals or reports to the Government. In its place, OGE has provided example 5, following proposed § 2641.201(e)(2), in order to emphasize the limits on communications during the performance of contracts, particularly in the difficult area of contracts to perform professional or managerial studies or similar services for the Government. Proposed examples 3 and 7 also provide additional guidance concerning the scope of permissible contacts in connection with Government contracts.

Some of the situations addressed in proposed § 2641.201(e)(2) pertain to communications and appearances that involve certain types of factual statements or questions, e.g., proposed § 2641.201(e)(2)(ii). OGE has long recognized that certain statements of fact, in appropriate circumstances, do not necessarily involve an intent to influence the United States. See, e.g., OGE Informal Advisory Letter 80 x 9. Factual statements, however, are not *per se* excluded from section 207(a). Factual disputes often are the heart of a given controversy, and a former employee’s

³ The Senate Report discussion and OGE Informal Advisory Letter 81 x 35 specifically pertained to section 207(c), but they were relevant also to section 207(a), because “[p]rior to the effective date of the amendments enacted by the Ethics Reform Act of 1989, both sections 207(a) and 207(c) contained identical language describing the nature of the representational activity prohibited.” OGE Informal Advisory Letter 96 x 14, n. 25.

characterization of the material facts can be a form of advocacy. *See, e.g.*, proposed § 2641.201(e)(2) (example 4) (dealing with efforts to persuade Government of safety and efficacy of new drug based on presentation of testing data). Congress recognized this by providing exceptions to section 207, such as the exceptions for scientific or technological information and testimony under oath, which permit certain factual statements, but only under specified safeguards. *See* proposed § 2641.301(e) and (f). It is clear that factual statements may be made with the intent to influence the Government, if they are made for the purpose of seeking discretionary Government action or affecting Government action in connection with an issue or aspect of a matter involving an appreciable element of dispute. Therefore, OGE was careful, in various proposed textual provisions and examples pertaining to factual statements (or appearances in connection with factual matters), to include circumstances that specifically would indicate that there is no intent to influence.

A word of caution is in order with respect to the application of proposed § 2641.201(e)(1) and (2). The presence or absence of the intent to influence typically will be based on a consideration of all the relevant circumstances in a given case. The facts of each case should be examined carefully, therefore, before any conclusion is reached that a particular activity would fall within any of the provisions of proposed § 2641.201(e)(2) indicating no intent to influence, or would more correctly be viewed as meeting the test for the intent to influence in proposed § 2641.201(e)(1).

Proposed § 2641.201(e)(3) makes explicit a principle that was already implicit in the prior section 207 regulations. *See* § 2637.201(b)(5) (example 1). This provision recognizes that certain communications or appearances may commence without any intent to influence the Government, but may take on a different character if unforeseen disputes or other changed circumstances arise. In these cases, the former employee must refrain from any further communication or appearance if it becomes apparent that such further contact would be made with the intent to influence.

Proposed § 2641.201(e)(4) emphasizes that a mere appearance, even without any accompanying communication by the former employee, may be prohibited by section 207(a). As one court put it, applying the pre-1989 language, a representational appearance by a former

employee may be covered “with or without speaking for the client.” *United States v. Coleman*, 805 F.2d 474, 480 (3d Cir. 1986).⁴ Phrased another way, silent appearances can be made with the intent to influence. This conclusion is compelled by the language and history of the statute. The language of section 207(a)(1) explicitly covers former employees who make, “with the intent to influence, any communication to or appearance before” the Government (emphasis added). Historically, as discussed above, representational appearances actually were covered *per se*, even without any explicit requirement of “intent to influence,” although it was recognized even prior to the 1989 amendments that the appearance must have been made under circumstances involving “at least inchoate adversariness.” 2 Op. Off. Legal Counsel at 316. There is nothing in the legislative history of the 1989 Act to indicate that the addition of an explicit “intent to influence” element in connection with appearances was intended to relax the restriction on representational appearances as it had been understood previously.

The question becomes, then, what circumstances would indicate that physical presence alone, without any substantive communication, is intended to influence the Government? The second sentence of proposed § 2641.201(e)(4) provides a nonexhaustive list of factors that can be relevant to such determinations. Many of these factors are derived from judicial and administrative precedents. *See, e.g., Coleman, supra; United States v. Schaltenbrand*, 930 F.2d 1554 (11th Cir. 1991); OGE Informal Advisory Letter 82 x 7. Although no one factor is necessarily determinative, these and any other relevant factors should be considered in light of the totality of the circumstances in a given case.

Proposed § 2641.201(f)—To or Before an Employee of the United States

The post-Ethics Reform Act of 1989 version of 18 U.S.C. 207(a)(1) prohibits communications to or appearances before any “officer or employee” of any “department, agency, court, or court-martial of the United States or the District of Columbia * * *.” The prior version of the permanent bar had also prohibited communications to and appearances before “any civil, military, or naval commission of the United States or the District of Columbia, or any

officer or employee thereof.” We believe the current version of the permanent bar no longer lists “civil, military, or naval commission” because these commissions are encompassed within the remaining terms. For purposes of summarizing the section 207(a)(1) restriction as briefly as possible at proposed § 2641.201(a), we refer to an employee “of the United States” rather than repeating the words “department, agency, court, or court-martial.” Proposed § 2641.201(f) is titled accordingly. Although a court-martial is held under the auspices of a department, we chose to specifically list this forum in order to avoid possible confusion. Moreover, proposed § 2641.201(f) does not distinguish between “department” and “agency,” because the definition of “agency” includes “department.” *See* proposed § 2641.104.

The term “employee of the United States” is defined at proposed § 2641.201(f)(1) for purposes of identifying those individuals with whom post-employment contact is restricted. The proposed definition specifically includes an individual who, under 5 U.S.C. 3374(a), is considered an employee because appointed or detailed under the IPA. Pursuant to 18 U.S.C. 207(i)(1)(A), it also encompasses the President and the Vice President. Section 207(i)(1)(A) specifically states that “the term “officer or employee,” when used to describe the person to whom a communication is made or before whom an appearance is made * * * shall include in subsections (a), (c), and (d), the President and the Vice President.”

More generally, the proposed definition of “employee of the United States” at § 2641.201(f)(1) includes any “Federal employee” who is “employed by” an agency, court, or court-martial. Our choice of words was guided by a number of factors. First, 18 U.S.C. 207(a)(1) states that a communication or appearance is barred only if directed to an “employee” of a department, agency, court, or court-martial. We specifically intend that the words “employed by” would exclude from the scope of section 207(a) those communications directed to a non-Federal employee who happens to be serving in a department, agency, court, or court-martial. However, as illustrated in proposed example 7 following § 2641.201(f), we recognize that there may be circumstances in which a communication to a non-Federal employee is actually directed to a Federal employee.

Proposed § 2641.201(f)(1)(i) specifies that an agency encompasses a Government corporation. While the

⁴ *Coleman* involved the application of former 18 U.S.C. 207(b)(1), but that statute contained the same language concerning the representational conduct prohibited as section 207(a), prior to the 1989 amendments.

term agency encompasses any independent agency, proposed § 2641.201(f)(1)(ii) emphasizes that the representational bar extends to contacts with employees of an independent agency in any of the three branches of the Federal Government. Notably, proposed example 1 following § 2641.201(f) as proposed would highlight the fact that Members of Congress and their staffs are not employees of an independent agency in the legislative branch. Proposed § 2641.201(f)(1)(iii) modifies the term “court” with the adjective “Federal” in order to distinguish State or other non-Federal courts. Of course, as has been described in several OGE Informal Advisory Letters, a communication made in a court has “the additional unavoidable intent of attempting to influence and to persuade” a Federal party in the lawsuit, regardless of the forum. OGE Informal Advisory Letter 80 x 6. Moreover, a former employee may be prohibited from contacting Federal employees for use as witnesses or otherwise in connection with a lawsuit in State court. OGE Informal Advisory Letter 82 x 13.

Proposed § 2641.201(f)(1) omits the District of Columbia from the list of entities to or before which communications and appearances may not be made. As clarified in 18 U.S.C. 207(a)(3), the District of Columbia is listed in section 207(a)(1) merely as a consequence of the permanent bar’s applicability to former District of Columbia employees. Thus, a former employee of the District of Columbia is covered by section 207(a)(1) in relation to contacts back to the government of the District of Columbia, but former employees of the executive branch (and of independent agencies) are not restricted by section 207(a)(1) from contacting employees of the District of Columbia.

Our definition of “to or before” in proposed § 2641.201(f)(2)(i) indicates that a communication or appearance will be considered directed to an employee of an agency, court, or court-martial even though not addressed to any particular employee of the entity. We believe it would be inconsistent with the purpose of 18 U.S.C. 207 to permit communications to a Federal entity merely because they are not addressed to a named individual.

In proposed § 2641.201(f)(2)(ii), we specify that a communication or appearance must be directed to an employee “in his capacity as an employee of” an agency, court, or court-martial. Proposed examples 2, 3, and 4 following proposed § 2641.201(f) are illustrative. While a former employee is

not prohibited from lobbying a legislative branch employee at a meeting, example 2 emphasizes that a former employee may not try to influence an employee of an independent agency who is participating in the same meeting. Example 3 indicates that the permanent bar would extend to communications directed to an executive branch employee who is assigned by his agency to carry out official Government duties as a member of the Board of Directors of a non-Federal entity. The employee would be acting in his capacity as an executive branch employee even when, as in the proposed example, he is considering a specific issue of most interest to the private sector entity. (Separately, of course, the issue must be of direct and substantial interest to the current employee’s agency, as described in proposed § 2641.201(j).) The proposed wording of § 2641.201(f)(2)(ii) is also intended to address the situation in which a former employee directs a communication to a former employee in a social setting. Although the current Federal Communications Commission (FCC) employee in proposed example 4 is “off-duty” at the cocktail party, the former employee nevertheless directs his communication to the FCC employee in his capacity as an employee of that agency.

As proposed, § 2641.201(f)(2)(ii) indicates that a former employee does not “direct” his communication to a mere bystander. Beyond this, we considered whether 18 U.S.C. 207(a)(1) should be interpreted as also not extending to a variety of situations in which a former employee directs a communication to a current employee who has no official role in a forum, yet who is participating in the forum as more than a mere bystander. We considered, for example, a number of situations in which a communication is directed to an assembled group. As we observed in OGE Informal Advisory Letter 81 x 5(1) in relation to the scope of section 207(c), the concern is the extent to which section 207 “might require [a former employee] to survey who his audience was before he argued a certain position to any group of individuals.”

Proposed § 2641.201(f)(3) permits a former employee to serve as a speaker if the forum “[i]s not sponsored or co-sponsored by an entity specified in paragraphs 2641.201(f)(1)(i)–(iv) of this section, [i]s attended by a large number of people, and [a] significant proportion of those attending are not employees of the United States.” See OGE Informal Advisory Letters 81 x 5(1), 81 x 5(2). It is our intention that former employees

not be prohibited from addressing what are essentially public forums. The regulation may depart somewhat from past guidance in that it states that employees otherwise permitted to address such fora may engage in debate with any other panel participants or with members of the audience who happen to be current employees without fear of being found to have made a prohibited communication. In a public setting outside the context of official decision-making, such incidental exchanges between participants are still primarily directed towards the audience.

Under proposed § 2641.201(f)(3), private sector sponsorship of a forum, standing alone, does not free a speaker or panel participant from his post-employment restrictions. The forum must be in the nature of a conference, seminar, or similar forum; the audience must be large; and a significant proportion of attendees must be persons other than Federal employees. We considered whether to specify a minimum number of attendees and/or a maximum percentage of Federal employee attendees. In some settings, a communication is directed to so wide an audience that it cannot be said to be made “to” Federal employees in the audience. And while some audiences will plainly fall on one side or the other of a line drawn for this purpose, a precise line as to the size and composition of such an audience cannot be drawn. Former employees should appreciate the risks of violating section 207 before agreeing to address a forum when it is unclear whether proposed § 2641.201(f)(3) applies. In this regard, former employees may be guided by the size of the conference and the proportion of non-employee attendees in proposed example 5.

The regulation would deal with published writings in a similar fashion. A former employee may “permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely-available publication.”

As proposed example 7 would indicate, a communication can be made “to” an employee of the United States if it is conveyed through an intermediary with the intent that the information be attributed to the former employee. A similar point is discussed above in connection with proposed example 5 following § 2641.201(d) as proposed, which would illustrate the distinction between permissible behind-the-scenes activity and communications directed to the Government.

Proposed § 2641.201(g)—On Behalf of Any Other Person

Proposed § 2641.201(g) defines the phrase “on behalf of” for purposes of 18 U.S.C. 207(a)(1), (a)(2), (c) and (d). As enacted in 1962, the lifetime restriction originally barred a former employee from acting as “agent or attorney” for anyone. Similarly, the predecessor of current section 207(a)(2), concerning matters under an employee’s official responsibility, originally barred a former employee from appearing personally as “agent or attorney.” These restrictions were amended by the Ethics in Government Act of 1978 to extend to the former employee who acts “as agent or attorney for, or otherwise represents, any other person * * * in any formal or informal appearance * * * or * * * makes any oral or written communication on behalf of any other person.” Congress used this same language in 1978 when it enacted section 207(c), the one-year “cooling-off” restriction applicable to former senior employees. Since the Ethics Reform Act of 1989, these three restrictions have barred a former employee from making any “communication to or appearance before” an employee of the United States “on behalf of” any other person. The same language appears in section 207(d), the one-year cooling-off restriction applicable to former very senior employees.

We determined that a communication or appearance that is in the interest of another person is not sufficient to be considered “on behalf of” that person. Accordingly, the proposed definition at § 2641.201(g)(1) states that “[a] former employee does not act on behalf of another merely because his communication or appearance is consistent with the interests of the other person, is in support of the other person, or may cause the other person to derive a benefit as a consequence of the former employee’s activity.” While we recognize that the terms “agent” and “attorney” no longer appear in the current version of the permanent, two-year, or one-year cooling-off restrictions, proposed § 2641.201(g)(1) indicates that when a former employee acts as another’s “agent” or “attorney,” he necessarily acts on behalf of the principal. Even when a former employee is not acting as an agent or attorney, however, proposed § 2641.201(g)(1) recognizes that a former employee may nevertheless act on behalf of another provided the criteria at proposed § 2641.201(g)(1)(i) and (ii) are satisfied. As specified in proposed § 2641.201(g)(1)(i), the former employee

must be acting with the consent, express or implied, of the other person. And, as specified in proposed

§ 2641.201(g)(1)(ii), the former employee must be subject to some degree of *control or direction* by the other person in relation to the communication or appearance.

The former employee in example 2 following proposed § 2641.201(g) has broad authority to further the interest of the organization with which she is serving as a volunteer. For purposes of the consent requirement in proposed § 2641.201(g)(1)(i), the organization is deemed to have consented to her dispatch of the letter to the Government. In contrast, the circumstances in proposed example 3 would indicate that the former employee is not acting on behalf of the nonprofit group with which he is serving as an employee.

OGE has fielded many questions from agencies that wish to contact former employees who have gone to work for private sector employers. We have generally been counseling that all relevant factors must be considered, including the relationship between the communication or appearance and any related interest of the former employee’s new employer or other organization with which he is affiliated. *See, e.g.*, OGE Informal Advisory Letter 97 x 9. We believe that the focus on the two factors at proposed § 2641.201(g)(1) would make certain contacts between an agency and its former employee less problematic and would allow OGE and agency ethics officials to advise accordingly.

An appearance or communication is barred by 18 U.S.C. 207(a)(1), (a)(2), (c), or (d) only if made on behalf of “any other person.” Proposed § 2641.201(g)(2) cross-references the definition of “person” in proposed § 2641.104, but specifically states that self-representation is not prohibited. Proposed example 1 following proposed § 2641.201(g) is illustrative. Proposed § 2641.201(g)(2) also includes a reference to sole proprietorships that is intended to distinguish that form of business enterprise from partnerships and corporations for purposes of the “exception” for self-representation. The proposed rule reflects that a corporation is a person separate from its owner or owners. As a result, if a former employee chooses to incorporate his consulting business, he must ensure that his communications with the Government do not run afoul of the post-employment statute’s requirements since he will be representing another “person.” On the other hand, if the same former employee had chosen not to incorporate his business, he would be

free to interact with current Government employees without fear of violating section 207(a)(1) since he would be representing only himself.

Proposed § 2641.201(h)—Particular Matter Involving Specific Parties

Proposed § 2641.201(h) explains a concept that has been central to the understanding of 18 U.S.C. 207 since its original enactment in 1962. The phrase “particular matter” is broadly defined in section 207(i)(3) to include “any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.” In section 207(a)(1) and (2), however, particular matter is modified by the additional phrase “which involved a specific party or specific parties.” *See* B. Manning, *Federal Conflict of Interest Law* 204 (1964) (explaining significance of the phrase); 2 Op. O.L.C. 151 (1978) (same). Proposed § 2641.201(h) is intended to explain the nature and scope of this statutory element.

The proposed regulation uses basically the same test for particular matters involving specific parties that is used in 5 CFR 2637.201(c). Proposed § 2641.201(h)(1) states: “These matters involve a specific activity or undertaking affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.” One minor change worth noting is that the proposed regulation speaks of “identified” parties, whereas section 2637.201(c)(1) used the term “identifiable” parties (following identical language originally found in B. Manning, *supra*, at 204). This change is consistent with the more recent definition of particular matter involving specific parties in 5 CFR 2640.102(l). *See* 60 FR 47207, 47211 n.1 (September 11, 1995). The use of “identified,” rather than “identifiable,” is intended to distinguish more clearly between particular matters involving specific parties and mere “particular matters,” which are described elsewhere as including matters of general applicability that focus “on the interests of a discrete and *identifiable* class of persons” but do not involve specific parties. 5 CFR 2640.102(m) (emphasis added). *See also* 5 CFR 2640.103(a)(1); 5 CFR 2635.402(b)(3). The use of the term “identified,” however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as

where an agent represents an unnamed principal.

Consistent with this basic test and with § 2637.201(c)(1), proposed § 2641.201(h)(2) confirms that matters of general applicability are not particular matters involving specific parties. See also *Shakeproof Indus. Prod. Div. of Ill. Tool Works, Inc. v. Department of Commerce*, 104 F.3d 1309, 1313–14 (Fed. Cir. 1997). As illustrated by the examples following this provision, section 207(a) ordinarily does not prohibit former employees from making representations in connection with general rulemaking, policy and legislative matters, notwithstanding any personal and substantial participation or official responsibility they may have had with respect to such matters as a Federal employee.

Proposed § 2641.201(h)(3) indicates that specific parties must be involved, under section 207(a), both at the time the former employee was involved in the matter and at the time of the post-employment representation. This reflects a longstanding interpretation of section 207(a), which was codified in 5 CFR 2637.201(c)(4). Nevertheless, the Ethics Reform Act of 1989 made certain adjustments to the grammatical structure of section 207(a) that may require some explanation. Prior to the 1989 Act, section 207(a) read, in pertinent part: “Whoever * * * knowingly acts as agent or attorney for, or otherwise represents, any other person * * * in connection with any * * * particular matter involving specific parties * * * in which he participated personally and substantially as an officer or employee * * *.” In 1989, the language pertaining to specific parties was broken out and moved to its own lettered subparagraph, which now reads: “(C) which involved a specific party or specific parties *at the time of such participation.*” 18 U.S.C. 207(a)(1)(c) (emphasis added).⁵ Based on the legislative history, it appears that the amendment was intended simply to resolve any doubt that specific parties must have been involved at the time that the former employee participated in the matter, not to cast doubt on the well-understood requirement that specific parties must be involved at the time of the representation.⁶

⁵ Similar language was enacted in 1989 in section 207(a)(2)(C), which pertains to particular matters pending under an employee’s official responsibility: “(C) which involved a specific party or specific parties *at the time it was so pending* (emphasis added).”

⁶ The leading Senate proponent of the 1989 amendments stated that many of the changes to section 207 “simply reflect an effort to make the statute more readable.” 135 Cong. Rec. S15954

Proposed § 2641.201(h)(4) pertains to the related issue of when specific parties can be said to be involved in a particular matter. Section 207(a) can apply to participation in preliminary or informal stages of a particular matter. See, e.g., 2 Op. O.L.C. 313 (1978). Consequently it becomes important to determine, in light of the facts surrounding a given matter, at what point specific parties are first identified. Proposed § 2641.201(h)(4) and the examples that follow are intended to provide guidance in making such determinations. In addition to general guidance applicable to all types of matters, the proposed regulation also provides more specific guidance with respect to contracts, grants, and other agreements, which historically have posed some of the most difficult and recurring questions. See OGE Informal Advisory Letter 96 × 21.

Another set of difficult and recurring questions is addressed by proposed § 2641.201(h)(5), which explains the requirement that the same particular matter must be involved both at the time of the former employee’s Government service and at the time of post-employment representation. The proposed regulation uses substantially the same test as 5 CFR 2637.201(c)(4), including a similar list of factors that should be taken into consideration, where relevant, in determinations as to whether two matters constitute the same particular matter involving specific parties. The proposed examples following proposed § 2641.201(h)(5) would illustrate the application of some

(November 17, 1989) (remarks of Sen. Levin). Senator Levin also entered into the record a section-by-section analysis stating that section 207(a)(1) is “similar to current law” and describing it as a prohibition against “lobbying * * * on a particular matter involving specific parties,” *id.*, which suggests this was not a novel effort to cover matters that do not involve specific parties at the time of the lobbying. Furthermore, the Department of Justice testified at a 1989 hearing with respect to H.R. 9, which contained the same language as the enacted amendments concerning the timing of the specific parties requirement. The Justice Department commented on this aspect of the proposal and specifically noted its consistency with the OGE regulation discussed above: “The requirement that a specific party must have been involved at the time of the employee’s government service clarifies present law in a way that is consistent with current regulations. It means, for example, that a Government employee who helped develop a set of regulations or policies is not precluded from becoming involved in a particular case or matter involving the application of the regulation or policy. See 5 CFR 737.5 (c)[now 5 CFR 2637.201(c)].” Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, on H.R. 2267 and Related Bills: Post-Employment Restrictions Act of 1989, 101st Cong., 1st Sess. 151 (April 27, 1989)(statement of John C. Keeney, Deputy Assistant Attorney General, Criminal Division).

of these factors and judicial precedents. E.g., *United States v. Medico Indus., Inc.*, 784 F.2d 840 (7th Cir. 1986); *CACI, Inc.-Federal v. United States*, 719 F.2d 1567 (Fed. Cir. 1983); OGE Informal Advisory Letter 93 × 32. For purposes of clarity, one factor was not carried over from the previous list in § 2637.201(c)(4), namely, “the continuing existence of an important Federal interest”; this factor was thought to add little to the analysis of section 207, since the statute already applies only to matters in which the United States is a party or at least has a “direct and substantial interest.” 18 U.S.C. 207(a)(1), (a)(2).

The principle reflected in proposed § 2641.105—that the primary responsibility for rendering post-employment advice resides in the ethics official at the agency where the former employee served—is particularly important in connection with these “same particular matter” determinations. These questions frequently require an understanding of the specific operations, programs, and missions of the agencies involved. Moreover, there is judicial recognition that agency determinations with respect to the “same particular matter” element are “entitled to weight.” *CACI*, 719 F.2d at 1576; see also *Shakeproof*, 104 F.3d at 1314. This is not to suggest, of course, that deference to the agency is absolute. See, e.g., *United States v. Gonzalez-Florida*, 986 F.Supp. 687 (D.P.R. 1997).

Proposed § 2641.201(i)—Participated Personally and Substantially

Proposed § 2641.201(i) defines the terms “participate,” “personally,” and “substantially.” The first regulatory definition of these terms for purposes of 18 U.S.C. 207 was published in 1980 at 5 CFR 2637.201(d). When Congress amended section 207 in 1989, it added a statutory definition of “participated” at section 207(i)(2). In the 1990s, OGE published regulatory guidance concerning the meaning of these terms in connection with its implementation of 18 U.S.C. 208 at 5 CFR part 2635 and 5 CFR part 2640. The current definitions of “personal and substantial” at 5 CFR 2635.401(b)(4) and “personal and substantial participation” at 5 CFR 2640.103(a)(2) were patterned closely after definitions in 5 CFR part 2637. The language of proposed § 2641.201(i) deviates somewhat from the language of these existing OGE regulations for several reasons. First, we are proposing to more clearly separate the definitions of the terms “participate,” “personally,” and “substantially.” We would also exactly track the language of the

statutory definition of “participated.” More significantly, however, we are proposing to include some additional guidance that reflects our experience with several questions arising since publication of the earlier regulations.

The first sentence of the definition of “participate” at proposed § 2641.201(i)(1) is from 18 U.S.C. 207(i)(2). Consistent with existing guidance at 5 CFR 2637.201(d)(3), the definition then indicates that to participate can also mean to “purposefully forbear in order to affect the outcome of a matter.” The proposed definition also distinguishes participation from mere knowledge of a matter and from the definition of “official responsibility” as set forth in proposed § 2641.202(j). Additionally, the proposed definition points out that an employee can participate in a particular matter even though it is not pending at his own agency. Finally, it would state that an employee does not participate in a particular matter within the meaning of section 207(a)(1) unless he does so in his official capacity.

Under the proposed definition at § 2641.201(i)(2), to participate “personally” includes the direct and active supervision of others. The existing regulations refer to active supervision of a “subordinate.” As proposed, § 2641.201(i)(2) indicates that the person supervised need not technically be a subordinate. An employee may participate in a matter, for example, by means of direct and active supervision of an employee who is merely on loan from another office. Separately, we are also proposing to make the fairly obvious point that an employee participates in a matter whether he does so “individually or in combination with other persons.”

The definition of “substantially” at proposed § 2641.201(i)(3) closely tracks the definitions of that term in 5 CFR part 2635 and 5 CFR part 2640. However, we are proposing to insert an additional sentence in response to two recent scenarios. The first concerned a former employee’s involvement as a Government employee in a meeting with a private sector company. The meeting was preliminary to the company’s submission of an application to the Government. The former employee was willing to concede that the meeting and the application were the same “particular matter.” He argued, however, that the meeting constituted an aspect of the matter that was insignificant in relation to the application process as a whole and that the former employee’s participation was, therefore, insubstantial. In another case, a former employee argued that his

participation in a multi-million dollar project had not been substantial since the dollar value of the aspect of the project in which he was involved was insignificant in relation to the dollar value of the project as a whole. The Office of Government Ethics rejected both arguments, noting that in both cases the former employee had made a substantive contribution to the matter.

As we propose to explain in § 2641.201(i), “[p]rovided that an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole.”

We have included an additional sentence in the definition at proposed § 2641.201(i)(3) emphasizing that participation in “peripheral” aspects of a matter or in aspects not directly involving the substantive merits of a matter is not substantial. We would note, however, that such an aspect might itself constitute a particular matter with respect to which the permanent bar might apply. This is set forth in 5 CFR 2637.201(d)(2) and example 1 following 5 CFR 2637.201(d)(1).

Although reworded, proposed examples 1 and 2 following proposed § 2641.201(i) are from existing 5 CFR 2637.201(c) and 2637.201(d). Proposed example 3 would make the point that an employee’s participation may be substantial even though her role in the matter may be minor in relation to the matter as a whole.

Proposed § 2641.201(j)—United States is a Party or Has a Direct and Substantial Interest

Finally, proposed § 2641.201(j) focuses on how to determine whether the United States is a party or has a direct and substantial interest in a particular matter at the time of a former employee’s post-employment representational activity.

The definition of “United States” at proposed § 2641.201(j)(1) is intended to encompass the entire Federal Government. As explained earlier in connection with the definitions in proposed § 2641.104, we cited the definition of “Government corporation” in 18 U.S.C. 6 for purposes of defining “United States” in proposed § 2641.201(j)(1). Also, as explained below in connection with proposed § 2641.301(a), the Government of the District of Columbia is not encompassed by the term United States. Separately, we note that the proposed definition of United States at § 2641.201(j)(1) encompasses the entire judicial branch.

Compare proposed § 2641.201(f) which provides that a representation is not made “to” an employee of the United States unless made, *inter alia*, to an employee of a Federal court. The narrower interpretation in proposed § 2641.201(f) reflects the statutory language “department, agency, court, or court-martial of the United States” in 18 U.S.C. 207(a).

Proposed § 2641.201(j)(2) specifically states that “the United States is neither a party to nor does it have a direct and substantial interest in a particular matter merely because a Federal statute is at issue or a Federal court is serving as the forum for resolution of the matter.” *See, e.g.*, 14 Op. Off. Legal Counsel O.L.C. 139 (June 7, 1990) (predecessors to 18 U.S.C. 207(a)(1) and (a)(2) determined not to bar former employees from serving as trustees in bankruptcy cases unless the United States is a party or has a direct and substantial interest in the bankruptcy proceeding, *e.g.*, if the United States is a creditor of the estate.) Of course, when a former employee wishes to participate in a judicial proceeding concerning the same particular matter with which he was involved while a Government employee, it is likely that his former agency will be a party to or have a direct and substantial interest in the subject of the proceeding or that the agency will itself be serving as the forum.

As OGE has noted in relation to 18 U.S.C. 205, determining whether or not the United States has a direct and substantial interest in a particular matter “may not be easy.” OGE Informal Advisory Letter 94 × 7. Proposed § 2641.201(j)(2)(i) assigns the primary responsibility for coordinating this determination to the designated agency ethics official at the former employee’s agency. This assignment is consistent with the DAEO’s responsibility, as specified in proposed § 2641.105(a), to provide advice to a former employee of his agency or to the individual’s representative. If any agency has a continuing direct and substantial interest in a matter, we suggest that it will most likely be the agency in which the matter was pending when the former employee worked on it as a Government employee. If the circumstances suggest that another agency may have a direct and substantial interest in the matter, the DAEO should contact an agency ethics official at the other agency. Moreover, we anticipate that an agency’s ethics staff will need only pursue resolution of a direct and substantial interest issue when all other elements of 18 U.S.C. 207(a)(1) or 207(a)(2) appear satisfied.

As proposed, the regulation does not establish any procedures for the internal coordination of an agency's direct and substantial interest determination. Under proposed § 2641.201(j)(2)(i), it is within an agency's discretion to determine who must be consulted within the agency (or any department of which the agency is a part) in order to determine whether the agency will assert a direct and substantial interest in a particular matter. A DAEO may accept the assurance of another agency's DAEO (or equivalent official in the legislative or judicial branch) that he has been authorized by competent agency authority to convey the agency's direct and substantial interest determination.

In making this determination, proposed § 2641.201(j)(2)(ii) provides that appropriate officials shall consider "all relevant factors." Thus, the proposed factors listed in § 2641.201(j)(2)(ii)(A)-(D) are not all-inclusive. We specifically seek public comment concerning useful revisions or additions to our proposed list.

Proposed § 2641.202—18 U.S.C. 207(a)(2)

All relevant statutory changes that were made to 18 U.S.C. 207(a)(1) by the Ethics Reform Act of 1989 were also made to section 207(a)(2), formerly section 207(b)(1), a two-year bar which similarly applies to all "former employees." Proposed § 2641.202(b) provides cross-references to the appropriate paragraphs of proposed § 2641.301 for each of the exceptions and waivers that in certain circumstances negate the prohibition contained in section 207(a)(2). As sections 207(a)(1) and (a)(2) are identical except for their duration and the degree of involvement in a particular matter during Government service necessary to trigger the restriction, proposed § 2641.202(d)-(i) cross-reference relevant portions of proposed § 2641.201 relating to the permanent bar.

Proposed § 2641.201(j)—Official Responsibility

The first sentence of the definition of "official responsibility" in proposed § 2641.202(j)(1) quotes the statutory definition of the term in 18 U.S.C. 202(b). In addition, consistent with existing guidance at 5 CFR 2637.202, proposed § 2641.202(j)(1) explains that the scope of an employee's official responsibility is ordinarily determined by statute, regulation, Executive order, job description, or delegation of authority. Example 1 following proposed § 2641.202(j) emphasizes that subject matter jurisdiction assigned by

position description is not removed from the scope of an employee's official responsibilities merely because the employee does not actually exercise his authority to direct Government action in that subject area.

Proposed § 2641.202(j)(1), drawing from existing 5 CFR 2637.202(b)(2), emphasizes the potential breadth of the term "official responsibility," noting that "[a]ll particular matters under consideration in an agency are under the official responsibility of the agency head and each is under that of any intermediate supervisor who supervises a person, including a subordinate, who actually participates in the matter or who has been assigned to participate in the matter within the scope of his duties" (emphasis added). The highlighted language is new. It is intended to make clear that a supervisor can have official responsibility for a pending matter even though his subordinate has not yet retrieved the assigned matter from his in-box or, although having retrieved it, has not yet worked on it "personally and substantially." This language would also make it clear that a supervisor need not have personally assigned the matter to the subordinate, provided the matter is pending with the subordinate and it falls within the scope of the subordinate's official duties. Proposed example 3 would emphasize the requirement that the assigned matter fall within the scope of the supervised employee's official duties. On the other hand, the proposed language is intended to indicate that an employee can have official responsibility for a matter even though he exercises only nominal supervision over the person actually doing the work; the supervised employee need not be a true subordinate. Thus, for example, OGE has advised that a former employee had official responsibility for a matter even though all work on a project was being accomplished by employees "on loan" from another office.

As drafted, proposed § 2641.202(j) indicates that a nonsupervisory subordinate is not deemed to have official responsibility for a matter to which he has been assigned, whether or not he has begun to work on it. *But see United States v. Coleman*, 805 F.2d 474 (3d Cir. 1986) (affirming conviction of nonsupervisory employee for violation of 18 U.S.C. 207(b)(i), the predecessor to section 207(a)(2).) Proposed example 4 following proposed § 2641.202(j) emphasizes, however, that the nature of a nonsupervisory employee's participation in a particular matter could potentially make her subject to

the permanent section 207(a)(1) bar as to that matter.

Existing 5 CFR 2637.202(b)(3) provides that authority for an "ancillary" consideration does not constitute responsibility for the particular matter as a whole. As proposed, § 2641.202(j)(1) continues to make the point that responsibility for ancillary matters, such as budgeting, or equal employment considerations, does not constitute official responsibility for the whole of a matter. Proposed example 2 following § 2641.202(j) illustrates this point. The proposed guidance makes the additional point that responsibility for nonsubstantive aspects of a matter similarly does not cause an employee's official responsibility to extend to the whole of a substantive matter.

Guidance in proposed § 2641.202(j)(2) concerning the meaning of "actually pending" also derives from existing guidance in 5 CFR 2637.202. New language clarifies that a supervisory employee acquires official responsibility for a matter as soon as it is referred to him for assignment, regardless of whether he subsequently assigns the matter to another employee or retains it for his own action. Thus, proposed § 2641.202(j)(2) provides that a supervisory employee acquires official responsibility for any matter referred to the employee "for assignment." In proposed example 5, the General Counsel is said to have acquired official responsibility for a certain matter as soon as it was referred to him as an issue requiring action by the legal department. In addition, as already noted, the proposed guidance notes that there is no requirement that a matter have been pending under an individual's official responsibility for any particular length of time. *See, e.g., OGE Informal Advisory Letter 94 x 13.* In proposed example 5, therefore, it would be enough that the particular matter had been pending under the General Counsel's official responsibility for 2 days. Proposed § 2641.202(j)(2) also indicates that a matter remains pending when it is not under "active" consideration, as discussed in *OGE Informal Advisory Letter 85 x 6.* Proposed example 6 is a reworded version of the current example following 5 CFR 2637.202(c).

Proposed § 2641.202(j)(3) addresses the applicability of section 207(a)(2) with respect to particular matters that fell within an employee's official responsibility only by virtue of a temporary assignment to a position. We recognize that while on detail or serving in an acting capacity, a temporary supervisor can potentially establish

policies, gain information, decide issues, and make contacts that may serve him well in his post-Government life. On the other hand, in proposing this regulatory provision, we sought to balance the concerns underlying section 207(a)(2) against the likelihood that a temporary assignment would permit an employee to acquire the knowledge and experience necessary to make those concerns legitimate. Such assignments occur frequently throughout the executive branch, sometimes lasting only a few days or otherwise involving circumstances indicating that the employee had no reasonable expectation of being able to exercise the full authority of the position. In many cases, where the employee functions only in a limited "caretaker" role, it seems remote that the policy concerns underlying section 207(a)(2) would be implicated. Although we were unable to establish a bright line test for determining when temporary duties implicate section 207(a)(2), we are proposing a nonexclusive list of factors that agencies can utilize in making such determinations, as set out in proposed § 2641.202(j)(3)(i)–(iv).

Proposed § 2641.202(j)(4) indicates that "[t]he scope of an employee's official responsibility is not affected by annual leave, terminal leave, sick leave, excused absence, leave without pay, or similar absence from assigned duties." Related § 2641.202(j)(5) as proposed would state that "[o]fficial responsibility for a matter is not eliminated through self-disqualification or avoidance of personal participation in a matter * * *." Thus, a matter is not removed from an employee's official responsibility when he recuses himself from participation in the matter due to a conflicting financial or personal interest or during a job search as required by subparts D, E, and F of 5 CFR part 2635 and 5 CFR part 2640. Example 8 following proposed § 2641.202(j) is illustrative. This interpretation is consistent with *United States v. Dorfman* 542 F. Supp. 402 (N.D. Ill. 1982), in which the court advised that a U.S. Attorney's recusal coupled with assignment of a particular matter to a "first assistant" would not remove the case from the U.S. Attorney's official responsibility. The court cited 5 CFR 737.7 (now 5 CFR 2637.202(b)(5)), a provision which was also the subject of OGE Informal Advisory Letter 86 x 2. As interpreted by OGE in that advisory letter, a contract could be removed from an employee's official responsibility if he had "not only the contract but also the actual function dealing with the

contract removed from his duties under his position description." Proposed § 2641.202(j)(5) recognizes that the scope of an employee's official responsibility may be changed by an amendment of a position description.

Proposed § 2641.202(j)(6) does not explicitly address the scope of the term "official responsibility" in the case of an employee whose Government service lasted less than one year and was preceded by a break in Government service. However, proposed example 9 does provide our interpretation of the application of section 207(a)(2) where there has been a break in service in the last year of the former employee's Government service. By way of background, this issue was brought to our attention when a former high-ranking employee, after a break in service lasting a few months, agreed to serve as an SGE for a short period of time. When he left Government the second time, less than one year had passed since serving in his previous Government job. We noted that an initial section 207(a)(2) bar would have commenced at the end of his first period of Government service. The issue was whether the section 207(a)(2) bar triggered by his second departure from Government should apply to particular matters for which he had responsibility during his first period of service (provided they were actually pending within the one-year period prior to his termination from his second Government job.) We determined that the second section 207(a)(2) restriction applied only to those particular matters that were actually pending under his official responsibility during his most recent period of Government service. (Of course, any section 207(a)(2) restriction remaining from the employee's termination from Government service immediately preceding the break in service would still be in effect.)

Section 207(a)(2) also requires that the particular matter be one that the former employee "knows or reasonably should know" was pending under his official responsibility during his last year of Government service. As described in existing part 2637, section 207(a)(2) had been interpreted to mean that the restriction would not apply to a former employee "unless at the time of the proposed representation of another, he or she knows or learns that the matter had been under his or her responsibility." The proposed new guidance similarly provides that it is the former employee's knowledge at the time of the post-employment representation that is critical. Thus, the last sentence of proposed

§ 2641.202(j)(7) notes that "[i]t is not necessary that a former employee have known during his Government service that the matter was actually pending under his official responsibility."

Proposed § 2641.202(j)(7) makes it clear that it is enough that the former employee "reasonably should know" at the time of his post-employment representation that the matter was actually pending under his official responsibility within his last year of Government service. We are proposing to include a note following § 2641.202(j) of the new regulation that would warn an employee that prudence dictates that he make inquiry "when the facts suggest that a particular matter involving specific parties *could* have been actually pending under his official responsibility" (emphasis added). The proposed note cross-references the provision in proposed § 2641.105(d) stating that an employee will not be deemed to violate section 207 when he contacts an employee of the United States for purposes of determining the applicability or meaning of section 207 as applied to his own activities.

Proposed § 2641.203—18 U.S.C. 207(b)

Pursuant to 18 U.S.C. 207(b), a former employee may not utilize specified nonpublic information to assist another person in relation to certain ongoing trade or treaty negotiations in which the former employee participated personally and substantially during his last year of Government service. The prohibition lasts for one year or until the termination of the negotiation, whichever occurs first. Enacted by the Ethics Reform Act of 1989 to protect sensitive Government information relating to certain trade or treaty negotiations, section 207(b) represents a significant departure from the earlier post-employment restrictions of section 207 since, like section 207(f) discussed below, it extends to "behind-the-scenes" assistance.

While OGE intends to publish comprehensive regulatory guidance concerning 18 U.S.C. 207(b), § 2641.203 of this proposed rule includes only a brief introductory summary of the restriction and paragraphs concerning applicable exceptions and waivers, and the commencement and duration of the restriction. We have reserved § 2641.203(d)–(i) for additional guidance.

To date, OGE's written guidance relating to 18 U.S.C. 207(b) remains the interpretation of the restriction that was distributed by means of a memorandum dated October 26, 1990, which was published as OGE Informal Advisory Letter 90 x 17. OGE reissued updated

versions of the memorandum on November 5, 1992 and again on February 17, 2000, by a Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General. Although the 1992 and 2000 memoranda incorporate a few substantive changes, none affects our original 1990 summary of section 207(b). The February 2000 updated summary is available on our Web site under "DAEOgrams," at <http://www.usoge.gov>.

Proposed § 2641.204—18 U.S.C. 207(c)

Section 207(c) of title 18, United States Code, is the one-year "cooling-off" restriction that prohibits a former "senior employee" from communicating to or appearing before his former agency, on behalf of another person, with the intent to influence official action. The statutory language of section 207(c) was substantially revised by the Ethics Reform Act of 1989. As noted earlier, OGE published interim regulatory guidance in February 1991 at part 2641 concerning section 207(c) as amended by the Ethics Reform Act of 1989. That rule set forth several definitions in connection with the establishment of interim procedures for the granting of exemptions and designation of components for purposes of section 207(c). As discussed above, in connection with proposed section 2641.104, we are proposing to make certain changes to the interim definitions in existing part 2641. (Our proposed changes to the existing exemption and component designation procedures at 5 CFR 2641.201(d) and (e) are discussed further below in connection with renumbered proposed §§ 2641.301(j) and 2641.302.)

Proposed § 2641.204(a) confirms that an executive branch employee can be subject to either 18 U.S.C. 207(c) or 207(d) but not both. Like section 207(d), section 207(c) states that the restriction applies "[i]n addition to the restrictions set forth in subsections (a) and (b)." Moreover, section 207(c)(2)(A) states that the section 207(c) bar "shall apply to a person (other than a person subject to the restrictions of subsection (d)) * * *." Accordingly, § 2641.204(a) as proposed would specifically provide that a former "very senior employee" is subject to the one-year cooling-off restriction set forth in section 207(d) in lieu of that set forth in section 207(c).

Proposed § 2641.204(b) provides cross-references to the appropriate paragraphs of proposed § 2641.301 for the exemption, exceptions, and waivers that in certain circumstances would negate the prohibition contained in 18 U.S.C. 207(c).

Proposed § 2641.204(c)(1) concerns the application of 18 U.S.C. 207(c) to special Government employees (SGEs). Since its enactment in 1978, section 207(c) has not applied to an SGE who served the Government fewer than 60 days during a statutorily specified time frame. As revised by the Ethics Reform Act of 1989, the current language of the statute provides that the one-year cooling-off period "shall not apply to a special Government employee who serves less than 60 days in the 1-year period before his or her service or employment as such employee terminates." Proposed renumbered § 2641.204(c)(1) confirms that the "60 days" refers to the number of days in which an employee served as an SGE and not to the number of days in which he served as a senior employee.

We are proposing to include a sentence in § 2641.204(c)(1) which addresses the manner in which the 60-day period should be computed for purposes of determining the applicability of section 207(c) to a former senior SGE. Guidance concerning the counting of days in connection with the service of SGEs was contained in the former Federal Personnel Manual and has been endorsed in OGE informal advisory letters and OLC opinions. Consistent with that guidance, § 2641.204(c)(1) as proposed would state that "[a]ny day on which work is performed shall count toward the 60-day threshold without regard to the number of hours worked on that day or whether the day falls on a weekend or holiday." See e.g., OGE Informal Advisory Letter 84 x 4 and 7 Op. Off. Legal Counsel 123 (1983). The first example following proposed § 2641.204(c) illustrates the proper method of counting the 60 days in the case of an SGE. It should be noted, however, that certain *de minimis* activities performed by an SGE on a given day might not be sufficient to count that day, under limited circumstances. See Manning, *supra*, at 28. The Office of Government Ethics has acknowledged a narrow *de minimis* standard where the activity is insignificant, both in terms of substance and in terms of the amount of time expended, and the SGE is not compensated by the Government specifically for that particular effort. An example would be a day on which the SGE did nothing more for the Government than make a brief telephone call to confirm the date of an official meeting. Proposed § 2641.204(c)(1) would also specify the manner in which an SGE's rate of basic pay should be calculated for purposes of

determining whether the rate of basic pay that he receives for his part-time or intermittent work is equal to or greater than the rate of basic pay payable for ES-5 within the meaning of section 207(c)(2)(A)(ii).

Proposed 2641.204(c)(2) concerns the application of 18 U.S.C. 207(c) to certain appointees or detailees. Specifically, this provision sets out those circumstances in which it has been determined that an individual appointed or detailed to an agency pursuant to the Intergovernmental Personnel Act (IPA), 5 U.S.C. 3371-3376, is subject to the restrictions of section 207(c). See "Applicability of the Post-Employment Restrictions of 18 U.S.C. § 207(c) to Assignees Under the Intergovernmental Personnel Act," Memorandum of Daniel L. Koffsky, Acting Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Susan F. Beard, Acting Assistant General Counsel, Department of Energy, June 26, 2000.

Proposed § 2641.204(d) emphasizes that 18 U.S.C. 207(c) is triggered upon termination from a senior employee position, not from termination of Government service, unless the two events occur simultaneously. (This interpretation applies equally with respect to sections 207(d) and 207(f) as specified in proposed §§ 2641.205(c) and 2641.206(c), respectively.) The two examples following proposed § 2641.204(d) illustrate the timing of the section 207(c) restriction in the case of a senior employee who moves from one agency to another. Since the restriction can run while an individual continues to serve as a Government employee, the first example cross-references proposed § 2641.301(a) which states that communications and appearances are permissible if made during the course of performing official duties as an employee of the United States. In the second example, the individual does not cease to be a senior employee until he terminates his senior position at the second agency.

As 18 U.S.C. 207(c) and the permanent bar share several elements in common, proposed § 2641.201 is cross-referenced several times in proposed § 2641.204. For example, both section 207(a)(1) and 207(c) require that there be a communication or appearance made with the intent to influence, although in the case of section 207(c), the representation is prohibited only if made to the former senior employee's former agency. Section 2641.201 is also cross-referenced for its proposed definition of "on behalf of any other person."

Section 2641.204(g)—To or Before Employee of Former Agency

Proposed § 2641.204(g)(1) defines “to or before employee of former agency.” This provision is different from

proposed § 2641.201(f) because that section focuses on employees “of the United States” rather than employees at the senior employee’s “former agency.”

The term “employee” is defined in proposed § 2641.204(g)(1) for purposes of identifying the individuals to whom a former senior employee may not direct a communication or appearance.

Proposed § 2641.204(g)(1)(ii) reflects the fact that an individual serving in an agency pursuant to the IPA is deemed an “employee” of that agency and, hence, is an individual to whom a former senior employee of that agency may not direct a communication or appearance. Notably, the definition of employee at proposed § 2641.204(g)(1) also includes an individual detailed to a former senior employee’s former agency. Section 207(g) of the statute provides that “a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both * * *.”

As reflected in proposed § 2641.204(g)(2)(iii), we interpreted this statutory provision to mean that an employee is barred from contacting any agency to which he was detailed during his last year of senior service, regardless of the duration of the detail. We also decided, however, that section 207(g) is relevant when identifying those employees serving in a former senior employee’s former agency to whom a communication or appearance cannot be directed. Accordingly, proposed § 2641.204(g)(1)(iii) specifies that the term employee encompasses an individual detailed from an agency to the former senior employee’s former agency.

As noted earlier, 18 U.S.C. 207(i)(1)(A) states that “the term ‘officer or employee’, when used to describe the person to whom a communication is made or before whom an appearance is made * * * shall include in subsections (a), (c), and (d), the President and the Vice President * * *.” Under the proposed rule, a former senior employee of the Executive Office of the President is barred from contacting not only employees of that Office, but also the President and Vice President. On the other hand, former senior or very senior employees who formerly served in entities other than the Executive Office of the President would not be barred by section 207(c) or (d) from contacting the President or Vice President. This

reasoning is reflected in proposed § 2641.204(g)(1)(v); proposed § 2641.204(g) is cross-referenced in § 2641.205(f) as proposed for purposes of the section 207(d) restrictions.

The definitions of “department” and “agency” in proposed § 2641.104, combined with the proposed guidance in § 2641.204(g)(2), are key to understanding the scope of 18 U.S.C. 207(c). As we noted earlier in connection with the definition of “agency” in proposed § 2641.104, we specifically included independent agencies (not in the legislative or judicial branches) within that definition.

As already mentioned, and as explained further below in connection with proposed § 2641.302, the Director of OGE is authorized to designate distinct and separate agency components for purposes of section 207(c). The designation of such components within an agency has the effect of narrowing the scope of the restriction as applied to former senior employees eligible to benefit from such designations.

Proposed § 2641.204(g)(2)(i) emphasizes that the 18 U.S.C. 207(c) bar applies only with respect to an agency in which the former employee served within his last year of service as a senior employee. Example 3 following proposed § 2641.204(g) illustrates the application of section 207(c) when a former senior employee’s period of Government service was preceded by a break in Government service.

Consistent with past interpretation, 18 U.S.C. 207(c) is described in proposed § 2641.204(g)(2)(ii) as extending to any agency in which a former senior employee served *in any capacity* prior to his termination from a senior position, “regardless of his position, rate of basic pay, or pay grade.” *See, e.g.,* OGE Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (February 17, 2000), available under “DAEOgrams” on OGE’s Web site, <http://www.usoge.gov>. Thus, the former employee in proposed example 2 following § 2641.204(g) is barred as to both the Commodity Futures Trading Commission (CFTC) and the Export-Import Bank of the United States even though she served in only a GS-15 position at the CFTC.

Proposed § 2641.204(g)(2)(iii) explains that, in addition to a detail, an employee may otherwise be deemed to be serving two entities simultaneously. The regulation would recognize that many employees are required to serve on committees or similar entities as a collateral duty. The regulation would

specify that an employee will be deemed an employee of such an entity if required to serve pursuant to statute or Executive order.

Defining the boundaries of an employee’s former agency is key to the proper interpretation of 18 U.S.C. 207(c). Proposed § 2641.204(g)(2)(iv) addresses situations where organizational changes affecting an agency could make it difficult to determine if a successor agency is substantially the same as a former senior employee’s former employing entity. For example, subsequent to an employee’s termination from a senior employee position, his former employing entity could be made larger or smaller, merged in whole or in part with another agency, or even abolished.

Significantly, proposed § 2641.204(g)(2)(iv) need not be consulted unless the agency to which 18 U.S.C. 207(c) applies “has been significantly altered by organizational changes after [a senior employee’s] termination from senior service * * *.” Thus, it is not necessary to consult § 2641.204(g)(2)(iv) as proposed merely because the name of a former senior employee’s former agency has changed or because some personnel have retired or transferred. If, however, an organizational change is such that the former senior employee’s former employing entity “is not identifiable as substantially the same agency from which the former senior employee terminated * * *”, then the guidance in proposed § 2641.204(g)(2)(iv)(A) applies and the section 207(c) bar will not apply with respect to that entity. *See* OGE Informal Advisory Letter 85 x 5 and example 4 following proposed § 2641.204(g).

Under proposed § 2641.204(g)(2)(iv)(B), a former senior employee’s 18 U.S.C. 207(c) bar will extend to the whole of an employing entity that has been affected by organizational changes if it “remains identifiable as substantially the same entity” from which he terminated. Proposed example 5 emphasizes that a former employee would be barred from contacting current employees who had joined the new employing entity, but would not be barred from contacting an employee who had been transferred elsewhere. Under proposed § 2641.204(g)(2)(iv)(C), if a former employing entity is made separate but otherwise remains “substantially the same,” the section 207(c) bar would apply with respect to the separate entity. Proposed § 2641.204(g)(2)(iv) would require designated agency ethics officials to provide counseling in consultation with OGE when the scope

of section 207(c) is at issue as a result of an agency reorganization.

The guidance concerning the meaning of “to or before” in proposed § 2641.204(g)(3) closely tracks the corollary guidance in proposed § 2641.201 as does the guidance at proposed § 2641.204(g)(4) concerning public commentary. The guidance is repeated in § 2641.204 as proposed only because it has been tailored to the one-year restriction which is aimed only at communications to or appearances before an individual’s former agency. Proposed § 2641.204(h), concerning the phrase “on behalf of any other person”, similarly cites the corollary discussion in proposed § 2641.201(g).

As amended by the Ethics Reform Act of 1989, 18 U.S.C. 207(c) prohibits a former senior employee from making certain communications or appearances on behalf of “any other person” in connection with “any matter on which such person seeks official action” (emphasis added). The guidance at proposed § 2641.204(i)(1) reflects that the reference to “such person” refers to the former senior employee.

Proposed § 2641.204(i)—Matter in Which Former Employee Seeks Official Action

Proposed § 2641.204(i)(2) emphasizes that a communication or appearance can be prohibited even if not in connection with a “particular” matter or a “particular matter involving a specific party or parties.” The adjective “particular” does not appear in the section 207(c). See 17 OP. Off. Legal Counsel. 37, 41–42 (1993) (describing effect of 1989 amendments to statute). Thus, proscribed contacts include those made in connection with “[b]road policy options that are directed to a large and diverse group of persons.” Compare 5 CFR 2637.204(d). See also 5 CFR 2640.103(a)(1) and 2635.402(b)(3).

Consistent with existing part 2637, proposed § 2641.204(i)(2)(iii) emphasizes that a communication or appearance may be barred even though made in connection with a new matter not pending at nor of interest to the agency prior to the post-employment contact. The Ethics Reform Act of 1989 deleted the requirement in 18 U.S.C. 207(c) that the subject of a communication or appearance be “pending before” the former senior employee’s former agency or of “direct and substantial interest” to it. In commenting upon H.R. 3660 prior to its passage, Senator Levin noted that “the offense is committed if the former employee seeks official action by an agency or department employee.” 135

Cong. Rec. S15954 (1989) (statement of Sen. Levin).

The language “seeks official action” distinguishes between official and unofficial acts. As implemented in proposed § 2641.204(i)(1), “[a] former senior employee seeks official action when the circumstances establish that he is making his communication or appearance for the purpose of inducing a current employee * * * to make a decision or to otherwise act in his *official capacity*” (emphasis added).

The proposed examples following § 2641.204(i) as proposed illustrate the concept of “official capacity.” In proposed example 1, the former senior employee can solicit a personal charitable contribution from a current employee of his former department since he is not requesting that the current employee act in his official capacity. In example 2 as proposed, a former senior employee wishes to invite the Secretary of his former department to a cocktail party where he would introduce the agency head to several of his private clients. The former senior employee and the Secretary do not have a history of socializing outside the office, the clients could be affected by the Secretary’s official duties, and the expenses of the party are being charged to the former senior employee’s consulting firm. The example advises that the former senior employee should not contact the Secretary since “[t]he circumstances do not establish that the communication would be made other than for the purpose of inducing the Secretary to make a decision in his official capacity about the invitation.”

Proposed § 2641.205—18 U.S.C. 207(d)

The one-year “cooling-off” restriction of 18 U.S.C. 207(d) was enacted by the Ethics Reform Act of 1989. Section 207(d) differs from section 207(c) in that, in addition to being barred from contacting employees of his former department or agency, a former very senior employee is barred from representing another person before any individual currently appointed to an Executive Level position listed in 5 U.S.C. 5312–5316.

Proposed § 2641.205(b) provides cross-references to the appropriate paragraphs of § 2641.301 as proposed for the exceptions and waivers that in certain circumstances would negate the prohibition contained in 18 U.S.C. 207(d).

Paragraphs (d)–(i) of proposed § 2641.205 cross-reference the elements described in proposed §§ 2641.201 and 2641.204 where relevant. Where cross-references to the § 2641.204 elements are made, proposed § 2641.205

highlights the differences between the senior employee and very senior employee restrictions. Proposed § 2641.205(f) points out that, unlike section 207(c), section 207(d) does not provide for the designation of departmental or agency components as a means of narrowing its impact. Proposed § 2641.205(f) also indicates that section 207(d) applies to communications to or appearances before any agency in which an individual served *as a very senior employee* during his last year of very senior service. By comparison, as interpreted in proposed § 2641.204(g)(2)(ii), section 207(c) applies to contacts with an employee of any agency in which the individual served “in any capacity” during the year prior to his termination from a senior position. Also, and more significantly, section 207(d) bars contacts not only with the individual’s former agency but, as noted in proposed § 2641.205(a) and (g), also with any official currently appointed to an Executive Schedule position. As emphasized in Example 2 following § 2641.205, however, we have interpreted the bar to apply only with respect to Executive Level officials who are actually listed in sections 5312–5316 of title 5 of the *United States Code*. This interpretation accords with the plain language of the provision (“any person appointed to a position in the executive branch which is listed in” those sections).

The note following proposed § 2641.205(g) indicates that a communication to an Executive Level official may include a communication made through a subordinate of such official. A former very senior employee cannot evade the prohibition of 18 U.S.C. 207(d) simply by making a communication to a subordinate official, as long as such communication is still made with the intent that the information be conveyed to an Executive Level official and attributed to the former very senior employee, *Cf.* Memorandum for Amy L. Comstock, Director, OGE, from Joseph R. Guerra, Deputy Assistant Attorney General, OLC, January 19, 2001, available under “Other Ethics Guidance, Conflict of Interest Prosecution Surveys and OLC Opinions” on OGE’s Web site, <http://www.usoge.gov>. This point is illustrated in proposed example 5.

Proposed § 2641.206—18 U.S.C. 207(f)

Section 207(f) of 18 U.S.C. was enacted by the Ethics Reform Act of 1989. It prohibits both former senior and former very senior employees from representing, aiding, or advising a foreign government or foreign political

party with the intent to influence a decision of an employee of a Federal department or agency. Like sections 207(c) and 207(d), the restriction is measured from the date when an employee ceases to be a senior or very senior employee and not necessarily from his termination from Government service. Like section 207(b), section 207(f) differs from the other section 207 restrictions in that it prohibits certain "behind-the-scenes" aid or advice in addition to prohibiting certain contacts with Government officials.

We have reserved § 2641.206(d)–(g) to indicate that OGE will revise § 2641.206 in the future additional guidance concerning section 207(f). For now, proposed § 2641.206 includes only a summary of the restriction and paragraphs concerning the restriction's applicability, commencement, and duration. Proposed § 2641.206(c) indicates that section 207(f) is a one-year restriction except as applied to a former U.S. Trade Representative or former Deputy U.S. Trade Representative. Originally a one-year restriction as applied to individuals terminating from these positions, section 609 of Pub. L. 102–395, 106 Stat. 691, amended section 207(f) to extend the one-year restriction to three years in the case of any individual becoming the U.S. Trade Representative after the 1992 effective date of that law. Subsequently, section 21(a) of Pub. L. 104–65, 109 Stat. 691, amended section 207(f)(2) to permanently bar either a former U.S. Trade Representative or former Deputy U.S. Trade Representative from engaging in the activities prohibited by section 207(f).

Subpart C—Exceptions, Waivers and Separate Components

Proposed § 2641.301(a)–(j) address the parenthetical "except the United States" provision contained in 18 U.S.C. 207(a)(1), (a)(2), (b), (c), and (d); the general exceptions and waivers described in section 207(j); the waiver authority in section 207(k); and section 207(c)(2)(C)'s provision for the exclusion of certain positions from the coverage of sections 207(c) and (f). Proposed § 2641.302 concerns the designation of separate and departmental components to narrow the scope of the section 207(c) bar.

Proposed § 2641.301(a)—Acting on Behalf of the United States

As indicated by the parenthetical "except the United States" which appears in each of the substantive restrictions of 18 U.S.C. 207 except section 207(f), otherwise prohibited activity is permissible if engaged in on

behalf of the United States. In addition to this parenthetical, however, section 207(j)(1) of the current version of the statute provides that "[t]he restrictions contained in this section shall not apply to acts done in carrying out official duties on behalf of the United States * * *". Proposed § 2641.301(a) implements the parenthetical language and section 207(j)(1).

The definition of "United States" at proposed § 2641.301(a)(1) encompasses the entire Federal Government. The District of Columbia is not part of the United States for purposes of the exception. While former employees of the government of the District of Columbia are covered by 18 U.S.C. 207(a)(1) and (a)(2), section 207(a)(3) makes it clear that the United States and the District of Columbia are separate entities for purposes of those restrictions. Thus, former employees of the United States may represent others before employees of the government of the District of Columbia and vice versa. Similarly, while section 207(j)(1) states that the restrictions of section 207 "shall not apply to acts done in carrying out official duties on behalf of the United States *or the District of Columbia* * * *" (emphasis added), we have interpreted this language merely to indicate that former employees of the District of Columbia may represent the government of the District of Columbia notwithstanding section 207(a)(1) or (a)(2). As we indicated earlier in connection with proposed § 2641.104, however, we have defined the District of Columbia as a State for purposes of the section 207(j) exceptions implemented in § 2641.301(b) and (c).

Proposed § 2641.301(a)(2) addresses the often repeated argument that an activity is undertaken on behalf of the United States if it benefits the United States. We have consistently rejected this expansive reading of the exception. *See, e.g.*, OGE Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (February 17, 2000), available under "DAEOgrams" on OGE's Web site, <http://www.usoge.gov>. As proposed, the regulation indicates that the exception does not apply merely because a former employee "is performing work funded by the Government, because he is engaging in the activity in response to a contract initiated by the Government, because the Government will derive some benefit from the activity, or because he or the person on whose behalf he is acting may share the same objective as the Government." Proposed examples 1, 2, and 3 are illustrative. To the extent that OGE Informal Advisory Letter 81 x

9 can be read as indicating that responses to Government-initiated exchanges are always permissible regardless of the circumstances, we expressly reject that reading here.

Proposed § 2641.301(a)(2)(i) states that activities are undertaken on behalf of the United States when undertaken in carrying out official duties as a current employee of the United States. Thus, as illustrated in examples 1 and 2 following proposed § 2641.301(a), a person who is reemployed by the United States may perform his official Government duties unfettered by the post-employment restrictions in 18 U.S.C. 207. Notably, proposed example 2 indicates that a former employee may carry out official duties as an employee of the legislative branch without violating the section 207 restrictions when she undertakes an activity for a constituent. Departing from guidance in OGE Informal Advisory Letter 81 x 4, we are not proposing to distinguish service performed for a Congressman's constituent from actions taken in furtherance of a Congressman's "legislative function."

The note following the proposed § 2641.301(a) examples cross-references two additional examples, found elsewhere in the regulation, which also concern the operation of this exception in the case of current employees. The second of these, example 1 following proposed § 2641.204(d), shows how the exception applies in the case of a current employee who, although having never left Government service, is a former employee by virtue of having terminated a senior employee position. But for the exception, the former senior employee might have been hindered in the performance of his official duties by 18 U.S.C. 207(c).

As described in proposed § 2641.301(a), the exception for acts undertaken on behalf of the United States is not limited to acts carried out as an *employee* of the United States. This subject was addressed in OGE Informal Advisory Letter 82 x 16, which dealt with a former employee whose law firm was hired by his former agency to represent it in a case in which the employee had been personally and substantially involved while in Government. After advising that the former employee could not negotiate the terms of the legal services contract on behalf of his firm, OGE concluded that the former employee could perform the contract by representing the agency in court, because such representations would be on behalf of the United States. OGE also stated that the former employee could "contact [the agency] for the files, discuss briefs previously

filed by [the agency], and discuss future strategy,” because communications and appearances made for these purposes were characterized as lacking the necessary “intent to influence” element.

In drafting proposed § 2641.301(a)(2)(ii)(A), we followed the result reached in 82 x 16, although we departed, in part, from the analysis in that opinion. We have concluded that a former employee acts on behalf of the United States when he serves “[a]s a representative of the United States pursuant to a specific agreement with the United States to provide representational services involving a fiduciary duty to the United States.” Consequently, the “on behalf of the United States” provision would permit not only representational contacts made by the former employee to a court (or another agency) but also any contacts with the agency with which there is an agreement to provide representational services, if those contacts are necessary for the former employee to carry out his representational duties under the agreement. Contrary to the analysis in 82 x 16, however, we decline to base the latter conclusion on the absence of intent to influence with respect to such contacts, because we do not believe that it is always the case that communications required during the course of performing a contract with an agency are necessarily made without the intent to influence the agency. This subject is discussed in more detail above in connection with the “intent to influence” element.

We specify in proposed § 2641.301(a)(2)(ii)(A) that the representational services must involve a “fiduciary duty to the United States.” This serves to emphasize that the former employee must have an independent obligation to act primarily for the benefit of the Government. See *Restatement of the Law (2d) Agency* § 13 (1958) (agreement to act on behalf of another person makes one a fiduciary with duty to act primarily for benefit of other person). It is important, therefore, to remember that a former employee will not be deemed to act on behalf of the United States merely because he is performing some kind of contract with the United States. See *Restatement* § 14N, comments a & b (distinguishing between contractor who agrees to act on behalf of principal and thereby becomes fiduciary, and non-agent contractor who is not fiduciary). OGE Informal Advisory Letter 81 x 35 focused on the restrictions applicable to a former employee who went to work for a corporation that had a contract to provide certain services to the Government. The opinion is noteworthy

for its conclusion that “[t]he fact that the contract between [the Department] and [the Corporation] requires communication between them on many questions arising under [the Project] does not authorize [the former employee’s] participation in such communications.”

Communications to and appearances before the legislative branch are not prohibited by sections 207(a)(1), (a)(2), (c), or (d). On the other hand, communications or appearances before the legislative branch can be barred by section 207(b) or (f). In addition, a section 207 issue can arise when an employee of the executive branch is present at a forum held under the auspices of the legislative branch, as discussed in connection with the “to or before” element in proposed § 2641.201(f)(2). Under proposed § 2641.301(a)(2)(ii)(B), however, a communication or appearance made by a former employee at the request of the Congress, in the context of a Congressional hearing, will be deemed made on behalf of the United States. This interpretation makes effective the permission, under the statute, for communications to Congress and its members. The provision is limited to hearings, however, in order not to permit a former employee to use the good offices of a Congressman to facilitate otherwise prohibited contacts with executive branch personnel.

Proposed § 2641.301(b)—Acting as an Elected State or Local Government Official

In addition to excepting communications or appearances made in carrying out official duties on behalf of the United States, 18 U.S.C. 207(j)(1) authorizes a former employee to carry out official duties as an elected official of a State or local government notwithstanding sections 207(a)(1), (a)(2), (b), (c), (d), or (f). As we noted in OGE Informal Advisory Letter 87 x 1, this exception “is grounded in considerations of federalism” in that “statutory restrictions should not unduly impede the ability of the elected representative of the people to perform the duties of his position.” The two examples following proposed § 2641.301(b) highlight the requirement that the former employee be acting as an “elected official” of the State or local government. The term “State” is defined in proposed § 2641.104 to include the District of Columbia, the Commonwealth of Puerto Rico, and United States territories or possessions.

Proposed § 2641.301(c)—Acting on Behalf of Specified Entities

Proposed § 2641.301(c) describes a second exception permitting representational activity on behalf of a State or local government. The exception in 18 U.S.C. 207(j)(2) would permit communications and appearances in carrying out official duties as an employee of “an agency or instrumentality of a State or local government” notwithstanding sections 207(c) or (d). It also would except from those prohibitions communications and appearances made as an employee of certain institutions of higher education, hospitals, or medical research organizations. The wording of proposed § 2641.301(c) indicates that the exception also applies when the former employee is employed by more than one of the entities specified in § 2641.301(c)(1), such as by an interstate compact organization composed of several States. See OGE Informal Advisory Letter 87 x 1. However, as proposed example 3 illustrates, the exemption does not apply to an association of States or State officials that is not an entity carrying out governmental functions. See Memorandum for An Agency General Counsel, from Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of the Exemption Provisions of 18 U.S.C. § 207(j)(2) to the Employment of a Former Federal Official by [an] Association* (July 2, 1999) (OGE Informal Advisory Letter 87 x 1 distinguished).

In order to qualify for the exception, the former employee must be an “employee” of the State or local government or other specified entity and not merely a consultant or independent contractor. This interpretation had been adopted in OGE Informal Advisory Letter 87 x 1 concerning the same exception in the previous version of 18 U.S.C. 207. That letter, citing legislative history relating to the Ethics in Government Act of 1978, had determined that the exception does not apply in the case of so-called “hired guns.” Use of the term “employee” in the new version of the statute is consistent with that legislative history. See 125 Cong. Rec. H3696, H3697 (daily ed. May 24, 1979). Accordingly, proposed § 2641.301(c)(2) incorporates the distinction, providing that the term “employee” means a person who has an employee-employer relationship with a specified entity and excludes individuals serving a specified entity as a consultant or independent contractor. Example 2 following

proposed § 2641.301(c) concerns an attorney who does not qualify for the exception because of this distinction.

*Proposed § 2641.301(d)—
Communicating Information Based on
Special Knowledge*

Proposed § 2641.301(d) implements 18 U.S.C. 207(j)(4), an exception to sections 207(c) and (d) permitting a former senior or very senior employee to make an uncompensated “statement” if “based on [his] own special knowledge in the particular area that is the subject of the statement * * *.”

When originally enacted by Congress in 1978, 18 U.S.C. 207(c) prohibited a former senior employee from representing “anyone” before his former agency. Because section 207(c) barred self-representation (as well as the representation of others), the statute specifically permitted communications or appearances “concerning matters of a personal and individual nature, such as personal income taxes or pension benefits.” The statute also stated that the one-year cooling-off provision did not prevent a former senior employee from “making or providing a statement, which is based on the former officer’s or employee’s own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses.”

The current version of 18 U.S.C. 207(c) no longer prohibits self-representation, and, therefore, the statute no longer includes an exception for communications of a personal and individual nature. On the other hand, the “special knowledge” exception survives. Of course, since self-representation is no longer barred, a former senior or very senior employee need not rely on this or any other exception to section 207(c) or (d) when he makes a communication solely on his own behalf.

For purposes of implementing the section 207(j)(4) exception, we propose guidance as to what the terms “special knowledge,” “statement” and “compensation” mean in section 207(j)(4). We indicate in proposed § 2641.301(d)(1) that a former employee will be deemed to have “special knowledge” with respect to the subject area “if he is familiar with the subject area as a result of education, interaction with experts, or other unique or particularized experience.” While this standard does not require the “outstanding qualifications” in a field that are the prerequisite for a section 207(j)(5) certification, discussed below, a former employee must have become

knowledgeable with the subject prior to making contact with the Government. Proposed § 2641.301(d)(2) defines the term “statement” as “a communication of facts directly observed by the former employee.”

The proposed definition of compensation at § 2641.301(d)(3) is broad. Reflecting the exception’s amendment by the Ethics Reform Act of 1989, the proposed definition does not exclude compensation provided for by law or regulation for witnesses. However, the proposed definition of compensation does exclude the payment of actual and necessary expenses incurred in connection with making the statement. *Cf.* Memorandum of Dawn Johnson, Acting Assistant Attorney General, Office of Legal Counsel, for the Counsel to the President, January 28, 1998 (“compensation,” within the meaning of 18 U.S.C. 203, does not include reimbursement of expenses in connection with representation), available on the DOJ Web site at <http://www.usdoj.gov/olc/1998opinions.htm>.

*Proposed § 2641.301(e)—
Communicating Scientific or
Technological Information*

Section 207(j)(5) of 18 U.S.C. permits a former employee to make communications “solely for the purpose of furnishing scientific or technological information” notwithstanding sections 207(a)(1), (a)(2), (c), or (d), provided that (1) the communications are made “under procedures” acceptable to the agency or agencies to which the communication is directed or (2) the head of such agency or agencies “makes a certification” that meets certain requirements. A former employee cannot use this exception to avoid the restrictions in sections 207(b) or 207(f). Thus, a former employee cannot escape the reach of either of these latter two restrictions by merely limiting his use of covered trade or treaty information to that which is of a scientific or technological character or by assisting a foreign entity only by means of furnishing scientific or technological information.

Proposed § 2641.301(e) incorporates both the procedures and certification aspects of the section 207(j)(5) exception for communication of scientific and technological information and, in effect, constitutes two exceptions. Proposed § 2641.301(e) states the exception in general terms, and proposed § 2641.301(e)(1)–(e)(3) provides information common to both the procedures exception and the certification exception. Guidance on the

promulgation and implementation of procedures is contained in proposed paragraph (e)(4). Guidance on the certification process is contained in proposed paragraph (e)(5).

As originally enacted in 1962, section 207 had provided an exception from its substantive restrictions for former employees certified as possessing “outstanding scientific or technological qualifications” and only when in the “national interest.” This certification exception, since modified, survives as part of current section 207(j)(5). Prior to the amendments to section 207 in the Ethics Reform Act of 1989, the certification mechanism freed the former employee from any post-employment restrictions attendant to such matter, not just communications solely for the purpose of furnishing scientific and technological information. *See* OGE Informal Advisory Letter 80 x 9. The 1989 amendments changed the wording of the certification exception, limiting recipients of a section 207(j)(5) certification to making contacts “solely for the purpose of furnishing scientific or technological information.” This change imposes a significant limitation on the scope of activities permitted by a certification, because the recipient of the certification is prohibited from making communications that are not “solely for the purpose of furnishing scientific or technological information.”

The part of the exception involving procedures was added by the Ethics in Government Act of 1978. *See* 124 Cong. Rec. 31,983 (1978) (statement of Rep. Stratton) (explaining need for alternative in addition to existing certification mechanism). Since its original enactment, the procedures provision has always been limited to communications solely for the purpose of furnishing scientific or technological information.

The exception in 18 U.S.C. 207(j)(5) permits otherwise prohibited “communications,” but is silent as to “appearances.” We have worded proposed § 2641.301(e) so that procedures and certifications under section 207(j)(5) permit both communications and appearances. It would defeat the purpose of the exception if it permitted a former employee to make communications but not to appear before the Government to make such communications.

When drafting proposed § 2641.301(e)(1), we were aware that certain legislative history in connection with the 1978 amendments indicated that the exception applies only to communications that are made “solely for the purpose of furnishing scientific or technological information and

without the intent to influence." See 124 Cong. Rec. H35,671 (1978) (emphasis added). However, as discussed earlier in connection with the "intent to influence" element in proposed § 2641.201(e), the post-1989 version of section 207 prohibits no communications or appearances that are not made with the intent to influence the Government. The exception in section 207(j)(5) would be surplusage if it only applied to communications and appearances that are not prohibited in the first place, *i.e.*, those made without any intent to influence. Even communications made solely for the purpose of conveying scientific or technological information may be deemed to be made with the intent to influence, if made for the purpose of affecting Government action in a matter that involves an appreciable element of dispute or discretionary Government action. Therefore, proposed § 2641.301(e)(1) reflects that a communication for the purpose of furnishing scientific or technological information may be permitted by the exception even when made in contexts involving intent to influence.

The former Marine Corps employee in proposed example 1 following § 2641.301(e)(4) as proposed, for example, may report the results of a series of scientific tests even though the methodology of those tests is expected to be and is, in fact, the subject of debate at the meeting. Moreover, he could report the results even though they tend to support the company's argument that it has complied with a certain contract specification. As emphasized in proposed § 2641.301(e)(1)(iii), the exception permits the communication of scientific or technological information in adversarial or other contexts even if the information is "inherently influential." On the other hand, proposed example 1 emphasizes that the former Marine Corps employee could not present the company's argument that it has complied with a contract term regarding advance payments.

Proposed § 2641.301(e)(2) offers guidance concerning the meaning of the adjectives "scientific" and "technological." It would provide that scientific or technological information refers, for example, to "technical or engineering information relating to the natural sciences" as distinguished from information "associated with a nontechnical discipline such as law, economics, or political science." This distinction is consistent with the legislative history concerning the certification authority in section 207(j)(5). The Conference Report issued in connection with the Ethics in

Government Act of 1978 reflected the intent of the Committee that the phrase "scientific, technological, or other technical discipline" excludes the social sciences. S. Conf. Rep. No. 95-127 at 77 (1978). We expect that an agency will be in the best position to interpret these adjectives in the context of its own programs and consistent with the guidance in proposed § 2641.301(e)(2).

While proposed § 2641.301(e)(2) requires that a communication convey scientific or technological information to be permissible under the exception, proposed § 2641.301(e)(3) recognizes that a communication may be made for the purpose of furnishing scientific or technological information notwithstanding an "incidental reference or remark" of a nontechnical character. Thus, like existing 5 CFR 2637.206(b), proposed § 2641.301(e)(3)(ii) recognizes the permissibility of nontechnical communications "when necessary to appreciate the practical significance of the basic scientific or technological information provided." Moreover, like 5 CFR 2637.206(a), § 2641.301(e)(3)(iii) as proposed would permit incidental communications "[i]ntended to facilitate the furnishing of scientific or technological information * * *." Significantly, however, proposed § 2641.301(e)(3) emphasizes that, taken as a whole, a communication (or series of related communications) must "primarily" convey information of a scientific or technological character.

Proposed examples 1 and 2 following § 2641.301(e)(3) are illustrative. Example 1 emphasizes that it is the former employee's own communications that must primarily convey scientific or technological information. Thus, the former employee in that example is not deemed to make a permissible "incidental" reference to a product's expected cost when the scientific information, although communicated on the same occasion, is communicated by another individual. On the other hand, as indicated in proposed example 2, the former employee could state the product's expected cost if the whole of her communication otherwise focused primarily on relevant scientific principles.

As specified in proposed § 2641.301(e)(4), the exception is available to a former employee where the communication is made in accordance with procedures adopted by the agency to which the communication is directed. The prerequisite that the agency to which the communication is directed is the agency whose procedures must be complied with is consistent

with existing regulatory guidance at 5 CFR 2637.206(e) and with past OGE advice. See, e.g., OGE Informal Advisory Letter 96 x 21.

The regulation as proposed does not specify any particular procedure or procedures that must be adopted by an agency. The language of the statute affords each agency the discretion to develop procedures it deems "acceptable." Proposed § 2641.301(e)(4)(i) suggests some possible mechanisms that could be employed by an agency to ensure the proper use of the exception. Many of these are taken from existing guidance at 5 CFR 2637.206(e).

The certification provision in section 207(j)(5) would be implemented by proposed § 2641.301(e)(5). As specified in proposed § 2641.301(e)(5)(iii), these certifications must be issued by the head of the agency with which the former employee would have contact.

We have interpreted section 207(j)(5) as permitting agency heads the discretion to limit their certification to only certain of the statute's substantive restrictions. For example, in OGE Informal Advisory Letter 97 x 14, we advised a designated agency ethics official that an agency head could waive section 207(c) only. Similarly, we have included a provision at proposed § 2641.301(e)(5)(iii)(E) that confirms our view that the granting authority has discretion to impose other limitations on the scope of a section 207(j)(5) certification. As we said in OGE Informal Advisory Letter 80 x 9, a certification for technical expertise "may be limited in nature at the discretion of the head of the agency or Department * * *."

While the authority to grant the certification ultimately rests with the appropriate agency head, proposed § 2641.301(e)(5) incorporates the statutory requirement for advance consultation with OGE prior to issuance. We believe that the statutory "national interest" standard contemplates that this authority will be used infrequently. Moreover, legislative history surrounding the amendment of this provision in 1978 supports the view that certifications should be granted only in "exceptional" cases. S. Rep. No. 170, 95th Cong., 1st Sess. 155 (1977).

Proposed § 2641.301(e)(5) provides that a section 207(j)(5) certification may be granted to a "former employee." We believe that an agency head may entertain a request for a certification from a current employee who has firm post-employment plans, provided that the effective date of the certification occurs after the employee terminates Government service.

Paragraphs (A), (B), and (C) of proposed § 2641.301(e)(5)(i) describe the three statutory criteria that must be satisfied in order for a certification to be issued. Proposed § 2641.301(e)(5)(i)(B) requires that the former employee will actually utilize his scientific, technological, or technical expertise in connection with the matter for which the waiver is granted. We believe this criterion follows from the statutory requirement that the former employee not only possess outstanding qualifications, but that he will be “acting with respect to a particular matter which requires such qualifications.” OGE will carefully examine the facts surrounding a waiver proposed for an individual who will occupy a management position to ensure this criterion is satisfied.

We used the term “matter” in proposed § 2641.301(e)(5)(i)(B). Section 207(j)(5) provides that a certification will apply with respect to a “particular matter” which requires outstanding qualifications in certain disciplines. Since sections 207(c) and (d) apply to any “matter” rather than to any “particular matter,” we reasoned that the policy underlying the certification authority would be ill-served by a distinction permitting experts to contact the Government concerning action focused on a “discrete and identifiable class of persons,” but not on broad policy issues or conceptual work. See the definition of “particular matter” at proposed § 2641.201(h)(1). See also 5 CFR 2640.103(a)(1).

As part of the consultation process, OGE will carefully review an agency’s draft certification to ensure that it specifies all of the information required by proposed § 2641.301(e)(5)(iii). Proposed § 2641.301(e)(5)(iii)(C) requires that a certification specify the name of the person on whose behalf the former employee will be acting. We do not read section 207(j)(5) as requiring that a certification recipient act only on behalf of a person specified in the certification. Rather, as already mentioned, we believe that the certification is specific to the *matter* that will be the subject of the recipient’s post-employment contacts. Accordingly, under proposed § 2641.301(e)(5)(iii)(F), a certification must include a “description of the matter and the communications that will be permissible or, if relevant, a statement that such information is protected from disclosure by statute.”

We did not include in this proposed regulation the provision that has appeared at 5 CFR 2637.207(d) providing for pre-qualification of experts through creation of an “agency

registry.” We are not aware that any agency has set up such a registry. Moreover, we are not convinced that such a registry would have anything but an insignificant impact on certification processing times. Indeed, we suspect that the administrative burden associated with a registry would outweigh any benefit.

Proposed § 2641.301(f)—Testifying under Oath

The amendment of 18 U.S.C. 207 by the Ethics Reform Act of 1989 prompted our proposed major revision of regulatory guidance concerning the permissibility of testimony under oath. In the prior version of the statute, section 207(h) had stated that nothing in section 207 prevented a former employee “from giving testimony under oath * * *.” The Ethics Reform Act of 1989 version of the statute also uses this language, in renumbered section 207(j)(6), but adds that a former employee “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.”

The proposed definition of “testimony under oath” is drawn from language in Rule 603 of the Federal Rules of Evidence. Proposed § 2641.301(f)(1) requires that the former employee’s oral or written testimony be given in a proceeding “in which applicable procedural rules require a witness to declare by oath or affirmation that he will testify truthfully.” In addition, the exception does not apply unless the testimony is given in connection with a “judicial, quasi-judicial, administrative or other legally recognized proceeding.” Taken together, these two requirements emphasize that a former employee cannot escape the restrictions of 18 U.S.C. 207 by merely raising his right hand and assuring those present at any gathering that he is telling the truth. On the other hand, provided the requirements as proposed are met, these provisions would confirm that the exception permits a witness to give testimony, except as limited by proposed § 2641.301(f)(2) concerning service as an expert witness.

As already noted, while the testimony-under-oath exception generally permits testimony offered as an expert witness, the exception is subject to a significant statutory limitation in this regard. As specified in section 207(j)(6)(A), a former employee “who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter” may not

“serve as an expert witness” except for the United States or pursuant to court order.

Proposed § 2641.301(f)(2)(ii) implements the court order provision. We specifically distinguished a subpoena as not falling within this definition. The practical nature of a subpoena is such that in many contexts it may be issued under the court’s authority by counsel’s filling out a form, without reasoned consideration by a court unless and until the subpoena is challenged. See, e.g., *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985) (subpoenas—grand jury or otherwise—do not qualify as “order[s] of a court of competent jurisdiction” under the Privacy Act.) Thus, the mere fact that an expert witness appears in court in response to a subpoena does not mean that he is testifying pursuant to court order within the meaning of section 207(j)(6)(A). Also, a court order merely qualifying a witness to testify as an expert is not a court order that directs the witness to testify in such a way as to overcome the expert witness bar. Because the United States will be represented in most proceedings in which it has a “direct and substantial interest” pursuant to 18 U.S.C. 207(a)(1), the United States should make the court aware of the statutory bar where appropriate.

The proposed regulation could not, and does not attempt to, instruct a judge as to the proper standard to apply in determining whether a court order is appropriate. Proposed example 4 suggests our view of an appropriate circumstance for a court to order expert testimony. We would expect that a court would order an expert witness otherwise barred by section 207(a)(1) to testify only where there are extraordinary circumstances present, such as where there is no other equivalent expert testimony available and the employee’s prior involvement in the matter will not cause him to have an undue influence on proceedings.

Of course, fact witness testimony is always allowable under the testimony-under-oath exception. However, some “experts” who could be fact witnesses because of having worked on matters while at their former agencies (thereby triggering the section 207(a)(1) bar) would prefer to serve as expert witnesses. An expert witness can be paid for his service as an expert while a payment for fact testimony may be prohibited by the bribery statute. See 18 U.S.C. 201. When Congress provided for the court order exception to the expert testimony bar in section 207, it did not intend to provide a mechanism for former employees who worked on

matters to receive compensation for testimony because of their personal knowledge of the facts.

Proposed § 2641.301(f)(3) implements section 207(j)(6) as it pertains to the permissibility of statements made under penalty of perjury. Proposed § 2641.301(f)(3) emphasizes that this exception does not authorize an employee to “submit a pleading, application, or other document as an attorney or other representative.” See also 5 CFR 2637.208(c). We also emphasize in § 2641.301(f)(3) as proposed that when the permanent bar is applicable, a former employee is subject to the limitation concerning expert witness testimony even though his testimony could also be characterized as a statement made under penalty of perjury.

The proposed note following § 2641.301(f)(3) as proposed would emphasize that, for purposes of the exception, it is irrelevant that a witness may be compensated for his testimony. On the other hand, the note alerts former employees and others to the criminal provisions in 18 U.S.C. 201(c)(3) and (d) which may prohibit fact witnesses from receiving compensation for testifying in certain forums other than as “provided by law” or to cover “the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance” at a proceeding. Separately, the note also alerts the reader to the possible existence of agency procedures relating to the production or disclosure of Government information by current or former employees. See, e.g., Department of Justice regulations at 28 CFR part 16, subpart B.

Proposed § 2641.301(g)—Acting on Behalf of a Candidate or Political Party

The Office of Government Ethics Authorization Act of 1996, Pub. L. 104–179, 110 Stat. 1566, amended 18 U.S.C. 207(j) to add a new exception to sections 207(c) and (d). Under new section 207(j)(7), a former senior or very senior employee may represent a “candidate” for Federal or State office or “an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party.” The proposed regulatory definitions of these terms at § 2641.301(g)(1) closely track the statutory definitions in section 207(j)(7). As noted earlier in connection with proposed § 2641.301(b) and (c), the term “State” is defined in § 2641.104 as proposed.

Proposed § 2641.301(g)(2)(ii) reflects that a communication or appearance must be made on behalf of “one or

more” of the candidates or political organizations specified in § 2641.301(g)(1) (i)–(vi). This language reflects our interpretation that the exception is available to a former senior or very senior employee who is simultaneously acting on behalf of more than one of the specified candidates or political organizations.

If the former senior or very senior employee is representing a candidate, section 207(j)(7) applies only if the employee makes the communication or appearance on behalf of the candidate “in his or her capacity as a candidate.” Accordingly, the former Attorney General in proposed examples 2 and 3 following proposed § 2641.301(g) could seek official action from a Government official about a tax matter of interest to a State committee, but could not make a communication on behalf of a candidate seeking the dismissal of an enforcement action involving the candidate’s family business.

The exception is available to a former senior or very senior employee who is retained either directly by a candidate or specified political organization or who is hired by a third person who provides services exclusively to candidates or the specified political organizations. Significantly, the exception is not available if the former employee is “employed by” any other person or entity at the time he makes the communication or appearance. This limitation, described at proposed § 2641.301(g)(2)(i), is illustrated in example 4. The former senior employee in that example cannot avoid the section 207(c) bar by using the exception because he is employed by a firm that does not exclusively “represent, aid, or advise” the specified persons or entities.

Section 207(j)(7) applies only when the communication or appearance is made “solely on behalf of” a specified candidate or political organization. We would highlight this restriction by denoting it as one of the “limitations” at § 2641.301(g)(2) as proposed.

Finally, proposed § 2641.301(g) recognizes that even a communication or appearance purportedly made solely on behalf of a specified person or entity may unavoidably also involve a representation of the former senior or very senior employee’s employer. Since the exception contemplates that former employees may become “employed by” third persons or entities who provide services exclusively to candidates or political organizations, we did not believe that such an affiliation should preclude use of the exception. Accordingly, we indicate that a former employee may make a communication or appearance on behalf of such a third

person or entity, described in proposed § 2641.301(g)(2)(i)(B), provided the communication or appearance otherwise meets the requirements for the § 2641.301(g) exception as proposed.

Proposed § 2641.301(h)—Acting on Behalf of an International Organization Pursuant to a Waiver

Section 207(j)(3) was added by the Ethics Reform Act of 1989 version of section 207. This exception provides that the restrictions of the statute shall not apply to “an appearance or communication on behalf of, or aid or advice 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.” The Secretary of State has issued several section 207(j)(3) waivers.

Proposed § 2641.301(h) provides that a section 207(j)(3) waiver may be granted to any “former employee.” We believe that the Secretary of State may entertain a request for a waiver from a current employee who has firm post-employment plans, provided that the effective date of the waiver occurs after the employee becomes a former employee.

Section 2641.301(i)—Acting as an Employee of a Government-Owned, Contractor Operated Entity Pursuant to a Waiver

Section 207(k) of 18 U.S.C. authorizes the President to waive some or all of the substantive restrictions of section 207 for up to 25 current employees of the executive branch (excluding any former employees who may be continuing to benefit from previously issued waivers). Subject to a slightly more flexible provision relating to prior employment at certain laboratories, a waiver under this section applies to an individual who returns to the same Government-owned, contractor operated entity by which he was employed just prior to entering Government service. Proposed § 2641.301(i) re-states the statutory criteria and procedures applicable to such waivers.

Proposed § 2641.301(j)—Waiver for Certain Positions From the Prohibitions of 18 U.S.C. 207 (c) and (f)

Apart from the general exceptions and waivers described in section 207(j) and the waiver authority set forth in section 207(k), section 207(c) is not applicable to any former senior employee whose Government position has been waived from the prohibition by the Director of OGE. See section 207(c)(2)(C).

On February 1, 1991 OGE published an interim rule (with request for

comments), which established procedures to waive positions pursuant to section 207(c)(2)(C). OGE has published waived positions as appendix A to 5 CFR part 2641.

OGE received three written comments in response to the 1991 rulemaking. One comment was generally supportive of the interim rule. A second comment raised, in part, the issue of the applicability of section 207(c) to employees detailed to senior employee positions. That issue has already been discussed as part of the discussion of the definition of "senior employee" in proposed § 2641.104. The third comment requested "clarification on the standards which will be used in determining whether to grant a waiver." More specifically, the comment stated that the rule "could be improved by adding a list of factors to consider for determining whether there would be a potential for the use of undue influence or unfair advantage."

The statute lists two criteria that must be satisfied in order for the Director to waive a position from section 207(c). First, the Director must determine that the imposition of section 207(c) "would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions," under section 207(c)(2)(C)(i). Second, the Director must determine that "granting the waiver would not create the potential for use of undue influence or unfair advantage," under section 207(c)(2)(C)(ii). Our interim rule listed some factors that could be relevant to such determinations, and the proposed rule would add additional guidance. It is impossible, however, to develop an exhaustive list of factors that could be considered. The waiver procedure envisions a case-by-case evaluation of the facts related to the hardship on the agency and the potential for undue influence and unfair advantage. It is up to the agency to bring any relevant factors to our attention in order to permit the Director to make the determinations required under the statute.

In addition to modifying certain definitions, as already discussed, we are proposing to make several other changes to the existing provisions of part 2641 relating to waivers. First, as the underlying statute states that OGE may *wave* the restrictions of section 207(c), we have used the term "waiver" throughout the new, renumbered § 2641.301(j) as proposed, rather than the term "exemption" which appears in existing § 2641.201(d). We would also renumber the existing paragraphs concerning waivers so that the

paragraph describing the statutory criteria would appear in proposed § 2641.301(j)(2) as proposed. In addition, we would reorder the statutory criteria in renumbered § 2641.301(j)(2) as proposed to track the order in which they are set forth in the statute.

We propose to modify renumbered § 2641.301(j) to emphasize that a waiver of section 207(c) will operate to waive the restriction of section 207(f). This result follows from the fact that the one-year ban on providing certain assistance to foreign governments or foreign political parties set forth in section 207(f) applies, *inter alia*, to "[a]ny person who is subject to the restrictions contained in subsection (c) * * *" of section 207. Thus, if a former senior employee is not subject to section 207(c) because that restriction has been waived by the Director of OGE, then he will similarly not be subject to section 207(f). We are proposing to insert necessary references to section 207(f) in renumbered § 2641.301(j). Along the same lines, we propose that the Director consider, in relation to the statutory criterion for waiver at renumbered § 2641.301(j)(2)(iii), the consequences of a position's waiver from the restrictions pertaining to foreign entities.

We are proposing to amend renumbered § 2641.301(j)(1) to indicate that OGE may consider waiving restrictions for a position if it "could be occupied by a senior employee." We chose this wording mainly because individuals serving in Senior Executive Service positions are paid basic rates of pay which range from ES-1 to ES-6 depending upon their individual qualifications. As long as a position *could* be occupied by a senior employee, OGE will not decline to consider a waiver merely because the current incumbent's pay rate is less than the ES-5 rate of basic pay triggering senior employee status.

We are proposing to add an example to follow proposed renumbered § 2641.301(j)(1), concerning eligible senior positions. As specified in 18 U.S.C. 207(c)(2)(C) and as would be reflected in renumbered § 2641.301(j)(1), positions for which the rate of basic pay is "specified in" or "fixed according to" the Executive Schedule are ineligible for waiver. Proposed example 1 illustrates the application of this limitation.

Waivers may not be issued to prevent or remedy individual hardships, but rather to address programmatic concerns. In the past, some waivers have been sought to ameliorate the effects of the one-year cooling-off provision as it would apply to a particular individual, rather than to prevent expected recruitment problems.

The Office of Government Ethics has not granted such waivers. *See, e.g.*, OGE Informal Advisory Letter 94 x 12. *See also* OGE Informal Advisory Letter 96 x 15, in which the Director of OGE declined to grant a waiver to remedy the consequences of an agency's misinterpretation of a personnel law which resulted in the retroactive reinstatement of an individual to her former senior position and the renewal of her one-year cooling-off period.

We are proposing to modify renumbered § 2641.301(j)(3)(i) by inserting the word "recommend" to emphasize the role of the designated agency ethics official. OGE expects that a request will not be forwarded for consideration by the Director unless the ethics official believes that waiver is warranted.

We are proposing to reword the description of the "hardship" criterion, at renumbered § 2641.301(j)(2)(i) and (ii), to emphasize what must be central to an agency's recommendation concerning this element. An agency must show that it "has experienced or is experiencing undue hardship in obtaining qualified personnel" and that "[w]aiver of the restriction with respect to the position or positions is expected to ameliorate the recruiting difficulties." *See* OGE Informal Advisory Letter 97 x 16.

We are proposing to add an additional factor that would support an agency's claim of recruitment difficulties. Proposed § 2641.301(j)(2)(i)(A) confirms the relevance of position vacancy rates. Moreover, we are proposing to modify the factor at existing § 2641.201(d)(5)(ii), which currently provides that the Director of OGE will consider, *inter alia*, that the incumbent of a position proposed for waiver possess "outstanding qualifications in a scientific, technological, or other technical discipline." We would revise this factor, at renumbered § 2641.301(j)(2)(i)(C), to include outstanding qualifications in any other "specialized discipline."

We are proposing to add a new sentence, at renumbered § 2641.301(j)(3)(i), indicating that a designated agency ethics official "may, at any time, request that a current waiver be revoked." In addition, we are proposing to delete the requirement that letters must be submitted annually to OGE concerning the continued waiver of the restriction. Finally, because OGE need publish a rule only when a revision to appendix A is warranted as a result of the granting of a new waiver or the revocation of an existing waiver, we propose to drop the requirement in existing § 2641.201(d)(3) that OGE

annually publish an updated compilation. As proposed, renumbered § 2641.301(j)(3)(ii) would merely require that the Director of OGE “maintain a listing” of waived positions in appendix A to 5 CFR part 2641.

Section 2641.301(k)—Miscellaneous Statutory Exceptions

Proposed § 2641.301(k) lists statutory provisions, other than those in 18 U.S.C. 207 itself, which modify the scope of the post-employment statute as it would otherwise apply to specified former employees or classes of former employees. We invite reviewers of this proposed rule to review our list and suggest modifications or additions.

Section 2641.302—Component Designations

The scope of 18 U.S.C. 207(c) can be narrowed through designation, by the Director, of separate departmental or agency components. Authority for the designation of separate components is set forth in section 207(h). On February 1, 1991, OGE published an interim rule establishing procedures, currently codified at 5 CFR 2641.201(e), to designate separate agency components. OGE has published agency component designations as appendix B to 5 CFR part 2641.

We are proposing to make several changes to existing § 2641.201(e), which would be renumbered as § 2641.302. We have reorganized the paragraphs in existing § 2641.201(e) concerning component designations so that the paragraph describing the statutory criteria would appear before the paragraph relating to procedures. In addition, we have reordered the two statutory criteria in renumbered § 2641.302(c). We have also changed the due date for the written updates, required by existing § 2641.201(e)(3)(ii), to July 1 and have dropped the requirement, at existing § 2641.201(e)(3)(iii), that the Director of OGE publish an annual compilation of designated components. OGE would “maintain a listing” of designations in appendix B and would publish amendatory rules only when necessary.

For clarity, we would avoid use of the term “component” in renumbered § 2641.302(a) when referring to an undesignated agency or bureau within a parent agency. We are also proposing to add two examples to follow that section. The first illustrates the effect of a component designation in the case of a former senior employee of a parent agency. The second example concerns a former senior employee of a designated component. Both proposed examples would also show that an agency office

that some might characterize as a “component” will, if not designated by the Director of OGE, nevertheless be considered part of the parent for purposes of determining the scope of the section 207(c) bar.

We propose to list four additional factors that the Director of OGE will consider in connection with the “distinct and separate” finding required by the statute. The first of these additional factors, at renumbered § 2641.302(c)(1)(iii), would indicate that the Director will consider “[t]he degree of supervision exercised by the parent over the component.” In view of this addition, we are proposing to delete much of existing § 2641.201(e)(7). That section had made clear that the Director may designate subordinate agencies or bureaus as distinct and separate from a parent notwithstanding that the parent may exercise some degree of general supervision over the subordinate entity. We would, however, retain the last sentence of existing § 2641.201(e)(7). As reworded and retitled, renumbered § 2641.302(d) would continue to indicate that the Director will not ordinarily designate agencies or other administrative units that are encompassed by or otherwise supervised by an existing designated component.

The other three new factors proposed at renumbered § 2641.302(c)(1) derive from OGE’s experience in deciding several designation requests over the past few years. New § 2641.302(c)(1)(iv) would indicate that the Director will consider “[w]hether the component exercises responsibilities that cut across organizational lines within the parent.” We have declined to designate an office that had been created administratively to provide personnel, payroll, and similar services to the parent and to its designated components. We also declined to designate an Inspector General’s office as a component distinct and separate from the parent and other designated components. The two other new factors will confirm the relevance of the size of the component, both in absolute and relative terms. In one instance, for example, we declined to designate an office of fewer than 25 people that also would have been very small in relation to other designated components of the parent.

In view of the passage of time since the original publication of part 2641, we are also proposing to delete existing § 2641.201(e)(3)(i) concerning the effective date of the Director’s initial post-Ethics Reform Act designations. The introductory paragraph in Appendix B would continue to provide that “[e]xcept as otherwise indicated, all

designations are effective as of January 1, 1991.” We also would reorganize existing § 2641.201(e)(3)(ii) by creating separate paragraphs, proposed § 2641.302(e)(1) and (e)(2), respectively titled “Agency recommendation” and “Agency update.”

Existing § 2641.201(e)(4) currently provides that a new designation “shall be effective as of the effective date of the rule that creates the designation * * *.” Since a designation can substantially affect the scope of 18 U.S.C. 207(c) as applied to particular individuals, it is important that the designation become effective as soon as possible. We are proposing to modify existing § 2641.201(e)(4) to establish the date of publication as the effective date for all future designations. However, since a revocation has the effect of expanding the section 207(c) bar, we propose to retain the 90-day delayed effective date with respect to revocations, now at renumbered § 2641.302(f). As before, a revocation would not apply to any individual who terminated senior service prior to the expiration of the 90-day period.

We also propose to revise existing § 2641.201(e)(4) so that a new component designation “shall be effective as to individuals who terminated senior service either before, on or after that date.” This proposed change, at renumbered § 2641.302(f), would serve to mitigate the consequences of administrative delays in connection with the publication of a rule designating a new component.

As stated earlier in relation to § 2641.204(g), it is necessary to identify a former senior employee’s “former agency” in order to determine the scope of 18 U.S.C. 207(c). If a designated component is determined to be no longer identifiable as substantially the same entity, the section 207(c) bar will not apply to a former senior employee of that component. Example 1 following § 2641.302(g) as proposed illustrates this concept. In the case of a designated component that remains identifiable as substantially the same entity, the bar will apply to a former senior employee as if the whole of the reorganized entity had been designated as a distinct and separate component by the Director. Proposed example 2 as proposed illustrates this idea. The example also points out that a former employee would not be barred from contacting a current employee who had been transferred outside the boundaries of the designated component, as reorganized.

Although OGE has assigned the “appropriate” designated agency ethics official the primary responsibility for applying the standards of proposed

§ 2641.204(g) in the context of agency components, we emphasize that proposed § 2641.302(g) would not constitute a delegation of the Director's authority to make or revoke component designations. Rather, it would reflect the practical necessity of determining if, subsequent to a reorganization, there is an identifiable successor to a component that had been previously designated as distinct and separate by OGE.

Agency ethics officials would need turn to § 2641.302(g) as proposed only when a designated component has been "significantly altered by organizational changes." Proposed § 2641.302(g) requires that the determination required by § 2641.302(g) be made in consultation with OGE. While agency officials will be most familiar with the details of a significant reorganization, OGE personnel can assist in determining whether a designated component remains "identifiable as substantially the same entity." Moreover, such consultation should ensure that advice rendered to a particular individual will be consistent with any subsequent revision of appendix B by the OGE Director.

Appendixes

Finally, we are proposing to delete existing footnotes 4 and 5 from the appendix B listing for the Department of Justice. The information in those footnotes would, henceforth, be contained in parentheses following the appropriate component.

B. Matters of Regulatory Procedure

Administrative Procedure Act

Interested persons are invited to submit written comments on this proposed regulation, to be received by May 19, 2003. The comments will be carefully considered and any appropriate changes will be made to the regulation before a final rule is adopted and published in the **Federal Register** by OGE.

Executive Order 12866

In promulgating this proposed rule, OGE has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This proposed rule has also been reviewed by the Office of Management and Budget under that Executive order.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this final amendatory regulation in light of section 3 of Executive Order 12988,

Civil Justice Reform, and certify that it meets the applicable standards provided therein.

Regulatory Flexibility Act

As Director of OGE, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this rule will not have a significant economic impact on a substantial number of small entities because it affects only current and former Federal employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this rule because it does not contain an information collection requirement that requires the approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this final rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this proposed rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will, before the future final rule takes effect, submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

List of Subjects in 5 CFR Parts 2637 and 2641

Conflict of interests, Government employees.

Approved: January 31, 2003.

Amy L. Comstock,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend 5 CFR Chapter XVI as follows:

Under the authority of 5 U.S.C. App (Ethics in Government Act of 1978):

1. Part 2637 is removed.
2. Part 2641 is revised to read as follows:

PART 2641—POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS

Subpart A—General Provisions

Sec.

- 2641.101 Purpose.
- 2641.102 Applicability.
- 2641.103 Enforcement and penalties.
- 2641.104 Definitions.
- 2641.105 Advice.

Subpart B—Prohibitions

- 2641.201 Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially [18 U.S.C. 207(a)(1)].
- 2641.202 Two-year restriction on any former employee's representations to United States concerning particular matter for which the employee had official responsibility [18 U.S.C. 207(a)(2)].
- 2641.203 One-year restriction on any former employee's representations, aid, or advice concerning ongoing trade or treaty negotiation [18 U.S.C. 207(b)].
- 2641.204 One-year restriction on any former senior employee's representations to former agency concerning any matter, regardless of prior involvement [18 U.S.C. 207(c)].
- 2641.205 One-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement [18 U.S.C. 207(d)].
- 2641.206 One-year restriction on any former senior or very senior employee's representations on behalf of, or aid or advice to, foreign entity [18 U.S.C. 207(f)].

Subpart C—Exceptions, Waivers and Separate Components

- 2641.301 Statutory exceptions and waivers.
- 2641.302 Separate agency components.
- Appendix A to Part 2641—Positions Waived from 18 U.S.C. 207(c) and (f)
- Appendix B to Part 2641—Agency Components for Purposes of 18 U.S.C. 207(c)

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 207; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Subpart A—General Provisions

§ 2641.101 Purpose.

(a) *Purpose of 18 U.S.C. 207.* 18 U.S.C. 207 prohibits certain acts by former employees (including current employees who formerly served in "senior" or "very senior" employee positions) which involve, or may appear to involve, the unfair use of prior Government employment. None of the restrictions of section 207 prohibit any former employee, regardless of Government rank or position, from accepting employment with any particular private or public employer. Rather, section 207 prohibits a former employee from providing certain services to or on behalf of non-Federal

employers or other persons, whether or not done for compensation. These restrictions are personal to the employee and are not imputed to others. (See, however, the note following § 2641.103 concerning 18 U.S.C. 2.)

(b) *Purpose of part 2641.* This part 2641 provides interpretive guidance explaining the scope and content of 18 U.S.C. 207 as it applies to former employees of the executive branch or of certain independent agencies (including current employees who formerly served in “senior” or “very senior” employee positions). Although certain restrictions in section 207 apply to former employees of the District of Columbia, Members and elected officials of the Congress and certain legislative staff, and employees of independent agencies in the legislative and judicial branches, this part is not intended to provide guidance to those individuals.

Note to § 2641.101: Part 2641 does not address post-employment restrictions that may be contained in laws or authorities other than 18 U.S.C. 207. These restrictions include those in 18 U.S.C. 203 and 41 U.S.C. 423(d).

§ 2641.102 Applicability.

Since its enactment in 1962, 18 U.S.C. 207 has been amended several times. As a consequence of these amendments, former executive branch employees are subject to varying post-employment restrictions depending upon the date they terminated Government service (or service in a “senior” or “very senior” employee position).

(a) *Employees terminating on or after January 1, 1991.* Former employees who terminated or employees terminating Government service (or service in a “senior” or “very senior” employee position) on or after January 1, 1991, are subject to the provisions of 18 U.S.C. 207 as amended by the Ethics Reform Act of 1989, title I, Public Law 101–194, 103 Stat. 1716 (with amendments enacted by Act of May 4, 1990, Public Law 101–280, 104 Stat. 149) and by subsequent amendments. This part 2641 provides guidance concerning section 207 to these former employees.

(b) *Employees terminating between July 1, 1979 and December 31, 1990.* Former employees who terminated service between July 1, 1979, and December 31, 1990, are subject to the provisions of section 207 as amended by the Ethics in Government Act of 1978, title V, Public Law 95–521, 92 Stat. 1864 (with amendments enacted by Act of June 22, 1979, Public Law No. 96–28, 93 Stat. 76). Regulations providing guidance concerning 18 U.S.C. 207 to these employees were last published in the 2003 edition of Title 5 of the Code

of Federal Regulations, revised as of January 1, 2003.

(c) *Employees terminating prior to July 1, 1979.* Former employees who terminated service prior to July 1, 1979, are subject to the provisions of 18 U.S.C. 207 as enacted in 1962 by the Act of October 23, 1962, Public Law 87–849, 76 Stat. 1123.

Note to § 2641.102: The provisions of this part 2641 reflect amendments to 18 U.S.C. 207 enacted subsequent to the Ethics Reform Act of 1989 and before [the effective date of the final rule]. An employee who terminated Government service (or service in a “senior” or “very senior” employee position) between January 1, 1991, and [the effective date of the final rule] may have become subject, upon termination, to a version of the statute that existed prior to the effective date of one or more of those amendments. Those amendments concerned: (1) Changes, effective in 1990 and 1996, concerning the rate of basic pay triggering “senior employee” status for purposes of section 207(c); (2) the reinstatement and subsequent amendment of the Presidential waiver authority in section 207(k); (3) the length of the restriction set forth in section 207(f) as applied to a former United States Trade Representative or Deputy United States Trade Representative; (4) the addition of section 207(j)(7), an exception to section 207(c) and (d); and (5) a change to section 207(j)(2)(B), an exception to section 207(c) and (d).

§ 2641.103 Enforcement and penalties.

(a) *Enforcement.* Criminal and civil enforcement of the provisions of 18 U.S.C. 207 is the responsibility of the Department of Justice. An agency is required to report to the Attorney General any information, complaints or allegations of possible criminal conduct in violation of title 18 of the United States Code, including possible violations of section 207 by former officers and employees. See 28 U.S.C. 535. When a possible violation of section 207 is referred to the Attorney General, the referring agency shall concurrently notify the Director of the Office of Government Ethics of the referral in accordance with 5 CFR 2638.603.

(b) *Penalties and injunctions.* 18 U.S.C. 216 provides for the imposition of one or more of the following penalties and injunctions for a violation of section 207:

(1) *Criminal penalties.* 18 U.S.C. 216(a) sets forth the maximum imprisonment terms for felony and misdemeanor violations of section 207. Section 216(a) also provides for the imposition of criminal fines for violations of section 207. For the amount of the criminal fines that may be imposed, see 18 U.S.C. 3571.

(2) *Civil penalties.* 18 U.S.C. 216(b) authorizes the Attorney General to take

civil actions to impose civil penalties for violations of section 207 and sets forth the amounts of the civil fines.

(3) *Injunctive relief.* 18 U.S.C. 216(c) authorizes the Attorney General to seek an order from a United States District Court to prohibit a person from engaging in conduct which violates section 207.

(c) *Other relief.* In addition to any other remedies provided by law, the United States may, pursuant to 18 U.S.C. 218, void or rescind contracts, transactions, and other obligations of the United States in the event of a final conviction pursuant to section 207, and recover the amount expended or the thing transferred or its reasonable value.

Note to § 2641.103: A person or entity who aids, abets, counsels, commands, induces, or procures commission of a violation of section 207 is punishable as a principal under 18 U.S.C. 2.

§ 2641.104 Definitions.

For purposes of this part:

Agency means any department, independent establishment, commission, administration, authority, board or bureau of the United States or Government corporation. The term includes any independent agency not in the legislative or judicial branches.

Agency ethics official means the designated agency ethics official (DAEO) or the alternate DAEO, appointed in accordance with 5 CFR 2638.202(b), and any deputy ethics official described in 5 CFR 2638.204.

Department means one of the executive departments listed in 5 U.S.C. 101.

Designated agency ethics official (DAEO) means the official designated under 5 CFR 2638.201 to coordinate and manage an agency’s ethics program.

Employee means, for purposes of determining the individuals subject to 18 U.S.C. 207, any officer or employee of the executive branch or any independent agency that is not a part of the legislative or judicial branches. The term does not include the President or the Vice President (except, with respect to the Vice President, as otherwise provided), an enlisted member of the Armed Forces, or an officer or employee of the District of Columbia. The term includes an individual appointed as an employee or detailed to the Federal Government under the Intergovernmental Personnel Act (5 U.S.C. 3371–3376) or specifically subject to section 207 under the terms of another statute. It encompasses senior employees, very senior employees, and special Government employees. (This term is redefined elsewhere in this part, as necessary, when the term is used for other purposes.)

Executive branch includes an executive department as defined in 5 U.S.C. 101, a Government corporation, an independent establishment (other than the General Accounting Office), the Postal Service, the Postal Rate Commission, and also includes any other entity or administrative unit in the executive branch.

Former employee means an individual who has completed a period of service as an employee. Unless otherwise indicated, the term encompasses a former senior employee and a former very senior employee. An individual becomes a former employee at the termination of Government service, whereas an individual becomes a former senior employee or a former very senior employee at the termination of service in a senior or very senior employee position. Consistent with 18 U.S.C. 202(c) and the definition of "employee" in this section, the Vice President is a former employee only for purposes of 18 U.S.C. 207(d) and (f) [§§ 2641.205 and 2641.206] and any applicable exceptions to those restrictions; there are no other section 207 or part 2641 restrictions applicable to the Vice President.

Example 1 to the definition of former employee: An individual served as an employee of the Agency for International Development, an agency within the executive branch. Since he was, therefore, an "employee" as that term is defined in this section by virtue of having served in the executive branch, he became a "former employee" when he terminated Government service to pursue his hobbies.

Example 2 to the definition of former employee: An individual served as an employee of the Tennessee Valley Authority (TVA). Since the TVA is a corporation owned or controlled by the Government of the United States, she served as an employee in the "executive branch" as that term is defined in this section. She became a "former employee," therefore, when she terminated Government service to do some traveling.

Example 3 to the definition of former employee: An individual terminated a GS-14 position in the executive branch to accept a position in the legislative branch. He did not become a "former employee" when he terminated service in the executive branch since he did not terminate "Government service" as that term is defined in this section.

Example 4 to the definition of former employee: An individual is appointed by the President to serve as a special Government employee on the Oncological Drug Advisory Committee at the Department of Health and Human Services. The special Government employee meets with the committee five days per year. She does not terminate Government service at the end of each meeting of the committee and therefore does not at that time become a "former employee."

Example 5 to the definition of former employee: An individual is a Major in the

U.S. Army Reserve. The Major earns points toward retirement by participating in weekend drills and performing active duty for training for two weeks each year. The Major is not a special Government employee when he performs weekend drills, but is considered to be one while on active duty for training. The Major is considered to be a "former employee" when he terminates each period of active duty for training.

Former senior employee is an individual who terminates service in a senior employee position (without successive Government service in another senior position).

Former very senior employee is an individual who terminates service in a very senior employee position (without successive Government service in another very senior employee position).

Government corporation means, for purposes of determining the individuals subject to 18 U.S.C. 207, a corporation that is owned or controlled by the Government of the United States. For purposes of identifying or determining individuals with whom post-employment contact is restricted, matters to which the United States is a party or has a direct and substantial interest, decisions which a former senior or very senior employee cannot seek to influence on behalf of a foreign entity, and whether a former employee is acting on behalf of the United States, it means a corporation in which the United States has a proprietary interest as distinguished from a custodial or incidental interest as shown by the functions, financing, control, and management of the corporation.

Government service means a period of time during which an individual is employed by the Federal Government. As applied to a special Government employee (SGE), Government service refers to the period of time covered by the individual's appointment (or other act evidencing employment with the Government), regardless of any interval or intervals between days actually served. See example 4 to the definition of *former employee* in this section. In the case of Reserve officers of the Armed Forces or officers of the National Guard of the United States who are not otherwise employees of the United States, Government service shall be considered to end upon the termination of a period of active duty or active duty for training during which they served as SGEs. See example 5 to the definition of *former employee* in this section.

He, his, and him include she, hers, and her, and vice versa.

Judicial branch means the Supreme Court of the United States; the United States courts of appeals; the United States district courts; the Court of

International Trade; the United States bankruptcy courts; any court created pursuant to Article I of the United States Constitution, including the United States Court of Appeals for the Armed Forces, the United States Claims Court, and the United States Tax Court, but not including a court of a territory or possession of the United States; the Federal Judicial Center; and any other agency, office, or entity in the judicial branch.

Legislative branch means the Congress; it also means the Office of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the United States Capitol Police, and any other agency, entity, office, or commission established in the legislative branch.

Person includes an individual, corporation, company, association, firm, partnership, society, joint stock company, or any other organization, institution, or entity, including any officer, employee, or agent of such person or entity. Unless otherwise indicated, the term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State and local governments. The term includes the "United States" as that term is defined in § 2641.301(a)(1).

Senior employee means an employee, other than a very senior employee who is:

(1) Employed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311–5318 (the Executive Schedule);

(2) Employed in a position for which the rate of basic pay, exclusive of any locality-based pay adjustment or additional pay such as bonuses, awards, and various allowances, is equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service;

(3) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(B);

(4) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(B); or

(5) An active duty commissioned officer of the uniformed services serving in a position for which the pay grade (as specified in 37 U.S.C. 201) is pay grade O–7 or above.

Example 1 to the definition of senior employee: A former administrative law judge serves on a commission created within the executive branch to adjudicate certain claims arising from a recent military operation. The position is uncompensated but the judge

receives travel expenses. The judge is not employed in a position for which the rate of pay is specified in or fixed according to the Executive Schedule, is not serving in a position to which he was appointed by the President or Vice President under 3 U.S.C. 105(a)(2)(B) or 106(a)(1)(B), and is not employed in a position for which the basic rate of pay (exclusive of locality and additional pay) is equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service. He is not a senior employee.

Example 2 to the definition of senior employee: A doctor is hired to fill a "senior-level" position and is initially compensated pursuant to 5 U.S.C. 5376 at a rate of basic pay slightly less than that payable for level 5 of the Senior Executive Service. If both the annual pay adjustment provided for in 5 CFR 534.504 and the periodic pay adjustment authorized in 5 CFR 534.503 result in a rate of basic pay equal to or above the rate of basic pay payable for level 5 of the Senior Executive Service, the doctor will become a senior employee.

Special Government employee means an officer or employee of the executive branch or an independent agency, as specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days.

State means one of the fifty States of the United States and the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Very senior employee means an employee who is:

- (1) Serving in the position of Vice President of the United States;
- (2) Employed in a position which is either listed in 5 U.S.C. 5312 or for which the rate of pay is equal to the rate of pay payable for level I of the Executive Schedule;
- (3) Employed in a position in the Executive Office of the President which is either listed in 5 U.S.C. 5313 or for which the rate of pay is equal to the rate of pay payable for level II of the Executive Schedule;
- (4) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(A); or
- (5) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(A).

§ 2641.105 Advice.

(a) *Agency ethics officials.* Current or former employees or others who have questions about 18 U.S.C. 207 or about this part 2641 should seek advice from a designated agency ethics official or another agency ethics official. The agency in which an individual formerly served has the primary responsibility to

provide oral or written advice concerning a former employee's post-employment activities. An agency ethics official, in turn, may consult with other agencies, such as those before whom a post-employment communication or appearance is contemplated, and with the Office of Government Ethics.

(b) *Office of Government Ethics.* The Office of Government Ethics (OGE) will provide advice to agency ethics officials and others concerning 18 U.S.C. 207 and this part 2641. The OGE may provide advice orally or through issuance of a written advisory opinion and shall, as appropriate, consult with the agency or agencies concerned and with the Department of Justice.

(c) *Effect of advice.* Reliance on the oral or written advice of an agency ethics official or the OGE cannot ensure that a former employee will not be prosecuted for a violation of 18 U.S.C. 207. However, good faith reliance on such advice is a factor that may be taken into account by the Department of Justice (DOJ) in the selection of cases for prosecution. In the case in which OGE issues a *formal* advisory opinion in accordance with subpart C of 5 CFR part 2638, the DOJ will not prosecute an individual who acted in good faith in accordance with that opinion. See 5 CFR 2638.309.

(d) *Contacts to seek advice.* A former employee will not be deemed to act on behalf of any other person in violation of 18 U.S.C. 207 when he contacts an agency ethics official or other employee of the United States for the purpose of seeking guidance concerning the applicability or meaning of section 207 as applied to his own activities.

(e) *No attorney-client privilege.* Disclosures made by a current or former employee to an agency ethics official, to any Government attorney, or to an employee of the Office of Government Ethics are not protected by an attorney-client privilege.

Subpart B—Prohibitions

§ 2641.201 Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially [18 U.S.C. 207(a)(1)].

(a) *Basic prohibition of 18 U.S.C. 207(a)(1).* No former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United

States is a party or has a direct and substantial interest.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(a)(1) does not apply to a former employee who is:

- (1) Acting on behalf of the United States. See § 2641.301(a).
- (2) Acting as an elected State or local government official. See § 2641.301(b).
- (3) Communicating scientific or technological information pursuant to procedures or certification. See § 2641.301(e).
- (4) Testifying under oath. See § 2641.301(f). (Note that this exception from § 2641.201 is generally not available for expert testimony. See § 2641.301(f)(2).)
- (5) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).
- (6) Acting as an employee of a Government-owned, contractor operated entity pursuant to a waiver. See § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(a)(1) is a permanent restriction that commences upon an employee's termination from Government service. The restriction lasts for the life of the particular matter involving specific parties in which the employee participated personally and substantially.

(d) *Communication or appearance—*
(1) *Communication.* A former employee makes a communication when he imparts or transmits information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in written correspondence, by electronic media, or by any other means. This includes only those communications with respect to which the former employee intends that the information conveyed will be attributed to himself, although it is not necessary that any employee of the United States actually recognize the former employee as the source of the information.

(2) *Appearance.* A former employee makes an appearance when he is physically present before an employee of the United States, in either a formal or informal setting. Although an appearance also may be accompanied by certain communications, an appearance need not involve any communication by the former employee.

(3) *Behind-the-scenes assistance.* Nothing in this section prohibits a former employee from providing assistance to another person, provided that the assistance does not involve a communication to or an appearance before an employee of the United States.

Example 1 to paragraph (d): A former employee of the Federal Bureau of

Investigation makes a brief telephone call to a colleague in her former office concerning an ongoing investigation. She has made a communication. If she personally attends an informal meeting with agency personnel concerning the matter, she will have made an appearance.

Example 2 to paragraph (d): A former employee of the National Endowment for the Humanities (NEH) accompanies other representatives of a NEH grantee to a meeting with the agency. Even if the former employee does not say anything at the meeting, he has made an appearance (although that appearance may or may not have been made with the intent to influence, depending on the circumstances).

Example 3 to paragraph (d): A Government employee administered a particular contract for agricultural research with Q Company. Upon termination of her Government employment, she is hired by Q Company. She works on the matter covered by the contract, but has no direct contact with the Government. At the request of a company vice president, she prepares a paper describing the persons at her former agency who should be contacted and what should be said to them in an effort to increase the scope of funding of the contract and to resolve favorably a dispute over a contract clause. She may do so.

Example 4 to paragraph (d): A former employee of the National Institutes of Health (NIH) prepares an application for an NIH research grant on behalf of her university employer. The application is signed and submitted by another university officer, but it lists the former employee as the principal investigator who will be responsible for the substantive work under the grant. He has not made a communication. He also may sign an assurance to the agency that he will be personally responsible for the direction and conduct of the research under the grant, pursuant to § 2641.201(e)(2)(iv). Moreover, he may personally communicate scientific or technological information to NIH concerning the application, provided that he does so under circumstances indicating no intent to influence the Government pursuant to § 2641.201(e)(2) or he makes the communication in accordance with the exception for scientific or technological information in § 2641.207(e).

Example 5 to paragraph (d): A former employee established a small government relations firm with a highly specialized practice in certain environmental compliance issues. She prepared a report for one of her clients, which she knew would be presented to her former agency by the client. The report is not signed by the former employee, but the document does bear the name of her firm. The former employee expects that it is commonly known throughout the industry and the agency that she is the author of the report. If the report were submitted to the agency, the former employee would be making a communication and not merely confining herself to behind-the-scenes assistance, because the circumstances indicate that she intended the information to be attributed to herself.

(e) *With the intent to influence—(1) Basic concept.* The prohibition applies

only to communications or appearances made by a former Government employee with the intent to influence the United States. A communication or appearance is made with the intent to influence when made for the purpose of:

(i) Seeking a Government ruling, benefit, approval, or other discretionary Government action; or

(ii) Affecting Government action in connection with an issue or aspect of a matter which involves an appreciable element of actual or potential dispute or controversy.

Example 1 to paragraph (e)(1): A former employee of the Administration on Children and Families (ACF) signs a grant application and submits it to ACF on behalf of a nonprofit organization for which she now works. She has made a communication with the intent to influence an employee of the United States because her communication was made for the purpose of seeking a Government benefit.

Example 2 to paragraph (e)(1): A former Government employee calls an agency official to complain about the auditing methods being used by the agency in connection with an audit of a Government contractor for which the former employee serves as a consultant. The former employee has made a communication with the intent to influence because his call was made for the purpose of seeking Government action in connection with an issue involving an appreciable element of dispute.

(2) *Intent to influence not present.* Certain communications to and appearances before employees of the United States are not made with the intent to influence, within the meaning of paragraph (e)(1) of this section, including, but not limited to, communications and appearances made solely for the purpose of:

(i) Making a routine request not involving a potential controversy, such as a request for publicly available documents or an inquiry as to the status of a matter;

(ii) Making factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action, such as conveying factual information regarding matters that are not potentially controversial during the regular course of performing a contract;

(iii) Signing and filing the tax return of another person as preparer;

(iv) Signing an assurance that one will be responsible as principal investigator for the direction and conduct of research under a Federal grant (see example 4 to paragraph (d) of this section);

(v) Filing a Securities and Exchange Commission (SEC) Form 10-K or similar disclosure forms required by the SEC;

(vi) Making a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract or grant, during a routine Government site visit to premises owned or occupied by a person other than the United States where the work is performed or would be performed, in the ordinary course of evaluation, administration, or performance of an actual or proposed contract or grant; or

(vii) Purely social contacts (See example 4 to paragraph (f) of this section).

Example 1 to paragraph (e)(2): A former Government employee calls an agency to ask for the date of a scheduled public hearing on her client's license application. This is a routine request not involving a potential controversy and is not made with the intent to influence.

Example 2 to paragraph (e)(2): In the previous example, the agency's hearing calendar is quite full, as the agency has a significant backlog of license applications. The former employee calls a former colleague at the agency to ask if the hearing date for her client could be moved up on the schedule, so that her client can move forward with its business plans more quickly. This is a communication made with the intent to influence.

Example 3 to paragraph (e)(2): A former employee of the Department of Defense (DOD) now works for a firm that has a DOD contract to produce an operator's manual for a radar device used by DOD. In the course of developing a chapter about certain technical features of the device, the former employee asks a DOD official certain factual questions about the device and its properties. The discussion does not concern any matter that is known to involve a potential controversy between the agency and the contractor. The former employee has not made a communication with the intent to influence.

Example 4 to paragraph (e)(2): A former medical officer of the Food and Drug Administration (FDA) sends a letter to the agency in which he sets out certain data from safety and efficacy tests on a new drug for which his employer, ABC Drug Co., is seeking FDA approval. Even if the letter is confined to arguably "factual" matters, such as synopses of data from clinical trials, the communication is made for the purpose of obtaining a discretionary Government action, i.e., approval of a new drug. Therefore, this is a communication made with the intent to influence.

Example 5 to paragraph (e)(2): A former Government employee now works for a management consulting firm, which has a Government contract to produce a study on the efficiency of certain agency operations. Among other things, the contract calls for the contractor to develop a range of alternative options for potential restructuring of certain internal Government procedures. The former employee would like to meet with agency representatives to present a tentative list of options developed by the contractor. She

may not do so. There is a potential for controversy between the Government and the contractor concerning the extent and adequacy of any options presented, and, moreover, the contractor may have its own interest in emphasizing certain options as opposed to others because some options may be more difficult and expensive for the contractor to develop fully than others.

Example 6 to paragraph (e)(2): A former employee of the Internal Revenue Service (IRS) prepares his client's tax return, signs it as preparer, and mails it to the IRS. He has not made a communication with the intent to influence. In the event that any controversy should arise concerning the return, the former employee may not represent the client in the proceeding, although he may answer direct factual questions about the records he used to compile figures for the return, provided that he does not argue any theories or positions to justify the use of one figure rather than another.

Example 7 to paragraph (e)(2): An agency official visits the premises of a prospective contractor to evaluate the testing procedure being proposed by the contractor for a research contract on which it has bid. A former employee of the agency, now employed by the contractor, is the person most familiar with the technical aspects of the proposed testing procedure. The agency official asks the former employee about certain technical features of the equipment used in connection with the testing procedure. The former employee may provide factual information that is responsive to the questions posed by the agency official, as such information is requested by the Government under circumstances for its convenience in reviewing the bid. However, the former employee may not argue for the appropriateness of the proposed testing procedure or otherwise advocate any position on behalf of the contractor.

(3) *Change in circumstances.* If, at any time during the course of a communication or appearance otherwise permissible under paragraph (e)(2) of this section, it becomes apparent that circumstances have changed which would indicate that any further communication or appearance would be made with the intent to influence, the former employee must refrain from such further communication or appearance.

Example 1 to paragraph (e)(3): A former Government employee accompanies the vice president of a company to a meeting with agency officials to convey test results called for under a Government contract. During the course of the meeting, an unexpected dispute arises concerning certain terms of the contract. The former employee may not participate in any discussion of this issue. Moreover, if the circumstances clearly indicate that even her continued presence during this discussion would be an appearance made with the intent to influence, she should excuse herself from the meeting.

(4) *Mere physical presence intended to influence.* Under some circumstances,

a former employee's mere physical presence, without any communication by the employee concerning any material issue or otherwise, may constitute an appearance with the intent to influence an employee of the United States. Relevant considerations include such factors as whether:

(i) The former employee has been given actual or apparent authority to make any decisions, commitments, or substantive arguments in the course of the appearance;

(ii) The Government employee before whom the appearance is made has substantive responsibility for the matter and does not simply perform ministerial functions, such as the acceptance of paperwork;

(iii) The former employee's presence is relatively prominent;

(iv) The former employee is paid for making the appearance;

(v) It is anticipated that others present at the meeting will make reference to the views or past or present work of the former employee;

(vi) Circumstances do not indicate that the former employee is present merely for informational purposes, for example, merely to listen and record information for later use;

(vii) The former employee has entered a formal appearance in connection with a legal proceeding at which he is present; and

(viii) The appearance is before former subordinates or others in the same chain of command as the former employee.

Example 1 to paragraph (e)(4): A former Regional Administrator of the Occupational Safety and Health Administration (OSHA) becomes a consultant for a company being investigated for possible enforcement action by the regional OSHA office. She is hired by the company to coordinate and guide its response to the OSHA investigation. She accompanies company officers to an informal meeting with OSHA, which is held for the purpose of airing the company's explanation of certain findings in an adverse inspection report. The former employee is introduced at the meeting as the company's compliance and governmental affairs adviser but she does not make any statements during the meeting concerning the investigation. She is paid a fee for attending this meeting. She has made an appearance with the intent to influence.

Example 2 to paragraph (e)(4): A former employee of an agency now works for a manufacturer that seeks agency approval for a new product. The agency convenes a public advisory committee meeting for the purpose of receiving expert advice concerning the product. Representatives of the manufacturer will make an extended presentation of the data supporting the application for approval, and a special table has been reserved for them in the meeting room for this purpose. The former employee does not participate in the manufacturer's presentation to the

advisory committee and does not even sit in the section designated for the manufacturer. Rather, he sits in the back of the room in a large area reserved for the public and the media. The manufacturer's speakers make no reference to the involvement or views of the former employee with respect to the matter. Even though the former employee may be recognized in the audience by certain agency employees, he has not made an appearance with the intent to influence because his presence is relatively inconspicuous and there is little to identify him with the manufacturer or the advocacy of its representatives at the meeting.

(f) *To or before an employee of the United States—(1) Employee of the United States.* For purposes of this paragraph, an "employee of the United States" means the President, the Vice President, and any current Federal employee (including an individual appointed as an employee or detailed to the Federal Government under the Intergovernmental Personnel Act (5 U.S.C. 3371–3376)) who is detailed to or employed by any:

(i) Agency (including a Government corporation);

(ii) Independent agency in the executive, legislative, or judicial branch;

(iii) Federal court; or

(iv) Court-martial.

(2) *To or before.* Except as provided in paragraph (f)(3) of this section, a communication "to" or appearance "before" an employee of the United States is one:

(i) Directed to and received by an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section even though not addressed to a particular employee, e.g., as when a former employee mails correspondence to an agency but not to any named employee; or

(ii) Directed to and received by an employee in his capacity as an employee of an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section, e.g., as when a former employee directs remarks to an employee representing the United States as a party or intervenor in a Federal or non-Federal judicial proceeding. A former employee does not direct his communication or appearance to a bystander who merely happens to overhear the communication or witness the appearance.

(3) *Public commentary.* (i) A former employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to be making a prohibited communication or appearance if the forum:

(A) Is not sponsored or co-sponsored by an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section;

(B) Is attended by a large number of people; and

(C) A significant proportion of those attending are not employees of the United States.

(ii) In the circumstances described in paragraph (f)(3)(i) of this section, a former employee may engage in exchanges with any other speaker or with any member of the audience.

(iii) A former employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely available publication.

Example 1 to paragraph (f): A Federal Trade Commission (FTC) employee participated in the FTC's decision to initiate an enforcement proceeding against a particular company. After terminating Government service, the former employee is hired by the company to lobby key Members of Congress concerning the necessity of the proceeding. He may contact Members of Congress or their staff since a communication to or appearance before such persons is not made to or before an "employee of the United States" as that term is defined in paragraph (f)(1) of this section.

Example 2 to paragraph (f): In the previous example, the former FTC employee arranges to meet with a Congressional staff member to discuss the necessity of the proceeding. A current FTC employee is invited by the staff member to attend and is authorized by the FTC to do so in order to present the agency's views. The former employee may not argue his new employer's position at that meeting since his arguments would unavoidably be directed to the FTC employee in his capacity as an employee of the FTC.

Example 3 to paragraph (f): The Department of State granted a waiver pursuant to 18 U.S.C. 208(b)(1) to permit one of its employees to serve in his official capacity on the Board of Directors of a private association. The employee participates in a Board meeting to discuss what position the association should take concerning the award of a recent contract by the Department of Energy (DOE). When a former DOE employee addresses the Board to argue that the association should object to the award of the contract, she is directing her communication to a Department of State employee in his capacity as an employee of the Department of State.

Example 4 to paragraph (f): A Federal Communications Commission (FCC) employee participated in a proceeding to review the renewal of a license for a television station. After terminating Government service, he is hired by the company that holds the license. At a cocktail party, the former employee meets his former supervisor who is still employed by the FCC and begins to discuss the specifics of the license renewal case with him. The former employee is directing his communication to an FCC employee in his capacity as an employee of the FCC. Moreover, as the conversation concerns the license renewal matter, it is not a purely social contact and

satisfies the element of the intent to influence the Government within the meaning of paragraph (e) of this section.

Example 5 to paragraph (f): A Department of Commerce employee participated in the negotiation of a proposed treaty with another country. After terminating Government service, she goes to work for a company that would be affected by the treaty. She is invited to speak about the pending negotiation at a conference sponsored by a trade association. The conference is attended by 100 individuals, 50 of whom are employees of entities specified in paragraphs (f)(1)(i)–(f)(1)(iv) of this section. The former employee may speak at the conference and may engage in a discussion of the merits of the treaty in response to a question posed by a Department of Agriculture employee in attendance.

Example 6 to paragraph (f): An employee of the Defense Base Closure and Realignment Commission participated in recommending that a particular military base be closed. After terminating Government service, the former employee may, on behalf of an organization with which he is affiliated, write and permit publication of an op-ed piece in a metropolitan newspaper in support of the recommendation to close that base.

Example 7 to paragraph (f): ABC Company has a contract with the Department of Energy which requires that contractor personnel work closely with agency employees in adjoining offices and work stations in the same building. After leaving the Department, a former employee goes to work for another corporation that has an interest in performing certain work related to the same contract, and he arranges a meeting with certain ABC employees at the building where he previously worked on the project. At the meeting, he asks the ABC employees to mention the interest of his new employer to the project supervisor, who is an agency employee. Moreover, he tells the ABC employees that they can say that he was the source of this information. The ABC employees in turn convey this information to the project supervisor. The former employee has made a communication to an employee of the Department of Energy. His communication is directed to an agency employee because he intended that the information be conveyed to an agency employee with the intent that it be attributed to himself, and the circumstances indicate such a close working relationship between contractor personnel and agency employees that it was likely that the information conveyed to contractor personnel would be received by the agency.

(g) *On behalf of any other person—(1) On behalf of.* (i) A former employee makes a communication or appearance on behalf of another person if the former employee is acting as the other person's agent or attorney or if:

(A) The former employee is acting with the consent of the other person, whether express or implied; and

(B) The former employee is acting subject to some degree of control or direction by the other person in relation to the communication or appearance.

(ii) A former employee does not act on behalf of another merely because his communication or appearance is consistent with the interests of the other person, is in support of the other person, or may cause the other person to derive a benefit as a consequence of the former employee's activity.

(2) *Any other person.* The term "person" is defined in § 2641.104. For purposes of this paragraph, the term excludes the former employee himself or any sole proprietorship owned by the former employee.

Example 1 to paragraph (g): An employee of the Bureau of Land Management (BLM) participated in the decision to grant a private company the right to explore for minerals on certain Federal lands. After retiring from Federal service to pursue her hobbies, the former employee becomes concerned that BLM is misinterpreting a particular provision of the lease. The former employee may contact a current BLM employee on her own behalf in order to argue that her interpretation is correct.

Example 2 to paragraph (g): The former BLM employee from the previous example later joins an environmental organization as an uncompensated volunteer. The leadership of the organization authorizes the former employee to engage in any activity that she believes will advance the interests of the organization. She makes a communication on behalf of the organization when, pursuant to this authority, she writes to BLM on the organization's letterhead in order to present an additional argument concerning the interpretation of the lease provision. Although the organization did not direct her to send the specific communication to BLM, the circumstances establish that she made the communication with the consent of the organization and subject to a degree of control or direction by the organization.

Example 3 to paragraph (g): An employee of the Administration for Children and Families wrote the statement of work for a cooperative agreement to be issued to study alternative workplace arrangements. After terminating Government service, the former employee joins a nonprofit group formed to promote family togetherness. He is asked by his former agency to attend a meeting in order to offer his recommendations concerning the ranking of the grant applications he had reviewed while still a Government employee. The management of the nonprofit group agrees to permit him to take leave to attend the meeting in order to present his personal views concerning the ranking of the applications. Although the former employee is a salaried employee of the non-profit group and his recommendations may be consistent with the group's interests, the circumstances establish that he did not make the communication pursuant to mutual consent.

Example 4 to paragraph (g): An Assistant Secretary of Defense participated in a meeting at which a defense contractor pressed Department of Defense (DOD) officials to continue funding the contractor's sole source contract to develop the prototype

of a specialized robot. After terminating Government service, the former Assistant Secretary approaches the contractor and suggests that she can convince her former DOD colleagues to pursue development of the prototype robot. The contractor agrees that the former Assistant Secretary's proposed efforts could be useful and asks her to set up a meeting with key DOD officials for the following week. Although the former Assistant Secretary is not an employee of the contractor, the circumstances establish that she is acting subject to some degree of control or direction by the contractor.

(h) *Particular matter involving a specific party or parties*— (1) *Basic concept*. The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although "particular matter" is defined broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. 207(i)(3), such particular matters also must involve a specific party or parties in order to fall within the prohibition. These matters involve a specific activity or undertaking affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

Example 1 to paragraph (h)(1): An employee of the Department of Housing and Urban Development approved a specific city's application for Federal assistance for a renewal project. After leaving Government service, she may not represent the city in relation to that application as it is a particular matter involving specific parties in which she participated personally and substantially as a Government employee.

Example 2 to paragraph (h)(1): An attorney in the Department of Justice drafted provisions of a civil complaint that is filed in Federal court alleging violations of certain environmental laws by ABC Company. The attorney may not subsequently represent ABC before the Government in connection with the lawsuit, which is a particular matter involving specific parties.

Example 3 to paragraph (h)(1): A former Government employee seeks to represent a foreign government before an agency in connection with certain issues arising under a bilateral treaty that he helped to negotiate as a Government employee. He may not do so, if it is determined that the matter with respect to which he seeks to represent the foreign government is the same matter in which he previously participated as a Government employee. Although bilateral treaties may involve the adoption of broad national policies that do not focus specifically on the rights of any one person or company within the United States, such matters do involve specific parties, namely

the United States and the foreign country, which are parties to a contract-like agreement. Note also that certain employees may be subject to additional restrictions with respect to trade and treaty negotiations or representation of a foreign entity, pursuant to 18 U.S.C. 207(b) and (f).

(2) *Matters of general applicability not covered*. Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties.

Example 1 to paragraph (h)(2): A former employee of the Mine Safety and Health Administration (MSHA) participated personally and substantially in the development of a regulation establishing certain new occupational health and safety standards for mine workers. Because the regulation applies to the entire mining industry, it is a particular matter of general applicability, not a matter involving specific parties, and the former employee would not be prohibited from making post-employment representations to the Government in connection with this regulation.

Example 2 to paragraph (h)(2): The former employee in the previous example also assisted MSHA in its defense of a lawsuit brought by a trade association challenging the same regulation. This lawsuit is a particular matter involving specific parties, and the former MSHA employee would be prohibited from representing the trade association or anyone else in connection with the case.

Example 3 to paragraph (h)(2): An employee of the National Science Foundation formulated policies for a grant program for organizations nationwide to produce science education programs targeting elementary school age children. She is not prohibited from later representing a specific organization in connection with its application for assistance under the program.

Example 4 to paragraph (h)(2): An employee in the legislative affairs office of the Immigration and Naturalization Service (INS) drafted official comments submitted to Congress with respect to a pending immigration reform bill. After leaving the Government, he contacts the White House on behalf of a private organization seeking to influence the administration to insist on certain amendments to the bill. This is not prohibited. Generally, legislation is not a particular matter involving specific parties. However, if the same employee had participated as an INS employee in formulating the agency's position on proposed private relief legislation granting citizenship to a specific individual, this matter would involve specific parties, and the employee would be prohibited from later making representational contacts in connection with this matter.

Example 5 to paragraph (h)(2): An employee of the Food and Drug Administration (FDA) drafted a proposed rule requiring all manufacturers of a particular type of medical device to obtain

pre-market approval for their products. It was known at the time that only three or four manufacturers currently were marketing or developing such products. However, there was nothing to preclude other manufacturers from entering the market in the future. Moreover, the regulation on its face was not limited in application to those companies already known to be involved with this type of product at the time of promulgation. Because the proposed rule would apply to an open-ended class of manufacturers, not just specifically identified companies, it would not be a particular matter involving specific parties. After leaving Government, the former FDA employee would not be prohibited from representing a manufacturer in connection with the final rule or the application of the rule in any specific case.

Example 6 to paragraph (h)(2): A former agency attorney participated in drafting a standard form contract and certain standard terms and clauses for use in all future contracts. The adoption of a standard form and language for all contracts is a matter of general applicability, not a particular matter involving specific parties. Therefore, the attorney would not be prohibited from representing another person in a dispute involving the application of one of the standard terms or clauses in a specific contract in which he did not participate as a Government employee.

(3) *Specific parties at all relevant times*. The particular matter must involve specific parties both at the time the individual participated as a Government employee and at the time the former employee makes the communication or appearance, although the parties need not be identical at both times.

Example 1 to paragraph (h)(3): An employee of the Department of Defense (DOD) performed certain feasibility studies and other basic conceptual work for a possible innovation to a missile system. At the time she was involved in the matter, DOD had not identified any prospective contractors who might perform the work on the project. After she left Government, DOD issued a request for proposals to construct the new system, and she now seeks to represent one of the bidders in connection with this procurement. She may do so. Even though the procurement is a particular matter involving specific parties at the time of her proposed representation, no parties to the matter had been identified at the time she participated in the project as a Government employee.

Example 2 to paragraph (h)(3): A former employee in an agency inspector general's office conducted the first investigation of its kind concerning a particular fraudulent accounting practice by a grantee. This investigation resulted in a significant monetary recovery for the Government, as well as a settlement agreement in which the grantee agreed to use only certain specified accounting methods in the future. As a result of this case, the agency decided to issue a proposed rule expressly prohibiting the fraudulent accounting practice and requiring

all grantees to use the same accounting methods that had been developed in connection with the settlement agreement. The former employee may represent a group of grantees submitting comments critical of the proposed regulation. Although the proposed regulation in some respects evolved from the earlier fraud case, which did involve specific parties, the subsequent rulemaking proceeding does not involve specific parties.

(4) *Preliminary or informal stages in a matter.* When a particular matter involving specific parties begins depends on the facts. A particular matter may involve specific parties prior to any formal action or filings by the agency or other parties. Much of the work with respect to a particular matter is accomplished before the matter reaches its final stage, and preliminary or informal action is covered by the prohibition, provided that specific parties to the matter actually have been identified. With matters such as grants, contracts, and other agreements, ordinarily specific parties are first identified when initial proposals or indications of interest, such as responses to requests for proposals (RFP) or earlier expressions of interest, are received by the Government; in unusual circumstances, however, a prospective grant, contract, or agreement may involve specific parties even prior to the receipt of a proposal or expression of interest, if there are sufficient indicia that the Government has specifically identified a party.

Example 1 to paragraph (h)(4): A Government employee participated in internal agency deliberations concerning the merits of taking enforcement action against a company for certain trade practices. He left the Government before any charges were filed against the company. He has participated in a particular matter involving specific parties and may not represent another person in connection with the ensuing administrative or judicial proceedings against the company.

Example 2 to paragraph (h)(4): A former special Government employee (SGE) of the Agency for Health Care Policy and Research served, before leaving the agency, on a "peer review" committee that made a recommendation to the agency concerning the technical merits of specific grant proposal submitted by a university. The committee's recommendations are nonbinding and constitute only the first of several levels of review within the agency. Nevertheless, the SGE participated in a particular matter involving specific parties and may not represent the university in subsequent efforts to obtain the same grant.

Example 3 to paragraph (h)(4): Prior to filing a product approval application with a regulatory agency, a company sought guidance from the agency. The company provided specific information concerning the product, including its composition and

intended uses, safety and efficacy data, and the results and designs of prior studies on the product. After a series of meetings, the agency advised the company concerning the design of additional studies that it should perform in order to address those issues that the agency still believed were unresolved. Even though no formal application had been filed, this was a particular matter involving specific parties. The agency guidance was sufficiently specific, and it was clearly intended to address the substance of a prospective application and to guide the prospective applicant in preparing an application that would meet approval requirements. An agency employee who was substantially involved in developing this guidance could not leave the Government and represent the company when it submits its formal product approval application.

Example 4 to paragraph (h)(4): A Government scientist participated in preliminary, internal deliberations about her agency's need for additional laboratory facilities. After she terminated Government service, the General Services Administration (GSA) issued a request for proposals (RFP) seeking private architectural services to design the new laboratory space for the agency. The former employee may represent an architectural firm in connection with its response to the RFP. During the preliminary stage in which the former employee participated, no specific architectural firms had been identified for the proposed work.

Example 5 to paragraph (h)(4): In the previous example, the proposed laboratory was to be an extension of a recently completed laboratory designed by XYZ Architectural Associates. From the very beginning of deliberations, both the agency and GSA were aware that the proposed laboratory extension posed unique architectural issues, intimately related to certain technical features of the original laboratory design, that might best be addressed by XYZ, which had specific experience and certain efficiencies resulting from its prior work. Before leaving the Government, the former employee participated in meetings in which these design issues and the ways in which XYZ might resolve them were discussed internally. Although XYZ was not contacted at this stage, and the ultimate procurement process would be open to all bidders, the agency had already identified XYZ as a likely qualified bidder based on the circumstances surrounding XYZ's recent involvement in a related matter. The former employee may not represent XYZ or any other competing contractor before the Government in connection with this matter.

(5) *Same particular matter.* The prohibition applies only to communications or appearances in connection with the same particular matter involving specific parties in which the former employee participated as a Government employee. The same particular matter may continue in another form or in part. In determining whether two particular matters involving specific parties are the same, all relevant factors should be

considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed. With matters such as grants, contracts or other agreements, a new matter typically does not arise simply because there are amendments, modifications, or extensions, unless there are fundamental changes in objectives or the nature of the matter.

Example 1 to paragraph (h)(5): An employee drafted one provision of an agency contract to procure new software. After she left Government, a dispute arose under the same contract concerning a provision that she did not draft. She may not represent the contractor in this dispute. The contract as a whole is the particular matter involving specific parties and may not be fractionalized into separate clauses for purposes of avoiding the prohibition of 18 U.S.C. 207(a)(1).

Example 2 to paragraph (h)(5): A former special Government employee (SGE) recommended that his agency approve a new food additive made by Good Foods, Inc., on the grounds that it was proven safe for human consumption. The Healthy Food Alliance (HFA) sued the agency in Federal court to challenge the decision to approve the product. After leaving Government service, the former SGE may not serve as an expert witness on behalf of HFA in this litigation because it is a continuation of the same product approval matter in which he participated personally and substantially.

Example 3 to paragraph (h)(5): An employee of the Department of the Army negotiated and supervised a contract with Munitions, Inc. for four million mortar shells meeting certain specifications. After the employee left the Government, the Army sought a contract modification to add another one million shells. All specifications and contractual terms except price, quantity and delivery dates were identical to those in the original contract. The former Army employee may not represent Munitions in connection with this modification, because it is part of the same particular matter involving specific parties as the original contract.

Example 4 to the paragraph (h)(5): In the previous example, certain changes in technology occurred since the date of the original contract, and the proposed contract modifications would require the additional shells to incorporate new design features. Moreover, because of changes in the Army's internal system for storing and distributing shells to various locations, the modifications would require Munitions to deliver its product to several de-centralized destination points, thus requiring Munitions to develop novel delivery and handling systems and incur new transportation costs. The Army considers these modifications to be fundamental changes in the approach and objectives of the contract and may determine that these changes constitute a new particular matter.

Example 5 to paragraph (h)(5): A Government employee reviewed and approved certain wiretap applications. The

prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the original wiretap application. The reason is that the validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.

(i) *Participated personally and substantially*—(1) Participate. To “participate” means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or to purposefully forbear in order to affect the outcome of a matter. An employee can participate in particular matters that are pending other than in his own agency. An employee does not participate in a matter merely because he had knowledge of its existence or because it was pending under his official responsibility. An employee does not participate in a matter within the meaning of this section unless he does so in his official capacity.

(2) *Personally*. To participate “personally” means to participate:

(i) Directly, either individually or in combination with other persons; or

(ii) Through direct and active supervision of the participation of any person he supervises, including a subordinate.

(3) *Substantially*. To participate “substantially” means that the employee’s involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Provided that an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole. Participation in peripheral aspects of a matter or in aspects not directly involving the substantive merits of a matter (such as reviewing budgetary procedures or scheduling meetings) is not substantial.

Example 1 to paragraph (i): A General Services Administration (GSA) attorney drafted a standard form contract and certain standard terms and clauses for use in future

contracts. A contracting officer uses one of the standard clauses in a subsequent contract without consulting the GSA attorney. The attorney did not participate personally in the subsequent contract.

Example 2 to paragraph (i): An Internal Revenue Service (IRS) attorney is neither in charge of nor does she have official responsibility for litigation involving a particular delinquent taxpayer. At the request of a co-worker who is assigned responsibility for the litigation, the lawyer provides advice concerning strategy during the discovery stage of the litigation. The IRS attorney participated personally in the litigation.

Example 3 to paragraph (i): The IRS attorney in the previous example had no further involvement in the litigation. She participated substantially in the litigation notwithstanding that the post-discovery stages of the litigation lasted for ten years after the day she offered her advice.

Example 4 to paragraph (i): The General Counsel of the Office of Government Ethics (OGE) contacts the OGE attorney who is assigned to evaluate all requests for “certificates of divestiture” to check on the status of the attorney’s work with respect to all pending requests. The General Counsel makes no comment concerning the merits or relative importance of any particular request. The General Counsel did not participate in any particular request when she checked on the status of all pending requests.

Example 5 to paragraph (i): The OGE attorney in the previous example completes his evaluation of a particular certificate of divestiture request and forwards his recommendation to the General Counsel. The General Counsel forwards the package to the Director of OGE with a note indicating her concurrence with the attorney’s recommendation. The General Counsel participated substantially in the request.

Example 6 to paragraph (i): An International Trade Commission (ITC) computer programmer developed software designed to analyze data related to unfair trade practice complaints. At the request of an ITC employee who is considering the merits of a particular complaint, the programmer enters all the data supplied to her, runs the computer program, and forwards the results to the employee who will make a recommendation to an ITC Commissioner concerning the disposition of the complaint. The programmer did not participate substantially in the complaint.

(j) *United States is a party or has a direct and substantial interest*—(1) *United States*. For purposes of this paragraph, the “United States” means:

(i) The executive branch (including a Government corporation);

(ii) The legislative branch; or

(iii) The judicial branch.

(2) *Party or direct and substantial interest*. The United States may be a party to or have a direct and substantial interest in a particular matter even though it is pending in a non-Federal forum, such as a State court. The United States is neither a party to nor does it have a direct and substantial interest in

a particular matter merely because a Federal statute is at issue or a Federal court is serving as the forum for resolution of the matter. When it is not clear whether the United States is a party to or has a direct and substantial interest in a particular matter, this determination shall be made in accordance with the following procedure:

(i) *Coordination by designated agency ethics official*. The designated agency ethics official (DAEO) for the former employee’s agency shall have the primary responsibility for coordinating this determination. When it appears likely that a component of the United States Government other than the former employee’s former agency may be a party to or have a direct and substantial interest in the particular matter, the DAEO shall coordinate with agency ethics officials serving in those components.

(ii) *Agency determination*. A component of the United States Government shall determine if it is a party to or has a direct and substantial interest in a matter in accordance with its own internal procedures. It shall consider all relevant factors, including whether:

(A) The component has a financial interest in the matter;

(B) The matter is likely to have an effect on the policies, programs, or operations of the component;

(C) The component is involved in any proceeding associated with the matter, e.g., as by having provided witnesses or documentary evidence; and

(D) The component has more than an academic interest in the outcome of the matter.

§ 2641.202 Two-year restriction on any former employee’s representations to United States concerning particular matter for which the employee had official responsibility [18 U.S.C. 207(a)(2)].

(a) *Basic prohibition of 18 U.S.C. 207(a)(2)*. For two years after his Government service terminates, no former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of his Government service.

(b) *Exceptions and waivers*. The prohibition of 18 U.S.C. 207(a)(2) does not apply to a former employee who is:

(1) Acting on behalf of the United States. See § 2641.301(a).

(2) Acting as an elected State or local government official. See § 2641.301(b).

(3) Communicating scientific or technological information pursuant to procedures or certification. See § 2641.301(e).

(4) Testifying under oath. See § 2641.301(f).

(5) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).

(6) Acting as an employee of a Government-owned, contractor operated entity pursuant to a waiver. See § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(a)(2) is a two-year restriction that commences upon an employee's termination from Government service. See example 9 to paragraph (j) of this section.

(d) *Communication or appearance.* See § 2641.201(d).

(e) *With the intent to influence.* See § 2641.201(e).

(f) *To or before an employee of the United States.* See § 2641.201(f).

(g) *On behalf of any other person.* See § 2641.201(g).

(h) *Particular matter involving a specific party or parties.* See § 2641.201(h).

(i) *United States is a party or has a direct and substantial interest.* See § 2641.201(j).

(j) *Official responsibility—(1) Definition.* “Official responsibility” means 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. Ordinarily, the scope of an employee's official responsibility is determined by those functions assigned by statute, regulation, Executive order, job description, or delegation of authority. All particular matters under consideration in an agency are under the official responsibility of the agency head and each is under that of any intermediate supervisor who supervises a person, including a subordinate, who actually participates in the matter or who has been assigned to participate in the matter within the scope of his official duties. A nonsupervisory employee does not have official responsibility for his own assignments within the meaning of section 207(a)(2). Authority to direct Government action concerning only ancillary or nonsubstantive aspects of a matter, such as budgeting, equal employment, scheduling, or format requirements does

not, ordinarily, constitute official responsibility for the matter as a whole.

(2) *Actually pending.* A matter is actually pending under an employee's official responsibility if it has been referred to the employee for assignment or has been referred to or is under consideration by any person he supervises, including a subordinate. A matter remains pending even when it is not under “active” consideration. There is no requirement that the matter must have been pending under the employee's official responsibility for a certain length of time.

(3) *Temporary duties.* An employee ordinarily acquires official responsibility for all matters within the scope of his position immediately upon assuming the position. However, under certain circumstances, an employee who is on detail (or other temporary assignment) to a position or who is serving in an “acting” status might not be deemed to have official responsibility for any matter by virtue of such temporary duties. Specifically, an employee performing such temporary duties will not thereby acquire official responsibility for matters within the scope of the position where he functions only in a limited “caretaker” capacity, as evidenced by such factors as:

(i) Whether the employee serves in the position for no more than 60 consecutive calendar days;

(ii) Whether there is actually another incumbent for the position, who is temporarily absent, for example, on travel or leave;

(iii) Whether there has been no event triggering the provisions of 5 U.S.C. 3345(a); and

(iv) Whether there are any other circumstances indicating that, given the temporary nature of the detail or acting status, there was no reasonable expectation of the full authority of the position.

(4) *Effect of leave status.* The scope of an employee's official responsibility is not affected by annual leave, terminal leave, sick leave, excused absence, leave without pay, or similar absence from assigned duties.

(5) *Effect of disqualification.* Official responsibility for a matter is not eliminated through self-disqualification or avoidance of personal participation in a matter, as when an employee is disqualified from participating in a matter in accordance with subparts D, E, or F of 5 CFR part 2635 or part 2640. Official responsibility for a matter can be terminated by a formal modification of an employee's responsibilities, such as by a change in the employee's position description.

(6) *One-year period before termination.* Section 207(a)(2) applies only with respect to a particular matter that was actually pending under the former employee's official responsibility:

(i) At some time when the matter involved a specific party or parties; and

(ii) Within his last year of Government service.

(7) *Knowledge of official responsibility.* A communication or appearance is not prohibited unless, at the time of the proposed post-employment communication or appearance, the former employee knows or reasonably should know that the matter was actually pending under his official responsibility within the one-year period prior to his termination from Government service. It is not necessary that a former employee have known during his Government service that the matter was actually pending under his official responsibility.

Note to paragraph (j): 18 U.S.C. 207(a)(2) requires only that the former employee “reasonably should know” that the matter was pending under his official responsibility. Consequently, when the facts suggest that a particular matter involving specific parties could have been actually pending under his official responsibility, a former employee should seek information from an agency ethics official or other Government official to clarify his role in the matter. See the definition of agency ethics official in § 2641.105.

Example 1 to paragraph (j): An Assistant Secretary of State's position description specifies that he is responsible for a certain class of treaty negotiations. These negotiations are handled by an office under his supervision. As a practical matter, however, the Assistant Secretary has not become involved with any treaty negotiation of this type. The Assistant Secretary has official responsibility for all such treaty negotiations as specified in his position description.

Example 2 to paragraph (j): A budget officer at the National Oceanic and Atmospheric Administration (NOAA) is asked to review NOAA's budget to determine if there are funds still available for the purchase of a new hurricane tracking device. The budget officer does not have official responsibility for the resulting contract even though she is responsible for all budget matters within the agency. The identification of funds for the contract is an ancillary aspect of the contract.

Example 3 to paragraph (j): An Internal Revenue Service (IRS) auditor worked in the office responsible for the tax-exempt status of nonprofit organizations. Subsequently, he was transferred to the IRS office concerned with public relations. When contacted by an employee of his former office for advice concerning a matter involving a certain nonprofit organization, the auditor provides useful suggestions. The auditor's supervisor

in the public relations office does not have official responsibility for the nonprofit matter since it does not fall within the scope of the auditor's current duties.

Example 4 to paragraph (j): An information manager at the Central Intelligence Agency (CIA) assigns a nonsupervisory subordinate to research an issue concerning a request from a news organization for information concerning past agency activities. Before she commences any work on the assignment, the subordinate terminates employment with the CIA. The request was not pending under the subordinate's official responsibility since a non-supervisory employee does not have official responsibility for her own assignments. (Once the subordinate commences work on the assignment, she may be participating "personally and substantially" within the meaning of 18 U.S.C. 207(a)(1) and § 2641.201(i).)

Example 5 to paragraph (j): A regional employee of the Federal Emergency Management Agency requests guidance from the General Counsel concerning a contractual dispute with Baker Company. The General Counsel immediately assigns the matter to a staff attorney whose workload can accommodate the assignment, then retires from Government two days later. Although the staff attorney did not retrieve the assignment from his in-box prior to the General Counsel's departure, the Baker matter was actually pending under the General Counsel's official responsibility from the time the General Counsel received the request for guidance.

Example 6 to paragraph (j): A staff attorney in the Federal Emergency Management Agency's Office of General Counsel is consulted by procurement officers concerning the correct resolution of a contractual matter involving Able Company. The attorney renders an opinion resolving the question. The same legal question arises later in several contracts with other companies but none of the disputes with such companies is referred to the Office of General Counsel. The General Counsel had official responsibility for the determination of the Able Company matter but the subsequent matters were never actually pending under his official responsibility.

Example 7 to paragraph (j): An employee of the National Endowment for the Humanities becomes "acting" Division Director of the Division of Education Programs when the Division Director is away from the office for three days to attend a conference. During those three days, the employee has authority to direct Government action in connection with many matters with which she ordinarily would have no involvement. However, in view of the brief time period and the fact that there remains an incumbent in the position of Division Director, the agency ethics official properly may determine that acting official did not acquire official responsibility for all matters then pending in the Division.

Example 8 to paragraph (j): A division director at the Food and Drug Administration disqualified himself from participating in the review of a drug for Alzheimer's disease, in accordance with subpart E of 5 CFR part 2635, because his brother headed the private

sector team which developed the drug. The matter was instead assigned to the division director's deputy. The director continues to have official responsibility for review of the drug. The division director also would have retained official responsibility for the matter had he either asked his supervisor or another division director to oversee the matter.

Example 9 to paragraph (j): The Deputy Secretary of a department terminates Government service to stay home with her newborn daughter. Four months later, she returns to the department to serve on an advisory committee as a special Government employee (SGE). After three months, she terminates Government service once again in order to accept a part-time position with a public relations firm. The 18 U.S.C. 207(a)(2) bar commences when she resigns as Deputy Secretary and continues to run for two years. (Any action taken in carrying out official duties as a member of the advisory committee would be undertaken on behalf of the United States and would, therefore, not be restricted by 18 U.S.C. 207(a)(2). See § 2641.301(a).) A second two-year restriction commences when she terminates from her second period of Government service but it applies only with respect to any particular matter actually pending under her official responsibility during her three-month term as an SGE.

§ 2641.203 One-year restriction on any former employee's representations, aid, or advice concerning ongoing trade or treaty negotiation [18 U.S.C. 207(b)].

(a) *Basic prohibition of 18 U.S.C. 207(b).* For one year after his Government service terminates, no former employee shall knowingly represent, aid, or advise on the basis of "covered information," any other person concerning an ongoing trade or treaty negotiation in which, during his last year of Government service, he participated personally and substantially as an employee. "Covered information" refers to agency records which were accessible to the employee which he knew or should have known were designated as exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552).

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(b) does not apply to a former employee who is:

- (1) Acting on behalf of the United States. See § 2641.301(a).
- (2) Acting as an elected State or local government official. See § 2641.301(b).
- (3) Testifying under oath. See § 2641.301(f).
- (4) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).
- (5) Acting as an employee at a Government-owned, contractor operated entity pursuant to a waiver. See § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(b) commences

upon an employee's termination from Government service. The restriction lasts for one year or until the termination of the negotiation, whichever occurs first.

(d) *Represent, aid, or advise.* [Reserved]

(e) *Any other person.* [Reserved]

(f) *On the basis of.* [Reserved]

(g) *Covered information.* [Reserved]

(h) *Ongoing trade or treaty negotiation.* [Reserved]

(i) *Participated personally and substantially.* [Reserved]

§ 2641.204 One-year restriction on any former senior employee's representations to former agency concerning any matter, regardless of prior involvement [18 U.S.C. 207(c)].

(a) *Basic prohibition of 18 U.S.C. 207(c).* For one year after his service in a senior position terminates, no former senior employee may knowingly, with the intent to influence, make any communication to or appearance before an employee of an agency in which he served in any capacity within the one-year period prior to his termination from a senior position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former senior employee seeks official action by any employee of such agency. An individual who served in a "very senior employee" position is subject to the broader one-year restriction set forth in 18 U.S.C. 207(d) in lieu of that set forth in section 207(c). See § 2641.205.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(c) does not apply to a former senior employee who is:

- (1) Acting on behalf of the United States. See § 2641.301(a).
- (2) Acting as an elected State or local government official. See § 2641.301(b).
- (3) Acting on behalf of specified entities. See § 2641.301(c).
- (4) Making uncompensated statements based on special knowledge. See § 2641.301(d).
- (5) Communicating scientific or technological information pursuant to procedures or certification. See § 2641.301(e).
- (6) Testifying under oath. See § 2641.301(f).
- (7) Acting on behalf of a candidate or political party. See § 2641.301(g).
- (8) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).
- (9) Acting as an employee of a Government-owned, contractor operated entity pursuant to a waiver. See § 2641.301(i).

(10) Subject to a waiver issued for certain positions. See § 2641.301(j).

(c) *Applicability to special Government employees and Intergovernmental Personnel Act appointees or detailees—(1) Special Government employees.* (i) 18 U.S.C. 207(c) applies to an individual as a result of service as a special Government employee (SGE) who:

(A) Served in a senior employee position while serving as an SGE; and

(B) Served 60 or more days as an SGE during the one-year period before terminating service as a senior employee.

(ii) Any day on which work is performed shall count toward the 60-day threshold without regard to the number of hours worked that day or whether the day falls on a weekend or holiday. For purposes of determining whether an SGE's rate of basic pay is equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service, within the meaning of the definition of senior employee in § 2641.104, the employee's hourly rate of pay (or daily rate divided by eight) shall be multiplied by 2087, the number of Federal working hours in one year. (In the case of a Reserve officer of the Armed Forces or an officer of the National Guard who is an SGE serving in a senior employee position, 18 U.S.C. 207(c) applies if the officer served 60 or more days as an SGE within the one-year period prior to his termination from a period of active duty or active duty for training.)

(2) *Intergovernmental Personnel Act appointees or detailees.* 18 U.S.C. 207(c) applies to an individual serving as a senior employee pursuant to an appointment or detail under the Intergovernmental Personnel Act, 5 U.S.C. 3371–3376. An individual is a senior employee if he received total pay from Federal or non-Federal sources equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service (exclusive of any reimbursement for a non-Federal employer's share of benefits not paid to the employee as salary), and:

(i) The individual served in a Federal position ordinarily compensated at a rate equal to or greater than level 5 of the Senior Executive Service, regardless of what portion of the pay is derived from Federal expenditures or expenditures by the individual's non-Federal employer;

(ii) The individual received a direct Federal payment, pursuant to 5 U.S.C. 3374(c)(1), that supplemented the salary that he received from his non-Federal employer; or

(iii) The individual's non-Federal employer received Federal reimbursement equal to or greater than the amount of basic pay payable for level 5 of the Senior Executive Service.

Example 1 to paragraph (c): An employee of a private research institution serves on an advisory committee that convenes periodically to discuss United States policy on foreign arms sales. The expert is compensated at a daily rate which is the equivalent of the rate of basic pay payable to a full-time employee for level 5 of the Senior Executive Service. The individual serves two hours per day for 65 days before resigning from the advisory committee nine months later. The individual becomes subject to 18 U.S.C. 207(c) when she resigns from the advisory committee since she served 60 or more days as a special Government employee during the one-year period before terminating service as a senior employee.

Example 2 to paragraph (c): An individual is detailed from a university to a Federal department under the Intergovernmental Personnel Act to do work that had previously been performed by a GS–15 employee. While on detail, the individual continues to receive pay from the university in an amount \$5,000 less than the rate of basic pay payable for level 5 of the Senior Executive Service (SES). In addition, the department pays a \$25,000 supplement directly to the individual, as authorized by 5 U.S.C. 3374(c)(1). Since the employee's total pay is equal to or greater than the rate of basic pay payable for level 5 of the SES, and a portion of that compensation is paid directly to the individual by the department, he becomes subject to 18 U.S.C. 207(c) when his detail ends.

(d) *Commencement and length of restriction.* 18 U.S.C. 207(c) is a one-year restriction. The one-year period is measured from the date when the employee ceases to serve in a senior employee position, not from the termination of Government service, unless the two events occur simultaneously. (In the case of a Reserve officer of the Armed Forces or an officer of the National Guard who is a special Government employee serving in a senior employee position, section 207(c) is measured from the date when the officer terminates a period of active duty or active duty for training.)

Example 1 to paragraph (d): An employee at the Department of Labor (DOL) serves in a senior employee position. He then accepts a GS–15 position at the Federal Labor Relations Authority (FLRA) but terminates Government service six months later to accept a job with private industry. 18 U.S.C. 207(c) commences when he ceases to be a senior employee at DOL, even though he does not terminate Government service at that time. (Any action taken in carrying out official duties on behalf of FLRA while still employed by that agency would be undertaken on behalf of the United States and would, therefore, not be restricted by section 207(c). See § 2641.301(a).)

Example 2 to paragraph (d): In the previous example, the DOL employee accepts a senior employee position at FLRA rather than a GS–15 position. The bar of 18 U.S.C. 207(c) commences when, six months later, he terminates service in the second senior employee position to accept a job with private industry. (The bar will apply with respect to both the DOL and FLRA. See paragraph (g) of § 2641.204 and examples 2 and 3 to that paragraph).

(e) *Communication or appearance.* See § 2641.201(d).

(f) *With the intent to influence.* See § 2641.201(e).

(g) *To or before employee of former agency—(1) Employee.* For purposes of this paragraph, a former senior employee may not contact:

(i) Any current Federal employee of the former senior employee's "former agency" as defined in paragraph (g)(2) of this section;

(ii) An individual detailed under the Intergovernmental Personnel Act (5 U.S.C. 3371–3376) to the former senior employee's former agency;

(iii) An individual detailed to the former senior employee's former agency from another agency;

(iv) An individual serving with the former senior employee's former agency as a collateral duty pursuant to statute or Executive order; and

(v) In the case of a communication or appearance made by a former senior employee who is barred by 18 U.S.C. 207(c) from communicating to or appearing before the Executive Office of the President, the President and Vice President.

(2) *Former agency.* The term "agency" is defined in § 2641.104. Unless eligible to benefit from the designation of distinct and separate agency components as described in § 2641.302, a former senior employee's former agency will ordinarily be considered to be the whole of any larger agency of which his former agency was a part on the date he terminated senior service.

(i) *One-year period before termination.* 18 U.S.C. 207(c) applies with respect to agencies in which the former senior employee served within the one-year period prior to his termination from a senior employee position.

(ii) *Served in any capacity.* Once the restriction commences, 18 U.S.C. 207(c) applies with respect to any agency in which the former senior employee served in any capacity during the one-year period, regardless of his position, rate of basic pay, or pay grade.

(iii) *Multiple Assignments.* An employee can simultaneously serve in more than one agency. A former senior employee will be considered to have

served in his own employing entity and in any entity to which he was detailed for any length of time or with which he was required to serve as a collateral duty pursuant to statute or Executive order.

(iv) *Effect of organizational changes.* If a former senior employee's former agency has been significantly altered by organizational changes after his termination from senior service, it may be necessary to determine whether a successor entity is the same agency as the former senior employee's former agency. The appropriate designated agency ethics official, in consultation with the Office of Government Ethics, shall identify the entity that is the individual's former agency. Whether a successor entity is the same as the former agency depends upon whether it has substantially the same organizational mission, the extent of the termination or dispersion of the agency's functions, and other factors as may be appropriate.

(A) *Agency abolished or substantially changed.* If a successor entity is not identifiable as substantially the same agency from which the former senior employee terminated, the 18 U.S.C. 207(c) prohibition will not bar communications or appearances by the former senior employee to that successor entity.

(B) *Agency substantially the same.* If a successor entity remains identifiable as substantially the same entity from which the former senior employee terminated, the 18 U.S.C. 207(c) bar will extend to the whole of the successor entity.

(C) *Employing entity is made separate.* If an employing entity is made separate from an agency of which it was a part, but it remains identifiable as substantially the same entity from which the former senior employee terminated senior service before the entity was made separate, the 18 U.S.C. 207(c) bar will apply to a former senior employee of that entity only with respect to the new separate entity.

(D) *Component designations.* If a former senior employee's former agency was a designated "component" within the meaning of § 2641.302 on the date of his termination as senior employee, see § 2641.302(g).

(3) *To or before.* Except as provided in paragraph (g)(4) of this section, a communication "to" or appearance "before" an employee of a former senior employee's former agency is one:

(i) Directed to and received by the former senior employee's former agency, even though not addressed to a particular employee; or

(ii) Directed to and received by an employee in his capacity as an employee of a former senior employee's former agency including in his capacity as an employee serving in the agency on detail or, if pursuant to statute or Executive order, as a collateral duty. A former senior employee does not direct his communication or appearance to a bystander who merely happens to overhear the communication or witness the appearance.

(4) *Public commentary.* (i) A former senior employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to make a prohibited communication or appearance if the forum:

(A) Is not sponsored or co-sponsored by the former senior employee's former agency;

(B) Is attended by a large number of people; and

(C) A significant proportion of those attending are not employees of the former senior employee's former agency.

(ii) In the circumstances described in paragraph (g)(4)(i) of this section, a former senior employee may engage in exchanges with any other speaker or with any member of the audience.

(iii) A former senior employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely-available publication.

Example 1 to paragraph (g): Two months after retiring from a senior employee position at the United States Department of Agriculture (USDA), the former senior employee is asked to represent a poultry producer in a compliance matter involving the producer's storage practices. The former senior employee may not represent the poultry producer before a USDA employee in connection with the compliance matter or any other matter in which official action is sought from the USDA. He has ten months remaining of the one-year bar which commenced upon his termination as a senior employee with the USDA.

Example 2 to paragraph (g): An individual serves for several years at the Commodity Futures Trading Commission (CFTC) as a GS-15. With no break in service, she then accepts a senior employee position at the Export-Import Bank of the United States (Ex-Im Bank) where she remains for nine months until she leaves Government service in order to accept a position in the private sector. Since the individual served in both the CFTC and the Ex-Im Bank within her last year of senior service, she is barred by 18 U.S.C. 207(c) as to both agencies for one year commencing from her termination from the senior employee position at the Ex-Im Bank.

Example 3 to paragraph (g): An individual serves for several years at the Securities and Exchange Commission (SEC) in a senior employee position. He terminates

Government service in order to care for his parent who is recovering from heart surgery. Two months later, he accepts a senior employee position at the Overseas Private Investment Corporation (OPIC) where he remains for nine months until he leaves Government service in order to accept a position in the private sector. The 18 U.S.C. 207(c) bar commences when he resigns from the SEC and continues to run for one year. (Any action taken in carrying out official duties as an employee of OPIC would be undertaken on behalf of the United States and would, therefore, not be restricted by section 207(c). See § 2641.301(a).) A second one-year restriction commences when he resigns from OPIC. The second restriction will apply with respect to OPIC only. Upon his termination from the OPIC position, he will have one remaining month of the section 207(c) restriction arising from his termination of his SEC position. This remaining month of restriction will run concurrently with the first month of the one-year OPIC restriction.

Example 4 to paragraph (g): An architect serves in a senior employee position in the Agency for Affordable Housing. Subsequent to her termination from the position, the agency is abolished and its functions are distributed among three other agencies within three departments, the Department of Housing and Urban Development, the Department of the Interior, and the Department of Justice. None of these successor entities is identifiable as substantially the same entity as the Agency for Affordable Housing, and, accordingly, the 18 U.S.C. 207(c) bar will not apply to the architect.

(h) *On behalf of any other person.* See § 2641.201(g).

(i) *Matter on which former senior employee seeks official action—(1) Seeks official action.* A former senior employee seeks official action when the circumstances establish that he is making his communication or appearance for the purpose of inducing a current employee, as defined in paragraph (g) of this section, to make a decision or to otherwise act in his official capacity.

(2) *Matter.* The prohibition on seeking official action applies with respect to any matter, including:

(i) Any "particular matter involving a specific party or parties" as defined in § 2641.201(h);

(ii) The consideration or adoption of broad policy options that are directed to a large and diverse group of persons;

(iii) A new matter that was not previously pending at or of interest to the former senior employee's former agency; and

(iv) A matter pending at any other agency in the executive branch, an independent agency, the legislative branch, or the judicial branch.

Example 1 to paragraph (i): A former senior employee at the National Capital Planning Commission (NCPC) wishes to

contact a friend who still works at the NCPC to solicit a donation for a local charitable organization. The former senior employee may do so since the circumstances establish that he would not be making the communication for the purpose of inducing the NCPC employee to make a decision in his official capacity about the donation.

Example 2 to paragraph (i): A former senior employee at the Department of Defense wishes to contact the Secretary of Defense to ask him if he would be interested in attending a cocktail party. At the party, the former senior employee would introduce the Secretary to several of the former senior employee's current business clients who have sought the introduction. The former senior employee and the Secretary do not have a history of socializing outside the office, the Secretary is in a position to affect the interests of the business clients, and all expenses associated with the party will be paid by the former senior employee's consulting firm. The former senior employee should not contact the Secretary. The circumstances do not establish that the communication would be made other than for the purpose of inducing the Secretary to make a decision in his official capacity about the invitation.

Example 3 to paragraph (i): A former senior employee at the National Science Foundation (NSF) accepts a position as vice president of a company that was hurt by recent cuts in the defense budget. She contacts the NSF's Director of Legislative and Public Affairs to ask the Director to contact a White House official in order to press the need for a new science policy to benefit her company. The former senior employee made a communication for the purpose of inducing the NSF employee to make a decision in his official capacity about contacting the White House.

§ 2641.205 One-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement [18 U.S.C. 207(d)].

(a) *Basic prohibition of 18 U.S.C. 207(d).* For one year after his service in a very senior employee position terminates, no former very senior employee shall knowingly, with the intent to influence, make any communication to or appearance before any official appointed to an Executive Schedule position listed in 5 U.S.C. 5312–5316 or before any employee of an agency in which he served as a very senior employee within the one-year period prior to his termination from a very senior employee position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former very senior employee seeks official action by any official or employee.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(d) does not apply to a former very senior employee who is:

(1) Acting on behalf of the United States. *See* § 2641.301(a).

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

(3) Acting on behalf of specified entities. *See* § 2641.301(c).

(4) Making uncompensated statements based on special knowledge. *See* § 2641.301(d).

(5) Communicating scientific or technological information pursuant to procedures or certification. *See* § 2641.301(e).

(6) Testifying under oath. *See* § 2641.301(f).

(7) Acting on behalf of a candidate or political party. *See* § 2641.301(g).

(8) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(9) Acting as an employee of a Government-owned, contractor operated entity pursuant to a waiver. *See* § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(d) is a one-year restriction. The one-year period is measured from the date when the employee ceases to serve in a very senior employee position, not from the termination of Government service, unless the two events occur simultaneously. *See* examples 1 and 2 to paragraph (d) of § 2641.204.

(d) *Communication or appearance.* *See* § 2641.201(d).

(e) *With the intent to influence.* *See* § 2641.201(e).

(f) *To or before employee of former agency.* *See* § 2641.204(g), except that this section covers only former very senior employees and applies only with respect to the agency or agencies in which a former very senior employee served as a very senior employee, and very senior employees do not benefit from the designation of distinct and separate agency components as referenced in § 2641.204(g)(2).

(g) *To or before an official appointed to an Executive Schedule position.* *See* § 2641.204(g)(3) for "to or before," except that this section covers only former very senior employees and also extends to a communication or appearance before any official currently appointed to a position that is listed in sections 5 U.S.C. 5312–5316. A communication made to an official described in 5 U.S.C. 5312–5316 can include a communication to a subordinate of such official with the intent that the information be conveyed directly to the official and attributed to the former very senior employee.

(h) *On behalf of any other person.* *See* § 2641.201(g).

(i) *Matter on which former very senior employee seeks official action.* *See*

§ 2641.204(i), except that this section only covers former very senior employees.

Example 1 to § 2641.205: The former Attorney General may not contact the Assistant Attorney General of the Antitrust Division on behalf of a professional sports league in support of a proposed exemption from certain laws, nor may he contact the Secretary of Labor. He may, however, speak directly to the President or Vice President concerning the issue.

Example 2 to § 2641.205: The former White House Chief of Staff is now the Chief Executive Officer of a major computer firm and wishes to convince the new Administration to change its new policy concerning computer chips. The former Chief of Staff may contact an employee of the Department of Commerce who, although paid at a level fixed according to level III of the Executive Schedule, does not occupy a position actually listed in 5 U.S.C. 5312–5316. She could not contact an employee working in the Office of the United States Trade Representative, an office within the Executive Office of the President (her former agency).

Example 3 to § 2641.205: A senior employee serves in the Department of Agriculture for several years. He is then appointed to serve as the Secretary of Health and Human Services (HHS) but resigns seven months later. Since the individual served as a very senior employee only at HHS, he is barred for one year by 18 U.S.C. 207(d) as to any employee of HHS and any official currently appointed to an Executive Schedule position listed in 5 U.S.C. 5312–5316, including any such official serving in the Department of Agriculture. (In addition, a one-year section 207(c) bar commenced when he terminated service as a senior employee at the Department of Agriculture.)

Example 4 to § 2641.205: The former Secretary of the Department of Labor may not represent another person in a meeting with the current Secretary of Transportation to discuss a proposed regulation on highway safety standards.

Example 5 to § 2641.205: In the previous example, the former very senior employee would like to meet instead with the special assistant to the Secretary of Transportation. The former employee knows that the special assistant has a close working relationship with the Secretary, and he expects that the special assistant will brief the Secretary about any discussions at the proposed meeting. The former very senior employee may not meet with the assistant.

§ 2641.206 One-year restriction on any former senior or very senior employee's representations on behalf of, or aid or advice to, a foreign entity [18 U.S.C. 207(f)].

(a) *Basic prohibition of 18 U.S.C. 207(f).* For one year after service in a senior or very senior employee position terminates, no former senior employee or former very senior employee shall knowingly, with the intent to influence a decision of an employee of an agency of the United States, represent, aid, or

advise a foreign government or foreign political party.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(f) does not apply to a former senior or former very senior employee who is:

(1) Acting on behalf of the United States. See § 2641.301(a). (Note, however, the limitation in § 2641.301(a)(2)(ii).)

(2) Acting as an elected State or local government official. See § 2641.301(b).

(3) Testifying under oath. See § 2641.301(f).

(4) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).

(5) Acting as an employee of a Government-owned, contractor operated entity pursuant to a waiver. See § 2641.301(i).

(6) Subject to a waiver issued for certain positions. See § 2641.301(j).

(c) *Commencement and length of restriction*—(1) *Generally.* Except as provided in paragraph (c)(2) of this section, 18 U.S.C. 207(f) is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a senior or very senior employee, not from the termination of Government service, unless the two occur simultaneously. See example 1 to paragraph (d) of § 2641.204.

(2) *U.S. Trade Representative or Deputy U.S. Trade Representative.* 18 U.S.C. 207(f) is a permanent restriction as applied to a former U.S. Trade Representative or Deputy U.S. Trade Representative.

(d) *Represent, aid, or advise.*
[Reserved]

(e) *With the intent to influence.*
[Reserved]

(f) *Decision of employee of an agency.*
[Reserved]

(g) *Foreign entity.* [Reserved]

Subpart C—Exceptions, Waivers and Separate Components

§ 2641.301 Statutory exceptions and waivers.

(a) *Exception for acting on behalf of United States.* A former employee is not prohibited by any of the prohibitions of 18 U.S.C. 207 from engaging in any activity on behalf of the United States.

(1) *United States.* For purposes of this paragraph, the term “United States” means:

(i) The executive branch (including a Government corporation);

(ii) The legislative branch; or

(iii) The judicial branch.

(2) *On behalf of the United States.* A former employee will be deemed to engage in the activity on behalf of the

United States if he acts in accordance with paragraph (a)(2)(i) or (a)(2)(ii) of this section.

(i) *As employee of the United States.* A former employee engages in an activity on behalf of the United States when he carries out official duties as a current employee of the United States.

(ii) *As other than employee of the United States.* (A) Provided that he does not represent, aid, or advise a foreign entity in violation of 18 U.S.C. 207(f), a former employee engages in an activity on behalf of the United States when he serves:

(1) As a representative of the United States pursuant to a specific agreement with the United States to provide representational services involving a fiduciary duty to the United States; or

(2) As a witness called by the United States (including a Congressional committee or subcommittee) to testify at a Congressional hearing (even if applicable procedural rules do not require him to declare by oath or affirmation that he will testify truthfully).

(B) A former employee will not be deemed to engage in an activity on behalf of the United States merely because he is performing work funded by the Government, because he is engaging in the activity in response to a contact initiated by the Government, because the Government will derive some benefit from the activity, or because he or the person on whose behalf he is acting may share the same objective as the Government.

Note to paragraph (a)(2)(ii): See also § 2641.301(f) concerning the permissibility of testimony under oath, including testimony as an expert witness, when a former employee is called as a witness by the United States.

Example 1 to paragraph (a): An employee of the Department of Labor (DOL) transfers to become an employee of the Pension Benefit Guaranty Corporation (PBGC). The PBGC, a wholly owned Government corporation, is a corporation in which the United States has a proprietary interest. The former DOL employee may press the PBGC's point of view in a meeting with DOL employees concerning an airline bankruptcy case in which he was personally and substantially involved while at the DOL. His communications to the DOL on behalf of the PBGC would be made on behalf of the United States.

Example 2 to paragraph (a): A Federal Transit Administration (FTA) employee recommended against the funding of a certain subway project. After terminating Government service, she is hired by a Congressman as a member of his staff to perform a variety of duties, including miscellaneous services for the Congressman's constituents. The former employee may contact the FTA on behalf of a constituent

group as part of her official duties in order to argue for the reversal of the subway funding decision in which she participated while still an employee of the FTA. Her communications to the FTA on behalf of the constituent group would be made on behalf of the United States.

Example 3 to paragraph (a): A Postal Service attorney participated in discussions with the Office of Personnel Management (OPM) concerning a dispute over the mailing of health plan brochures. After terminating Government service, the attorney joins a law firm as a partner. He is assigned by the firm's managing partner to represent the Postal Service pursuant to a contract requiring the firm to provide certain legal services. The former senior employee may represent the Postal Service in meetings with OPM concerning the dispute about the health plan brochures. The former senior employee's suggestions to the Postal Service concerning strategy and his arguments to OPM concerning the dispute would be made on behalf of the United States (even though he is also acting on behalf of his law firm when he performs representational services for the United States). A communication to the Postal Service concerning a disagreement about the law firm's fee, however, would not be made on behalf of the United States.

Example 4 to paragraph (a): A former senior employee of the Food and Drug Administration (FDA), now an employee of a drug company, is called by a Congressional committee to give unsworn testimony concerning the desirability of instituting cost controls in the pharmaceutical industry. The former senior employee may address the committee even though her testimony will unavoidably also be directed to a current employee of the FDA who has also been asked to testify as a member of the same panel of experts. The former employee's communications at the hearing, provided at the request of the United States, would be made on behalf of the United States.

Example 5 to paragraph (a): A National Security Agency (NSA) analyst drafted the specifications for a contract that was awarded to the Secure Data Corporation to develop prototype software for the processing of foreign intelligence information. After terminating Government service, the analyst is hired by the corporation. The former employee may not attempt to persuade NSC officials that the software is in accord with the specifications. Although the development of the software is expected to significantly enhance the processing of foreign intelligence information and the former employee's opinions might be useful to current NSC employees, his communications would not be made on behalf of the United States.

Example 6 to paragraph (a): A senior employee at the Department of the Air Force specialized in issues relating to the effective utilization of personnel. After terminating Government service, the former senior employee is hired by a contractor operating a Federally Funded Research and Development Center (FFRDC). The FFRDC is not a “Government corporation” as defined in § 2641.104. The former senior employee may not attempt to convince the Air Force of

the manner in which Air Force funding should be allocated among projects proposed to be undertaken by the FFRDC. Although the work performed by the FFRDC will be determined by the Air Force, may be accomplished at Government-owned facilities, and will benefit the Government, her communications would not be made on behalf of the United States.

Example 7 to paragraph (a): A Department of Justice (DOJ) attorney represented the United States in a civil enforcement action against a company that had engaged in fraudulent activity. The settlement of the case required that the company correct certain deficiencies in its operating procedures. After terminating Government service, the attorney is hired by the company. When DOJ auditors schedule a meeting with the company's legal staff to review company actions since the settlement, the former employee may not attempt to persuade the auditors that the company is complying with the terms of the settlement. Although the former employee's insights might facilitate the audit, his communications would not be made on behalf of the United States even though the Government's auditors initiated the contact with the former employee.

Note to paragraph (a): See also example 9 to paragraph (j) of § 2641.202 and example 1 to paragraph (d) of § 2641.204.

(b) *Exception for acting on behalf of State or local government as elected official.* A former employee is not prohibited by any of the prohibitions of 18 U.S.C. 207 from engaging in any post-employment activity on behalf of one or more State or local governments, provided the activity is undertaken in carrying out official duties as an elected official of a State or local government.

Example 1 to paragraph (b): A former employee of the Department of Housing and Urban Development (HUD) participated personally and substantially in the evaluation of a grant application from a certain city. After terminating Government service, he was elected mayor of that city. The former employee may contact an Assistant Secretary at HUD to argue that additional funds are due the city under the terms of the grant.

Example 2 to paragraph (b): A former employee of the Federal Highway Administration (FHWA) participated personally and substantially in the decision to provide funding for a bridge across the White River in Arkansas. After terminating Government service, she accepted the Governor's offer to head the highway department in Arkansas. A communication to or appearance before the FHWA concerning the terms of the construction grant would not be made as an elected official of a State or local government.

(c) *Acting on behalf of specified entities.* A former senior or very senior employee is not prohibited by 18 U.S.C. 207(c) or (d), or §§ 2641.204 or 2641.205, from making a communication or appearance on behalf of one or more entities specified in

paragraph (c)(1) of this section, provided the communication or appearance is made in carrying out official duties as an employee of a specified entity.

(1) *Specified entities.* For purposes of this paragraph, a specified entity is:

- (i) An agency or instrumentality of a State or local government;
- (ii) A hospital or medical research organization, if exempted from taxation under 26 U.S.C. 501(c)(3); or
- (iii) An accredited, degree-granting institution of higher education, as defined in 20 U.S.C. 1001.

(2) *Employee.* For purposes of this paragraph, the term "employee" of a specified entity means a person who has an employee-employer relationship with an entity specified in paragraph (c)(1) of this section. It includes a person who is employed to work part-time for a specified entity. The term excludes an individual performing services for a specified entity as a consultant or independent contractor.

Example 1 to paragraph (c): A senior employee leaves her position at the National Institutes of Health (NIH) and takes a full-time position at the Gene Research Foundation, a tax-exempt organization pursuant to 26 U.S.C. 501(c)(3). As an employee of a 501(c)(3) tax-exempt medical research organization, the former senior employee is not barred by 18 U.S.C. 207(c) from representing the Foundation before the NIH.

Example 2 to paragraph (c): A former senior employee of the Environmental Protection Agency (EPA) joins a law firm in Richmond, Virginia. The firm is hired by the Commonwealth of Virginia to represent it in discussions with the EPA about an environmental impact statement concerning the construction of a highway interchange. The former senior employee's arguments concerning the environmental impact statement would not be made as an employee of the Commonwealth of Virginia.

Example 3 to paragraph (c): A former senior employee becomes an employee of the ABC Association. The ABC Association is a nonprofit organization whose membership consists of a broad representation of State health agencies and senior State health officials, and it performs services from which certain State governments benefit, including collecting information from its members and conveying that information and views to the Federal Government. However, the ABC Association has not been delegated authority by any State government to perform any governmental functions, and it does not operate under the regulatory, financial, or management control of any state government. Therefore, the ABC Association is not an agency or instrumentality of a state government, and the former senior employee may not represent the organization before his former agency within one year after terminating his senior employee position.

(d) *Exception for uncompensated statements based on special knowledge.*

A former senior or very senior employee is not prohibited by 18 U.S.C. 207(c) or (d), or §§ 2641.204 or 2641.205, from making a statement based on his own special knowledge in the particular area that is the subject of the statement, provided that he receives no compensation for making the statement.

(1) *Special knowledge.* A former employee has special knowledge concerning a subject area if he is familiar with the subject area as a result of education, interaction with experts, or other unique or particularized experience.

(2) *Statement.* A statement for purposes of this paragraph is a communication of facts directly observed by the former employee.

(3) *Compensation.* Compensation includes any form of remuneration or income that is given in consideration, in whole or in part, for the statement. It does not include the payment of actual and necessary expenses incurred in connection with making the statement.

Example 1 to paragraph (d): The Chairman of the Council of Economic Advisors was personally and substantially involved in discussions with other White House officials concerning the advisability of a three-phase reduction in the capital gains tax. After Government service, the former Chairman affiliates with a nonprofit group that advocates a position on the three-phase capital gains issue that is similar to his own. The former Chairman, who receives no salary from the nonprofit organization, may meet with the current Chairman on the organization's behalf to state what steps had previously been taken by the Council to address the issue. The statement would be permissible even if the nonprofit organization reimbursed the former Chairman for his actual and necessary travel expenses incurred in connection with making the statement.

Example 2 to paragraph (d): A former senior employee becomes a government relations consultant, and he enters into a \$5,000 per month retainer agreement with XYZ Corporation for government relations services. He would like to meet with his former agency to discuss a regulatory matter involving his client. Even though he would not be paid by XYZ specifically for this particular meeting, he nevertheless would receive compensation for any statements at the meeting, because of the monthly payments under his standing retainer agreement. Therefore he may not rely on the exemption for uncompensated statements based on special knowledge.

(e) *Exception for furnishing scientific or technological information.* A former employee is not prohibited by 18 U.S.C. 207(a), (c), or (d), or §§ 2641.201, 2641.202, 2641.204, or 2641.205, from making communications, including appearances, solely for the purpose of furnishing scientific or technological information, provided the

communications are made either in accordance with procedures adopted by the agency or agencies to which the communications are directed or the head of such agency or agencies, in consultation with the Director of the Office of Government Ethics, makes a certification published in the **Federal Register**.

(1) *Purpose of information.* A communication made solely for the purpose of furnishing scientific or technological information may be:

- (i) Made in connection with a matter that involves an appreciable element of actual or potential dispute;
- (ii) Made in connection with an effort to seek a discretionary Government ruling, benefit, approval, or other action; or
- (iii) Inherently influential in relation to the matter in dispute or the Government action sought.

(2) *Scientific or technological information.* The former employee must convey information of a scientific or technological character, such as technical or engineering information relating to the natural sciences. The exception does not extend to information associated with a nontechnical discipline such as law, economics, or political science.

(3) *Incidental references or remarks.* Provided the former employee's communication primarily conveys information of a scientific or technological character, the entirety of the communication will be deemed made solely for the purpose of furnishing such information notwithstanding an incidental reference or remark:

- (i) Unrelated to the matter to which the post-employment restriction applies;
- (ii) Concerning feasibility, risk, cost, speed of implementation, or other considerations when necessary to appreciate the practical significance of the basic scientific or technological information provided; or
- (iii) Intended to facilitate the furnishing of scientific or technological information, such as those references or remarks necessary to determine the kind and form of information required or the adequacy of information already supplied.

Example 1 to paragraph (e)(3): After terminating Government service, a former senior employee at the National Security Agency (NSA) accepts a position as a senior manager at a firm specializing in the development of advanced security systems. The former senior employee and another firm employee place a conference call to a current NSA employee to follow up on an earlier discussion in which the firm had sought funding from the NSA to develop a certain

proposed security system. After the other firm employee explains the scientific principles underlying the proposed system, the former employee may not state the system's expected cost. Her communication would not primarily convey information of a scientific or technological character.

Example 2 to paragraph (e)(3): If, in the previous example, the former senior employee explained the scientific principles underlying the proposed system, she could also have stated its expected cost as an incidental reference or remark.

(4) *Communications made under procedures acceptable to the agency.* (i) An agency may adopt such procedures as are acceptable to it, specifying conditions under which former Government employees may make communications solely for the purpose of furnishing scientific or technological information, in light of the agency's particular programs and needs. In promulgating such procedures, an agency may consider, for example, one or more of the following:

- (A) Requiring that the former employee specifically invoke the exception prior to making a communication (or series of communications);
 - (B) Requiring that the designated agency ethics official for the agency to which the communication is directed (or other agency designee) be informed when the exception is used;
 - (C) Limiting communications to certain formats which are least conducive to the use of personal influence;
 - (D) Segregating, to the extent possible, meetings and presentations involving technical substance from those involving other aspects of the matter; or
 - (E) Employing more restrictive practices in relation to communications concerning specified categories of matters or specified aspects of a matter, such as in relation to the pre-award as distinguished from the post-award phase of a procurement.
- (ii) The Director of the Office of Government Ethics may review any agency implementation of this exception in connection with OGE's executive branch ethics program oversight responsibilities. See 5 CFR part 2638.

Example 1 to paragraph (e)(4): A Marine Corps engineer participates personally and substantially in drafting the specifications for a new assault rifle. After terminating Government service, he accepts a job with the company that was awarded the contract to produce the rifle. Provided he acts in accordance with agency procedures, he may accompany the President of the company to a meeting with Marine Corps employees and report the results of a series of metallurgical tests. These results support the company's

argument that it has complied with a particular specification. He may do so even though the meeting was expected to be and is, in fact, a contentious one in which the company's testing methods are at issue. He may not, however, present the company's argument that an advance payment is due the company under the terms of the contract since this would not be a mere incidental reference or remark within the meaning of paragraph (e)(3) of this section.

(5) *Certification for expertise in technical discipline.* A certification issued in accordance with this section shall be effective on the date it is executed (unless a later date is specified), provided that it is transmitted to the **Federal Register** for publication.

(i) *Criteria for issuance.* A certification issued in accordance with this section may not broaden the scope of the exception and may be issued only when:

- (A) The former employee has outstanding qualifications in a scientific, technological, or other technical discipline (involving engineering or other natural sciences as distinguished from a nontechnical discipline such as law, economics, or political science);
- (B) The matter requires the use of such qualifications; and
- (C) The national interest would be served by the former employee's participation.

(ii) *Submission of requests.* The individual wishing to make the communication shall forward a written request to the head of the agency to which the communications would be directed. Any such request shall address the criteria set forth in paragraph (e)(5)(i) of this section.

(iii) *Issuance.* The head of the agency to which the communications would be directed may, upon finding that the criteria specified in paragraph (e)(5)(i) of this section are satisfied, approve the request by executing a certification, which shall be published in the **Federal Register**. A copy of the certification shall be forwarded to the affected individual. The head of the agency shall, prior to execution of the certification, furnish a draft copy of the certification to the Director of the Office of Government Ethics and consider the Director's comments, if any, in relation to the draft. The certification shall specify:

- (A) The name of the former employee;
- (B) The Government position or positions held by the former employee during his most recent period of Government service;
- (C) The identity of the employer or other person on behalf of which the former employee will be acting;

(D) The restriction or restrictions to which the certification shall apply;

(E) Any limitations imposed by the agency head (or deputy or acting head) with respect to the scope of the certification; and

(F) The basis for finding that the criteria specified in paragraph (e)(5)(i) of this section are satisfied, specifically including a description of the matter and the communications that will be permissible or, if relevant, a statement that such information is protected from disclosure by statute.

(iv) *Copy to Office of Government Ethics.* Once published, the agency shall provide the Director of the Office of Government Ethics with a copy of the certification as published in the **Federal Register**.

(v) *Revocation.* The agency head may revoke a certification and shall forward a written notice of the revocation to the former employee and to the OGE Director. Revocation of a certification shall be effective on the date specified in the notice revoking the certification.

(f) *Exception for giving testimony under oath or making statements required to be made under penalty of perjury.* Subject to the limitation described in paragraph (f)(2) of this section concerning expert witness testimony, a former employee is not prohibited by any of the prohibitions of 18 U.S.C. 207 from giving testimony under oath or making a statement required to be made under penalty of perjury.

(1) *Testimony under oath.* Testimony under oath is evidence delivered by a witness either orally or in writing, including deposition testimony and written affidavits, in connection with a judicial, quasi-judicial, administrative, or other legally recognized proceeding in which applicable procedural rules require a witness to declare by oath or affirmation that he will testify truthfully.

(2) *Limitation on exception for service as an expert witness.* The exception described in paragraph (f)(1) of this section does not negate the bar of 18 U.S.C. 207(a)(1), or § 2641.201, to a former employee serving as an expert witness; where the bar of section 207(a)(1) applies, a former employee may not serve as an expert witness except:

(i) If he is called as a witness by the United States; or

(ii) By court order. For this purpose, a subpoena is not a court order, nor is an order merely qualifying an individual to testify as an expert witness.

(3) *Statements made under penalty of perjury.* A former employee may make

any statement required to be made under penalty of perjury, except that he may not:

(i) Submit a pleading, application, or other document as an attorney or other representative; or

(ii) Serve as an expert witness where the bar of 18 U.S.C. 207(a)(1) applies, except as provided in paragraph (f)(2) of this section.

Note to paragraph (f): Whether compensation of a witness is appropriate is not addressed by 18 U.S.C. 207. However, 18 U.S.C. 201 may prohibit individuals from receiving compensation for testifying under oath in certain forums except as authorized by 18 U.S.C. 201(d). Note also that there may be statutory or other bars on the disclosure by a current or former employee of information from the agency's files or acquired in connection with the individual's employment with the Government; a former employee's agency may have promulgated procedures to be followed with respect to the production or disclosure of such information.

Example 1 to paragraph (f): A former employee is subpoenaed to testify in a case pending in a United States district court concerning events at the agency she observed while she was performing her official duties with the Government. She is not prohibited by 18 U.S.C. 207 from testifying as a fact witness in the case.

Example 2 to paragraph (f): An employee was removed from service by his agency in connection with a series of incidents where the employee was absent without leave or was unable to perform his duties because he appeared to be intoxicated. The employee's supervisor, who had assisted the agency in handling the issues associated with the removal, subsequently left Government. In the ensuing case in Federal court between the employee who had been removed and his agency over whether he had been discriminated against because of his disabling alcoholism, his former supervisor was asked whether on certain occasions the employee had been intoxicated on the job and unable to perform his assigned duties. Opposing counsel objected to the question on the basis that the question required expert testimony and the witness had not been qualified as an expert. The judge overruled the objection on the basis that the witness would not be providing expert testimony but opinions or inferences which are rationally based on his perception and helpful to a clear understanding of his testimony or the determination of a fact in issue. The former employee may provide the requested testimony without violating 18 U.S.C. 207.

Example 3 to paragraph (f): A former senior employee of the Environmental Protection Agency (EPA) is a recognized expert concerning compliance with Clean Air Act requirements. Within one year after terminating Government service, she is retained by a utility company that is the defendant in a lawsuit filed against it by the EPA. While the matter had been pending while she was with the agency, she had not worked on the matter. After the court rules that she is qualified to testify as an expert,

the former senior employee may offer her sworn opinion that the utility company's practices are in compliance with Clean Air Act requirements. She may do so although she would otherwise have been barred by 18 U.S.C. 207(c) from making the communication to the EPA.

Example 4 to paragraph (f): In the previous example, an EPA scientist served as a member of the EPA investigatory team that compiled a report concerning the utility company's practices during the discovery stage of the lawsuit. She later terminated Government service to join a consulting firm and is hired by the utility company to assist it in its defense. She may not, without a court order, serve as an expert witness for the company in the matter since she is barred by 18 U.S.C. 207(a)(1) from making the communication to the EPA. On application by the utility company for a court order permitting her service as an expert witness, the court found that there were no extraordinary circumstances that would justify overriding the specific statutory bar to such testimony. Such extraordinary circumstances might be where no other equivalent expert testimony can be obtained and an employee's prior involvement in the matter would not cause her testimony to have an undue influence on proceedings. Without such extraordinary circumstances, ordering such expert witness testimony would undermine the bar on such testimony.

(g) *Exception for representing certain candidates or political organizations.* Except as provided in paragraph (g)(2) of this section, a former senior or very senior employee is not prohibited by 18 U.S.C. 207(c) or (d), or §§ 2641.204 or 2641.205, from making a communication or appearance on behalf of a candidate in his capacity as a candidate or an entity specified in paragraphs (g)(1)(ii) through (g)(1)(vi) of this section.

(1) *Specified persons or entities.* For purposes of this paragraph (g), the specified persons or entities are:

(i) A *candidate*. A 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 own behalf the possibility of seeking nomination for election, or election to, Federal or State office;

(ii) An *authorized committee*. An authorized committee means any political committee designated in writing by a candidate as authorized to receive contributions or make expenditures to promote the nomination or election of the candidate or to explore the possibility of seeking the nomination or election of the candidate. The term does not include a committee that receives contributions or makes expenditures to promote more than one candidate;

(iii) A *national committee*. A national committee means the organization

which, under the bylaws of a political party, is responsible for the day-to-day operation of the political party at the national level;

(iv) A *national Federal campaign committee*. A national Federal campaign committee means an organization which, under the bylaws of a political party, is established primarily to provide assistance at the national level to candidates nominated by the party for election to the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(v) A *State committee*. A State committee means the organization which, under the bylaws of a political party, is responsible for the day-to-day operation of the political party at the State level; or

(vi) A *political party*. A 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 the association, committee, or organization.

(2) *Limitations*. The exception in this paragraph (g) shall not apply if the communication or appearance:

(i) Is made at a time the former senior or very senior employee is employed by any person or entity other than:

(A) A person or entity specified in paragraph (g)(1) of this section; or

(B) A person or entity who exclusively represents, aids, or advises persons or entities described in paragraph (g)(1) of this section;

(ii) Is made other than solely on behalf of one or more persons or entities specified in paragraph (g)(1) or (g)(2)(i)(B) of this section; or

(iii) Is made to or before the Federal Election Commission by a former senior or very senior employee of the Federal Election Commission.

Example 1 to paragraph (g):

The former Counsel to the President becomes the full-time head of the President's re-election committee. The former Counsel may, within one year of terminating his very senior employee position, represent the re-election committee to the White House travel office in discussions regarding the appropriate amounts of reimbursements by the committee of political travel costs of the President.

Example 2 to paragraph (g): The former U.S. Attorney General is asked by a candidate running for Governor of Alabama to contact the Chairman of the Federal Trade Commission (a position listed in 5 U.S.C. 5314) to seek the dismissal of a pending enforcement action involving the candidate's family business. The former very senior employee's communication to the Chairman would not be made on behalf of the

candidate in his capacity as a candidate and, thus, would be barred by 18 U.S.C. 207(d).

Example 3 to paragraph (g): In the previous example, the former Attorney General could contact the Commissioner of Internal Revenue (a position listed in 5 U.S.C. 5314) to urge the review of a tax ruling affecting Alabama's Republican Party since the communication would be made on behalf of a State committee.

Example 4 to paragraph (g): The former Assistant Secretary for Legislative and Intergovernmental Affairs at the Department of Commerce is hired as a consultant by a company that provides advisory services to political candidates and senior executives in private industry. Her only client is a candidate for the U.S. Senate. The former senior employee may not contact the Deputy Secretary of Commerce within one year of her termination from the Department to request that the Deputy Secretary give an official speech in which he would express support for legislation proposed by the candidate. The communication would be prohibited by 18 U.S.C. 207(c) because it would be made when the former senior employee was employed by an entity that did not exclusively represent, aid, or advise persons or entities specified in paragraph (g)(1) of this section.

(h) *Waiver for acting on behalf of international organization*. (1) The Secretary of State may grant a former employee an individual waiver of one or more of the restrictions in 18 U.S.C. 207 where the employee would act on behalf of an international organization in which the United States participates. The Secretary of State must certify in advance that the proposed activity is in the interests of the United States.

(2) An employee who is detailed under 5 U.S.C. 3343 to an international organization remains an employee of his agency. In contrast, an employee who transfers under 5 U.S.C. 3581-3584 to an international organization is a former employee of his agency.

(i) *Waiver for re-employment by Government-owned contractor operated entity*. The President may grant a waiver of one or more of the restrictions in 18 U.S.C. 207 to eligible employees upon the determination and certification in writing that the waiver is in the public interest and the services of the individual are critically needed for the benefit of the Federal Government. Upon the issuance of a waiver pursuant to this paragraph, the restriction or restrictions waived will not apply to a former employee acting as an employee of the same Government-owned, contractor operated entity with which he was employed immediately before the period of Government service during which the waiver was granted. If the individual was employed by the Lawrence Livermore National Laboratory, the Los Alamos National

Laboratory, or the Sandia National Laboratory immediately before the person's Federal Government employment began, the restriction or restrictions waived shall not apply to a former employee acting as an employee of any one of those three national laboratories after the former employee's Government service has terminated.

(1) *Eligible employees*. Any current civilian employee of the executive branch, other than an employee serving in the Executive Office of the President, who served as an officer or employee at a Government-owned, contractor operated entity immediately before he became a Government employee. A total of no more than 25 current employees shall hold waivers at any one time.

(2) *Issuance*. The President may not delegate the authority to issue waivers under this paragraph. If the President issues a waiver, a certification shall be published in the **Federal Register** and shall identify:

(i) The employee covered by the waiver by name and position; and

(ii) The reasons for granting the waiver.

(3) *Copy to Office of Government Ethics*. A copy of the certification shall be provided to the Director of the Office of Government Ethics.

(4) *Effective date*. A waiver issued under this section shall be effective on the date the certification is published in the **Federal Register**.

(5) *Reports*. Each former employee holding a waiver must submit semiannual reports, for a period of two years after terminating Government service, to the President and the OGE Director.

(i) *Submission*. The reports shall be submitted:

(A) Not later than six months and 60 days after the date of the former employee's termination from the period of Government service during which the waiver was granted; and

(B) Not later than 60 days after the end of any successive six-month period.

(ii) *Content*. Each report shall describe all activities undertaken by the former employee during the six-month period that would have been prohibited by 18 U.S.C. 207 but for the waiver.

(iii) *Public availability*. All reports filed with the OGE Director under this paragraph shall be made available for public inspection and copying.

Note to paragraph (i)(5): 18 U.S.C. 207(k)(5)(D) specifies that an individual who is granted a waiver as described in this paragraph is ineligible for appointment in the civil service unless all reports required by that section have been filed.

(6) *Revocation*. A waiver shall be revoked when the recipient of the

waiver fails to file a report required by paragraph (i)(4) of this section, and the recipient of the waiver shall be notified of such revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

(j) *Waiver of restrictions of 18 U.S.C. 207(c) and (f) for certain positions.* The Director of the Office of Government Ethics may waive application of the restriction of section 18 U.S.C. 207(c) and § 2641.204, with respect to certain positions or categories of positions. When the restriction of 18 U.S.C. 207(c) has been waived by the Director pursuant to this paragraph, the one-year restriction of 18 U.S.C. 207(f) and § 2641.206 also will not be triggered upon an employee's termination from the position.

(1) *Eligible senior employee positions.* Any position which could be occupied by a senior employee is eligible for a waiver of the 18 U.S.C. 207(c) restriction except the following:

(i) Positions for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311–5318 (the Executive Schedule);

(ii) Positions for which occupants are appointed by the President pursuant to 3 U.S.C. 105(a)(2)(B); or

(iii) Positions for which occupants are appointed by the Vice President pursuant to 3 U.S.C. 106(a)(1)(B).

Example 1 to paragraph (j)(1): The head of a department has authority to fix the annual salary for a category of positions administratively at a rate of compensation not in excess of the rate of compensation provided for level IV of the Executive Schedule (5 U.S.C. 5315). He sets a salary level that does not reference any Executive Schedule salary. The level of compensation is not "specified in" or "fixed according to" the Executive Schedule. If the authority pursuant to which compensation for a position is set instead stated that the position is to be paid at the rate of level IV of the Executive Schedule, the salary for the position would be fixed according to the Executive Schedule.

(2) *Criteria for waiver.* A waiver of restrictions for a position or category of positions shall be based on findings that:

(i) The agency has experienced or is experiencing undue hardship in obtaining qualified personnel to fill such position or positions as shown by relevant factors which may include, but are not limited to:

(A) Vacancy rates;

(B) The payment of a special rate of pay to the incumbent of the position pursuant to specific statutory authority; or

(C) The requirement that the incumbent of the position have

outstanding qualifications in a scientific, technological, technical, or other specialized discipline;

(ii) Waiver of the restriction with respect to the position or positions is expected to ameliorate the recruiting difficulties; and

(iii) The granting of the waiver would not create the potential for the use of undue influence or unfair advantage based on past Government service, including the potential for use of such influence or advantage for the benefit of a foreign entity.

(3) *Procedures.* A waiver shall be granted in accordance with the following procedures:

(i) *Agency recommendation.* An agency's designated agency ethics official (DAEO) may, at any time, recommend the waiver of the 18 U.S.C. 207(c) (and section 207(f)) restriction for a position or category of positions by forwarding a written request to the Director addressing the criteria set forth in paragraph (j)(2) of this section. A DAEO may, at any time, request that a current waiver be revoked.

(ii) *Action by Office of Government Ethics.* The Director of the Office of Government Ethics shall promptly provide to the designated agency ethics official a written response to each request for waiver or revocation. The Director shall maintain a listing of positions or categories of positions in appendix A to this part for which the 18 U.S.C. 207(c) restriction has been waived. The Director shall publish notice in the **Federal Register** when revoking a waiver.

(4) *Effective dates.* A waiver shall be effective on the date of the written response to the designated agency ethics official indicating that the request for waiver has been granted. A waiver shall inure to the benefit of the individual who holds the position when the waiver takes effect, as well as to his successors, but shall not benefit individuals who terminated senior service prior to the effective date of the waiver. Revocation of a waiver shall be effective 90 days after the date that the OGE Director publishes notice of the revocation in the **Federal Register**. Individuals who formerly served in a position for which a waiver of restrictions was applicable will not become subject to 18 U.S.C. 207(c) (or section 207(f)) if the waiver is revoked after their termination from the position.

(k) *Miscellaneous statutory exceptions.* Several statutory authorities specifically modify the scope of 18 U.S.C. 207 as it would otherwise apply to a former employee or class of former employees. These authorities include:

(1) 22 U.S.C. 3310(c), permitting employees of the American Institute in Taiwan to represent the Institute notwithstanding 18 U.S.C. 207;

(2) 22 U.S.C. 3613(d), permitting the individual who was Administrator of Panama Canal Commission on the date of its termination to act in carrying out official duties as Administrator of the Panama Canal Authority notwithstanding 18 U.S.C. 207;

(3) 22 U.S.C. 3622(e), permitting an individual who was an employee of the Panama Canal Commission on the date of its termination to act in carrying out official duties on behalf of the Panama Canal Authority;

(4) 25 U.S.C. 450i(j), permitting a former employee who is employed by an Indian tribe to act on behalf of the tribe notwithstanding 18 U.S.C. 207 if the former employee submits notice of any personal and substantial involvement in the matter during Government service;

(5) 38 U.S.C. 5902(d), permitting a former employee who is a retired officer, warrant officer, or enlisted member of the Armed Forces, while not on active duty, to act on behalf of certain claimants notwithstanding 18 U.S.C. 207 if the claim arises under laws administered by the Secretary of Veterans Affairs;

(6) 50 U.S.C. 405(b), permitting a former part-time member of an advisory committee appointed by the Federal Emergency Management Agency, the Central Intelligence Agency, or the National Security Council to engage in conduct notwithstanding 18 U.S.C. 207 except with respect to any particular matter directly involving an agency the former member advised or in which such agency is directly interested; and

(7) 50 U.S.C. app. 463, permitting former employees appointed to certain positions under 50 U.S.C. App. 451 *et seq.* (Military Selective Service Act) to engage in conduct notwithstanding 18 U.S.C. 207.

Note to paragraph (k): Exceptions from 18 U.S.C. 207 may be included in legislation mandating privatization of Governmental entities. See, for example, 42 U.S.C. 2297h–3(c), concerning the privatization of the United States Enrichment Corporation.

(1) *Guide to available exceptions and waivers to the prohibitions of 18 U.S.C. 207.* This chart lists the exceptions and waivers set forth in 18 U.S.C. 207 and for each exception and waiver identifies the prohibitions of section 207 excepted or subject to waiver. Detailed guidance on the applicability of the exceptions and waivers is contained in the cross-referenced paragraphs of this section.

SECTION 207 PROHIBITIONS AFFECTED

Exception/Waiver	(a)(1)	(a)(2)	(b)	(c)	(d)	(f)
(1) Acting for the United States, see § 2641.301(a)	•	•	•	•	•	•
(2) Elected State or local government official, see § 2641.301(b)	•	•	•	•	•	•
(3) Acting for specified entities, see § 2641.301(c)	•	•
(4) Special knowledge, see § 2641.301(d)	•	•
(5) Scientific or technological information, see § 2641.301(e)	•	•	•	•
(6) Testimony, see § 2641.301(f)	•	•	•	•	•	•
(7) Acting for a candidate or political party, see § 2641.301(g)	•	•
(8) Acting for an international organization, see § 2641.301(h)	•	•	•	•	•	•
(9) Employee of a Government-owned, contractor operated entity, see § 2641.301(i)	•	•	•	•	•	•
(10) Waiver for certain positions, see § 2641.301(j)	•	•

§ 2641.302 Separate agency components.

(a) *Designation.* For purposes of 18 U.S.C. 207(c) only, and § 2641.204, the Director of the Office of Government Ethics may designate agency “components” that are distinct and separate from the “parent” agency and from each other. Absent such designation, the representational bar of section 207(c) extends to the whole of the agency in which the former senior employee served. An eligible former senior employee who served in the *parent* agency is not barred by section 207(c) from making communications to or appearances before any employee of any designated component of the parent, but is barred as to any employee of the parent or of any agency or bureau of the parent that has not been designated. An eligible former senior employee who served in a *designated component* of the parent agency is barred from communicating to or making an appearance before any employee of that designated component, but is not barred as to any employee of the parent, of another designated component, or of any other agency or bureau of the parent that has not been designated.

Example 1 to paragraph (a): While employed in the Office of the Secretary of Defense, a former career Senior Executive Service employee was employed in a position for which the rate of basic pay exceeded that payable for level 5 of the Senior Executive Service. He is prohibited from contacting the Secretary of Defense and DOD’s Inspector General. However, because eligible under paragraph (b) of this section to benefit from component designation procedures, he is not prohibited by 18 U.S.C. 207(c) from contacting the Secretary of the Army. (The Department of the Army is a

designated component of the parent, DOD. The Office of the Secretary of Defense and the Office of the DOD Inspector General are both part of the parent, DOD. See the listing of DOD components in appendix B to this part.)

Example 2 to paragraph (a): Because eligible under paragraph (b) of this section to benefit from component designation procedures, a former Navy Admiral who last served as the Vice Chief of Naval Operations is not prohibited by 18 U.S.C. 207(c) from contacting the Secretary of Defense, the Secretary of the Army, or DOD’s Inspector General. He is prohibited from contacting the Secretary of the Navy. (The Department of the Navy is a designated component of the parent, DOD. The Office of the Secretary of Defense and the Office of the DOD Inspector General are both part of the parent. See the listing of DOD components in appendix B to this part.)

(b) *Eligible former senior employees.* All former senior employees are eligible to benefit from this procedure except those who were senior employees by virtue of having been:

(1) Employed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311–5318 (the Executive Schedule) (see example 1 to paragraph (j)(1) of § 2641.301);

(2) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(B); or

(3) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(B).

Example 1 to paragraph (b): A former senior employee who had served as Deputy Commissioner of the Internal Revenue Service is not eligible to benefit from the designation of components for the Department of the Treasury because the position of Deputy Commissioner is listed in 5 U.S.C. 5316, at a rate of pay payable for level V of the Executive Schedule.

(c) *Criteria for designation.* A component designation must be based on findings that:

(1) The component is an agency or bureau, within a parent agency, that exercises functions which are distinct and separate from the functions of the parent agency and from the functions of other components of that parent as shown by relevant factors which may include, but are not limited to:

(i) The component’s creation by statute or a statutory reference indicating that it exercises functions which are distinct and separate;

(ii) The component’s exercise of distinct and separate subject matter or geographical jurisdiction;

(iii) The degree of supervision exercised by the parent over the component;

(iv) Whether the component exercises responsibilities that cut across organizational lines within the parent;

(v) The size of the component in absolute terms; and

(vi) The size of the component in relation to other agencies or bureaus within the parent.

(2) There exists no potential for the use of undue influence or unfair advantage based on past Government service.

(d) *Subdivision of components.* The Director will not ordinarily designate agencies that are encompassed by or otherwise supervised by an existing designated component.

(e) *Procedures.* Distinct and separate components shall be designated in accordance with the following procedure:

(1) *Agency recommendation.* A designated agency ethics official may, at any time, recommend the designation of

an additional component or the revocation of a current designation by forwarding a written request to the Director of the Office of Government Ethics addressing the criteria set forth in paragraph (c) of this section.

(2) *Agency update.* Designated agency ethics officials shall, by July 1 of each year, forward to the OGE Director a letter stating whether components currently designated should remain designated in light of the criteria set forth in paragraph (c) of this section.

(3) *Action by the Office of Government Ethics.* The Director of the Office of Government Ethics shall, by rule, make or revoke a component designation after considering the recommendation of the designated agency ethics official. The Director shall maintain a listing of all designated agency components in appendix B to this part.

(f) *Effective dates.* A component designation shall be effective on the date the rule creating the designation is published in the **Federal Register** and shall be effective as to individuals who terminated senior service either before, on or after that date. Revocation of a component designation shall be effective 90 days after the publication in the **Federal Register** of the rule that revokes the designation, but shall not be effective as to individuals who terminated senior service prior to the expiration of such 90-day period.

(g) *Effect of organizational changes.* (1) If a former senior employee served in an agency with component designations and the agency or a designated component that employed the former senior employee has been significantly altered by organizational changes, the appropriate designated agency ethics official shall determine whether any successor entity is substantially the same as the agency or a designated component that employed the former senior employee. Section 2641.204(g)(2)(iv)(A) through (g)(2)(iv)(C) should be used for guidance in determining how the 18 U.S.C. 207(c) bar applies when an agency or a designated component has been significantly altered.

(2) *Consultation with Office of Government Ethics.* When counseling individuals concerning the applicability of 18 U.S.C. 207(c) subsequent to significant organizational changes, the appropriate designated agency ethics official (DAEO) shall consult with the Office of Government Ethics. When it is determined that appendix B to this part no longer reflects the current organization of a parent agency, the DAEO shall promptly forward recommendations for designations or

revocations in accordance with paragraph (e) of this section.

Example 1 to paragraph (g): An eligible former senior employee had served as an engineer in the Agency for Transportation Safety, an agency within Department X primarily focusing on safety issues relating to all forms of transportation. The agency had been designated as a distinct and separate component of Department X by the Director of the Office of Government Ethics. Subsequent to his termination from the position, the functions of the agency are distributed among three other designated components with responsibilities relating to air, sea, and land transportation, respectively. The agency's few remaining programs are absorbed by the parent. As the designated component from which the former senior employee terminated is no longer identifiable as substantially the same entity, the 18 U.S.C. 207(c) bar will not affect him.

Example 2 to paragraph (g): A scientist served in a senior employee position in the Agency for Medical Research, an agency within Department X primarily focusing on cancer research. The agency had been designated as a distinct and separate component of Department X by the Director of the Office of Government Ethics. Subsequent to her termination from the position, the mission of the Agency for Medical Research is narrowed and it is renamed the Agency for Cancer Research. Approximately 20% of the employees of the former agency are transferred to various other parts of the Department to continue their work on medical research unrelated to cancer. The Agency for Cancer Research is determined to be substantially the same entity as the designated component in which she formerly served, and the 18 U.S.C. 207(c) bar applies with respect to the scientist's contacts with employees of the Agency for Cancer Research. She would not be barred from contacting an employee who was among the 20% of employees who were transferred to other parts of the Department.

(h) *Unauthorized designations.* No agency or bureau within the Executive Office of the President may be designated as a separate agency component.

Appendix A to Part 2641—Positions Waived from 18 U.S.C. 207(c) and (f)

Pursuant to the provisions of 18 U.S.C. 207(c)(2)(C) and 5 CFR 2641.301(j), each of the following positions is waived from the provisions of 18 U.S.C. 207(c) and 5 CFR 2641.204, as well as the provisions of 18 U.S.C. 207(f) and 5 CFR 2641.206. All waivers are effective as of the date indicated.

Agency: Department of Justice

Positions: United States Trustee (21) (effective June 2, 1994).

Agency: Securities and Exchange Commission

Positions: Solicitor, Office of General Counsel (effective October 29, 1991).

Chief Litigation Counsel, Division of Enforcement (effective October 29, 1991).

Appendix B to Part 2641—Agency Components for Purposes of 18 U.S.C. 207(c)

Pursuant to the provisions of 18 U.S.C. 207(h), each of the following agencies is determined, for purposes of 18 U.S.C. 207(c), and 5 CFR 2641.204, to have within it distinct and separate components as set forth below. Except as otherwise indicated, all designations are effective as of January 1, 1991.

Parent: Department of Commerce

Components: Bureau of the Census, Bureau of Export Administration (effective January 28, 1992), Economic Development Administration, International Trade Administration, Minority Business Development Administration, National Oceanic and Atmospheric Administration, National Telecommunications and Information Administration, Patent and Trademark Office, Technology Administration (effective January 28, 1992),

Parent: Department of Defense

Components: Department of the Air Force, Department of the Army, Department of the Navy, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Threat Reduction Agency (effective February 5, 1999), National Imagery and Mapping Agency (effective May 16, 1997), National Reconnaissance Office (effective January 30, 2003), National Security Agency.

Parent: Department of Energy

Component: Federal Energy Regulatory Commission.

Parent: Department of Health and Human Services

Components: Administration on Aging (effective May 16, 1997), Administration for Children and Families (effective January 28, 1992), Agency for Healthcare Research and Quality (formerly Agency for Health Care Policy and Research) (effective May 16, 1997), Agency for Toxic Substances and Disease Registry (effective May 16, 1997), Centers for Disease Control and Prevention (effective May 16, 1997), Centers for Medicare and Medicaid Services (formerly Health Care Financing Administration), Food and Drug Administration, Health Resources and Services Administration (effective May 16, 1997), Indian Health Service (effective May 16, 1997), National Institutes of Health (effective May 16,

1997), Substance Abuse and Mental Health Services Administration (effective May 16, 1997).

Parent: Department of the Interior

Components¹: Bureau of Indian Affairs (effective January 28, 1992), Bureau of Land Management (effective January 28, 1992), Bureau of Reclamation (effective January 28, 1992), Minerals Management Service (effective January 28, 1992), National Park Service (effective January 28, 1992), Office of Surface Mining Reclamation and Enforcement (effective January 28, 1992), U.S. Fish and Wildlife Service (effective January 28, 1992), U.S. Geological Survey (effective January 28, 1992).

Parent: Department of Justice

Components: Antitrust Division, Bureau of Prisons (including Federal Prison Industries, Inc.), Civil Division, Civil Rights Division, Community Relations Service, Criminal Division, Drug Enforcement Administration, Environment and Natural Resources Division, Executive Office for United

¹ All designated components under the jurisdiction of a particular Assistant Secretary shall be considered a single component for purposes of determining the scope of 18 U.S.C. 207(c) as applied to senior employees serving on the immediate staff of that Assistant Secretary.

States Attorneys² (effective January 28, 1992), Executive Office for United States Trustees³ (effective January 28, 1992), Federal Bureau of Investigation, Foreign Claims Settlement Commission, Immigration and Naturalization Service, Independent Counsel appointed by the Attorney General, Office of Justice Programs, Office of the Pardon Attorney (effective January 28, 1992), Offices of the United States Attorney (each of 94 offices), Offices of the United States Trustee (each of 21 offices), Tax Division, United States Marshals Service (effective May 16, 1997), United States Parole Commission.

Parent: Department of Labor

Components: Bureau of Labor Statistics, Employment and Training Administration, Employment Standards Administration, Mine Safety and Health Administration, Occupational Safety and Health Administration, Office of Disability Employment Policy (effective January 30, 2003), Pension and Welfare Benefits Administration (effective May 16, 1997).

² The Executive Office for United States Attorneys shall not be considered separate from any Office of the United States Attorney for a judicial district, but only from other designated components of the Department of Justice.

³ The Executive Office for United States Trustees shall not be considered separate from any Office of the United States Trustee for a region, but only from other designated components of the Department of Justice.

Parent: Department of State

Component: Foreign Service Grievance Board.

Parent: Department of Transportation

Components: Federal Aviation Administration, Federal Highway Administration, Federal Motor Carrier Safety Administration (effective January 30, 2003), Federal Railroad Administration, Federal Transit Administration, Maritime Administration, National Highway Traffic Safety Administration, Saint Lawrence Seaway Development Corporation, Surface Transportation Board (effective May 16, 1997), Transportation Security Administration (effective January 30, 2003), United States Coast Guard.

Parent: Department of the Treasury

Components: Bureau of Alcohol, Tobacco and Firearms, Bureau of Engraving and Printing, Bureau of the Mint, Bureau of the Public Debt, Comptroller of the Currency, Federal Law Enforcement Training Center, Financial Crimes Enforcement Center (FinCEN) (effective January 30, 2003), Financial Management Service, Internal Revenue Service, Office of Thrift Supervision, United States Customs Service, United States Secret Service.

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